

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*

REPLY BRIEF FOR PETITIONERS

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February 2009

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR PETITIONERS 1

I. NON-PARTIES WITH ARBITRATION RIGHTS
RECOGNIZED BY STATE LAW MAY
ENFORCE THOSE RIGHTS THROUGH
SECTIONS 3 AND 4 OF THE FAA. 3

 A. Section 3 Makes Relief Available to Stay
 Applicants Otherwise Entitled to Enforce an
 Arbitration Agreement. 5

 B. Respondents’ Interpretation of Section 3 Is
 Inconsistent with Section 2’s Anti-
 Discrimination Principle and Would
 Overturn Decades of Decisional Law. 12

II. SECTION 16 PROVIDES APPELLATE
JURISDICTION OVER ALL DENIALS OF
SECTION 3 RELIEF. 19

CONCLUSION 25

TABLE OF AUTHORITIES

CASES

<i>Anaconda v. Am. Sugar Ref. Co.</i> , 322 U.S. 42 (1944)	4, 15
<i>Apostol v. Gallion</i> , 870 F.2d 1335 (7th Cir. 1989)	22
<i>ATSA of Cal., Inc. v. Cont’l Ins. Co.</i> , 702 F.2d 172 (9th Cir. 1983)	7, 8
<i>Behrens v. Pelletier</i> , 516 U.S. 299 (1996)	20, 21, 23
<i>Bernhardt v. Polygraphic Co.</i> , 350 U.S. 198 (1956)	12
<i>Bradford-Scott Data Corp. v. Physician Computer Network</i> , 128 F.3d 504 (7th Cir. 1997)	22
<i>Campbell v. Gen. Dynamics Gov’t Sys. Corp.</i> , 407 F.3d 546 (1st Cir. 2005)	5
<i>Carroll v. United States</i> , 354 U.S. 394 (1957)	20
<i>Citrus Mktg. Bd. of Isr. v. J. Lauritzen A/S</i> , 943 F.2d 220 (2d Cir. 1991)	6
<i>Daisy Mfg. Co. v. NCR Corp.</i> , 29 F.3d 389 (8th Cir. 1994)	24

<i>Davidson v. Becker</i> , 256 F. Supp. 2d 377 (D. Md. 2003)	8
<i>Deloitte Noraudit A/S v. Deloitte Haskins & Sells</i> , 9 F.3d 1060 (2d Cir. 1993)	24
<i>DSMC Inc. v. Convera Corp.</i> , 349 F.3d 679 (D.C. Cir. 2003)	23, 24
<i>FDA v. Brown & Williamson Tobacco Corp.</i> , 529 U.S. 120 (2000)	12
<i>Fisser v. Int’l Bank</i> , 282 F.2d 231 (2d Cir. 1960)	16
<i>Genesco, Inc. v. T. Kakiuchi & Co.</i> , 815 F.2d 840 (2d Cir. 1987)	24
<i>Griggs v. Provident Consumer Discount Co.</i> , 459 U.S. 56 (1982)	22
<i>Gulfstream Aerospace Corp. v. Mayacamas Corp.</i> , 485 U.S. 271 (1988)	9
<i>IDS Life Insurance Co. v. Sunamerica, Inc.</i> , 103 F.3d 524 (7th Cir. 1996)	5, 6, 7, 10
<i>In re Talbott Big Foot, Inc.</i> , 887 F.2d 611 (5th Cir. 1989)	6
<i>Kimberlin v. Renasant Bank</i> , 295 Fed. Appx. 18 (6th Cir. 2008)	22
<i>Letizia v. Prudential Bache Secs.</i> , 802 F.2d 1185 (9th Cir. 1986)	8

<i>Mastrobuono v. Shearson Lehman Hutton, Inc.</i> , 514 U.S. 52 (1995)	17
<i>Mitchell v. Forsyth</i> , 472 U.S. 511 (1985)	20
<i>Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.</i> , 473 U.S. 614 (1985)	13
<i>Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.</i> , 460 U.S. 1 (1983)	3
<i>Nederlandse Erts-Tankersmaatschappij, N.V. v. Isbrandtsen Co.</i> , 339 F.2d 440 (2d Cir. 1964)	6
<i>Omni Tech Corp. v. MPC Solutions Sales, LLC</i> , 432 F.3d 797 (7th Cir. 2005)	19
<i>Perry Educ. Ass'n v. Perry Local Educators' Ass'n</i> , 460 U.S. 37 (1983)	2
<i>Perry v. Thomas</i> , 482 U.S. 483 (1987)	<i>passim</i>
<i>Pritzker v. Merrill Lynch</i> , 7 F.3d 1110 (3d Cir. 1993)	8
<i>Richardson v. McKnight</i> , 521 U.S. 399 (1997)	20
<i>Roby v. Corp. of Lloyd's</i> , 996 F.2d 1353 (2d Cir. 1993)	8

<i>Ross v. Am. Express Co.</i> , 478 F.3d 96 (2d Cir. 2007)	7, 11
<i>Shanferoke Coal & Supply Corp. v. Westchester Serv. Corp.</i> , 70 F.2d 297 (2d Cir. 1934) <i>aff'd</i> , 293 U.S. 449 (1935), <i>overruled on other grounds by Gulfstream Aerospace Corp. v. Mayacamas Corp.</i> , 485 U.S. 271 (1988)	9
<i>Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.</i> , 10 F.3d 753 (11th Cir. 1993)	8
<i>Thomas v. Perry</i> , 246 Cal. Rptr. 156 (Cal. App. 1988)	8
<i>Westmoreland v. Sadoux</i> , 299 F.3d 462 (5th Cir. 2002)	18

STATUTES

Federal Arbitration Act, 9 U.S.C. § 2	<i>passim</i>
9 U.S.C. § 3	<i>passim</i>
9 U.S.C. § 4	<i>passim</i>
9 U.S.C. § 16	<i>passim</i>
9 U.S.C. § 16(a)(1)	23
9 U.S.C. § 16(a)(1)(A)	3, 15, 25
28 U.S.C. § 1292(b)	14, 15

RULES

Fed. R. App. P. 38	22
Fed. R. Civ. P. 11	21

OTHER

1 *Domke on Commercial Arbitration* § 13:1 (3d ed. 2008) 17, 18

1 Thomas Oehmke, *Oehmke Commercial Arbitration* § 5.5 (3d ed. 2008) 5

21 Richard A. Lord, *Williston on Contracts* § 57:17 (4th ed. 2001) 16

REPLY BRIEF FOR PETITIONERS

Like the court of appeals, respondents erroneously conflate the merits of petitioners' claim under Section 3 of the Federal Arbitration Act ("FAA")—*i.e.*, whether petitioners have a cognizable claim to relief under Section 3—with the question of whether petitioners were permitted to appeal the district court's denial of their Section 3 motion. As a result, respondents' jurisdictional and Section 3 arguments all depend upon a single faulty premise: that the text of Section 3 renders relief categorically unavailable to non-parties to an arbitration agreement. But respondents' interpretation of Section 3 is demonstrably incorrect.

Contrary to respondents' arguments, nothing in the text of Section 3 precludes petitioners, as non-parties to an arbitration agreement, from obtaining relief if they can otherwise enforce the arbitration agreement under applicable state law. The test for relief under Section 3 is not whether a stay applicant is a *party*, but whether the stay applicant *has rights under the agreement pursuant to applicable state law*. Under the FAA's statutory scheme, Sections 3 and 4 are devices to enforce, rather than limitations upon, state law arbitration rights made applicable by Section 2.

As this Court recognized in *Perry v. Thomas*, 482 U.S. 483 (1987), the question of a non-party's rights under an arbitration agreement is determined by reference to state law principles made applicable by Section 2. *Id.* at 492–493 & n.9. Respondents fail to

offer any reason or explanation why *Perry v. Thomas*¹ does not control this case. Instead, respondents simply argue that only parties may enforce arbitration agreements through Sections 3 and 4, even though this argument upsets the FAA’s statutory scheme by exiling an entire category of arbitration rights and obligations recognized by state law—those of non-parties under myriad theories, including third-party beneficiary, agency, and equitable estoppel—outside of the protection of the FAA. In so doing, respondents’ argument, like the decision below, violates Section 2’s anti-discrimination principle by rendering arbitration agreements *less* enforceable than other contracts. Respondents’ theory, if accepted by this Court, would therefore upend several decades of decisional law recognizing that, under the FAA, non-parties may enforce and be bound by arbitration agreements.

Though the defects in respondents’ interpretation of Section 3 are sufficient reason to reject respondents’ jurisdictional argument, this Court should also make clear that appellate jurisdiction under Section 16 and the availability of relief under Section 3 are analytically distinct issues. Section 16 establishes a broad category of orders—denials of Section 3 and 4 motions—and makes all such orders immediately appealable. Respondents, by contrast, argue that appellate jurisdiction under Section 16 must be decided on the basis of “an easily ascertainable fact,” Resp. Br. 42, *i.e.*, whether the appellant is a “party” to

¹ As respondents cite a different *Perry* (*Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37 (1983)), this brief refers to “*Perry v. Thomas*” to avoid possible confusion between the two *Perry* cases.

the arbitration agreement. Such a test is inconsistent with this Court's cases, which teach that appellate jurisdiction cannot depend on the facts of any given case. As petitioners actually sought and were denied relief under Section 3, Section 16(a)(1)(A) authorizes petitioners' interlocutory appeal of the district court's order.

This Court should therefore hold that the court of appeals had jurisdiction over petitioners' appeal because the order appealed from is within the category of orders made appealable by Section 16, and that non-parties to an arbitration agreement who can otherwise enforce the agreement under applicable state law are entitled to relief under Sections 3 and 4. It should then remand for consideration of the remaining merits of petitioners' argument that they may enforce the arbitration provision.

**I. NON-PARTIES WITH ARBITRATION RIGHTS
RECOGNIZED BY STATE LAW MAY
ENFORCE THOSE RIGHTS THROUGH
SECTIONS 3 AND 4 OF THE FAA.**

In their opening brief, petitioners explained how the structure of the FAA protects and provides a means to enforce arbitration rights under written arbitration agreements. Section 2 of the FAA, which "is the primary substantive provision of the Act," *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983), provides that "[a] written provision [to arbitrate] . . . 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. Significantly for present purposes, Section 2 is phrased in the passive voice—it declares that a

written arbitration provision “*shall be enforceable*,” but does not limit *who* may enforce or be bound by an arbitration provision. Those questions, along with all other questions concerning the interpretation and revocation of the provision, are left to the state principles of “law and equity” generally applicable to contracts. Pet. Br. 4–6, 31–34; *see also Perry v. Thomas*, 482 U.S. at 492–493 & n.9.

Sections 3 and 4, in turn, provide procedural devices through which rights and obligations made applicable by Section 2 can be enforced in federal court: Section 3 gives putative arbitration defendants the means to arrest improper judicial proceedings so that arbitration might be had in lieu of litigation, while Section 4 provides putative arbitration plaintiffs the means to compel putative defendants to arbitrate. Pet. Br. 6–7; *see also Anaconda v. Am. Sugar Ref. Co.*, 322 U.S. 42, 44 (1944) (Sections 3 and 4 “implement” the policy of Section 2).

Respondents make no effort to reconcile their narrow interpretation of Section 3 with either Section 2 or *Perry v. Thomas*. Instead, they rely exclusively on textual features of Section 3 that they claim are “incompatible” with petitioners’ argument. Resp. Br. 24–31. Respondents’ textual arguments fail because Section 2, not Section 3, resolves the question of *who* may enforce an arbitration agreement. Section 3 merely makes relief available to persons otherwise entitled to enforce an arbitration agreement.

A. Section 3 Makes Relief Available to Stay Applicants Otherwise Entitled to Enforce an Arbitration Agreement.

Respondents identify three “textual features” that they claim preclude non-parties from using Section 3 to enforce state law arbitration rights under an arbitration agreement. But nothing in Section 3 is inconsistent with Section 2’s mandate that state law, rather than the FAA, determines *who* may enforce or be bound to an arbitration agreement.

1. Respondents primarily rely on Section 3’s language conditioning the availability of relief on the district court’s determination that the “issue involved in such suit or proceeding is referable to arbitration under such an agreement.” 9 U.S.C. § 3. Citing *IDS Life Insurance Co. v. SunAmerica, Inc.*, 103 F.3d 524 (7th Cir. 1996) (Posner, J.), respondents argue that the phrase “under an agreement” limits Section 3’s applicability to the actual parties to an arbitration contract. Resp. Br. 25–26.

Nothing in the text of the “issues referable” provision, however, expressly limits relief to *parties* to the arbitration agreement. Rather, as courts and commentators have noted, an “issue” is “referable to arbitration under such an agreement” for purposes of Section 3 if “the movant is entitled to invoke the arbitration clause, . . . the other party is bound by that clause, and . . . the claim asserted comes within the clause’s scope.” *Campbell v. Gen. Dynamics Gov’t Sys. Corp.*, 407 F.3d 546, 552 (1st Cir. 2005); 1 Thomas Oehmke, *Oehmke Commercial Arbitration* § 5.5, at 5-12 (3d ed. 2008) (same). The salient question is not whether the Section 3 applicant is a *party* to the

agreement, but whether the applicant is otherwise *entitled* to invoke the agreement under state law principles made applicable by Section 2.

The Seventh Circuit implicitly recognized this principle in its decision in *IDS Life*. In that case, non-parties to an arbitration agreement sought a Section 3 stay on the basis of an identity of issues between the plaintiffs' claims against them and against co-defendants who were parties to the agreement. The Section 3 applicants did not seek a stay for purposes of enforcing their *own* arbitration rights with plaintiffs; rather, the stay sought was a stay pending a *parallel* arbitration between the plaintiffs and the co-defendants involving identical issues. *See* 103 F.3d at 529–530. The Seventh Circuit held that Section 3 only applies to claims involving parties to an arbitration agreement (although it acknowledged that this requirement is *not* found in the text, *see id.* at 529), but was careful to note that the stay applicants did not argue that they were entitled to enforce the arbitration agreement as third-party beneficiaries. *Id.*²

² *IDS Life* cited four cases for the proposition that Section 3 only applies to claims involving parties to an arbitration agreement. *See* 103 F.3d at 529. Three were cases, like *IDS Life*, in which courts denied Section 3 stays of claims involving non-parties pending *parallel* arbitrations of related issues; in none of these cases was it contended that the non-parties could enforce or be bound to the arbitration agreement. *See Citrus Mktg. Bd. of Isr. v. J. Lauritzen A/S*, 943 F.2d 220, 224–225 (2d Cir. 1991); *Nederlandse Erts-Tankersmaatschappij, N.V. v. Isbrandtsen Co.*, 339 F.2d 440, 441 (2d Cir. 1964); *In re Talbott Big Foot, Inc.*, 887 F.2d 611, 614 (5th Cir. 1989). The fourth case recognized that Section 3 would apply to claims involving a non-party, *if* it could

In contrast to the stay applicants in *IDS Life*, petitioners seek a Section 3 stay pending not a parallel arbitration between respondents and co-defendant Bricolage, but rather, an arbitration *between respondents and petitioners* pursuant to the arbitration agreement under rights that petitioners claim under state law.³ This, then, is the line drawn by Section 3—between those *with* rights and obligations under the arbitration agreement as recognized by applicable state law and those *without* such rights and obligations—not between signatories and non-signatories, as the Sixth Circuit held below, or between parties and non-parties, as respondents now argue. Section 2 of the FAA makes Section 3 or 4 relief available whenever state law generally applicable to contracts allows the applicant to enforce an arbitration agreement. Though the underlying state law principles will determine whether such a claim succeeds, the claim itself is cognizable under Section 3 or 4.

Respondents also protest that equitable estoppel “seek[s] to bind a signatory to an arbitral obligation beyond that signatory’s strictly contractual obligation to arbitrate.” Resp. Br. 26. But “[i]n every relevant sense,” *Ross v. Am. Express Co.*, 478 F.3d 96, 99 (2d Cir. 2007), petitioners seek to arbitrate “under a

be established that the non-party was bound by the arbitration agreement under theories of agency or alter ego. *See ATSA of Cal., Inc. v. Cont’l Ins. Co.*, 702 F.2d 172, 176 (9th Cir. 1983).

³ Though petitioners also requested, in the alternative, a discretionary (rather than Section 3) stay pending respondents’ arbitration with Bricolage, that request was mooted by Bricolage’s bankruptcy filing and is not at issue before this Court.

written arbitration agreement.” *Id.* The mere fact that petitioners sometimes simplify their position as an argument that “respondents’ claims are ‘referable to arbitration’ under the doctrine of equitable estoppel,” Pet. Br. 14, does not change what equitable estoppel is—an argument that respondents are contractually obligated to arbitrate their claims against petitioners because of a written arbitration agreement. *See also Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 755–756 (11th Cir. 1993) (characterizing equitable estoppel under FAA as party’s “contractual[] obligat[ion] to arbitrate its claims [against a non-party] *under the terms of the [agreement]*” (emphasis added)).

In this regard, equitable estoppel is no different from other doctrines, such as agency, that courts have recognized as allowing non-parties to enforce or be bound by contractual provisions in arbitration agreements. *See, e.g., Davidson v. Becker*, 256 F. Supp. 2d 377, 384–385 (D. Md. 2003) (collecting cases recognizing non-party enforcement rights on the basis of agency doctrine, including *Roby v. Corp. of Lloyd’s*, 996 F.2d 1353, 1360 (2d Cir. 1993); *Pritzker v. Merrill Lynch*, 7 F.3d 1110, 1121 (3d Cir. 1993); *Letizia v. Prudential Bache Secs.*, 802 F.2d 1185, 1187–1188 (9th Cir. 1986)). Indeed, after this Court remanded *Perry v. Thomas* to the California intermediate appellate court to determine the arbitration enforcement rights of non-parties, that court held that the non-parties were entitled to enforce the arbitration agreement under state law principles of agency, citing, *inter alia*, *Letizia*. *See Thomas v. Perry*, 246 Cal. Rptr. 156, 159 (Ct. App. 1988). These cases, like cases applying equitable estoppel to the issue of non-party rights and obligations, reflect that Section 2 applies to arbitration

agreements the full spectrum of state law relevant to the enforcement and interpretation of contracts. *See* Pet. Br. 5.

Thus, petitioners' equitable estoppel argument is fully consonant with Section 3's issue-referable requirement. Equitable estoppel merely provides the state-law basis for petitioners' argument that the dispute between them and the respondents is "referable to arbitration under" the agreement between respondents and Bricolage.

2. Respondents also point to Section 3's exception for cases where the applicant is "in default in proceeding with such arbitration," 9 U.S.C. § 3, which they claim "assumes the stay applicant's obligation to comply with the agreement's specific terms for proceeding to arbitration," Resp. Br. 29. By definition, respondents continue, non-parties are not "bound to comply with the arbitration agreement's terms." *Id.* Section 3's default provision, however, offers no support for respondents' argument that Section 3's text precludes non-parties from seeking relief.

Under Section 3, stay applicants are in default if they either (1) refuse to participate in an arbitration initiated by the putative plaintiff or (2) fail to raise their arbitration rights promptly after a lawsuit is initiated against them. *See, e.g., Shanferoke Coal & Supply Corp. v. Westchester Serv. Corp.*, 70 F.2d 297, 299 (2d Cir. 1934) (Hand, J.), *aff'd*, 293 U.S. 449, 453–454 (1935), *overruled on other grounds by Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271 (1988). There is no reason, then, that petitioners could not have been found in default had respondents actually *initiated* arbitration against

them, or had petitioners unreasonably delayed in raising their arbitration rights before the district court; petitioners would have been bound by the same default rules applicable to all Section 3 applicants.

To be sure, the default provision does confirm that Section 3 relief is only available to stay applicants—like petitioners here—who seek a stay so that the plaintiff’s claim against *them* can be arbitrated. Stay applicants, like those in *IDS Life*, who merely seek a stay pending arbitration between the plaintiff and co-defendants could not be in “default” with proceeding in arbitration, because they seek *no* arbitration themselves.

3. Respondents finally point to Section 3’s requirement that a stay last “until such arbitration has been had in accordance with the terms of the agreement.” 9 U.S.C. § 3. Respondents argue that this 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.” Resp. Br. 29–30. But, to the extent this argument is not a mere rehash of the “under an agreement” analysis, respondents’ claim is demonstrably wrong.

The arbitration agreements that petitioners seek to enforce each contain clear terms governing any arbitration held thereunder: arbitration is to be “conducted in New York, New York in accordance with the Commercial Arbitration Rules of the American Arbitration Association,” held “before at least three arbitrators.” J.A. 81, 100, 119. By arguing that these agreements require respondents to arbitrate their claims against petitioners, petitioners’ Section 3

motion necessarily contemplates that arbitration would proceed according to these terms. *See Ross*, 478 F.3d at 99 (“Where a party is deemed bound by a written arbitration agreement because of principles of equitable estoppel, that written agreement alone creates, defines, and provides procedures—including the method for selecting the arbitrators—for implementing the arbitration obligation.”). Thus, the “terms” language cited by respondents is consistent with enforcement of the arbitration agreement by non-parties otherwise entitled to do so. If a non-party can otherwise enforce the agreement under state law, then a Section 3 stay allows arbitration to be “had in accordance with the terms of the agreement.”

4. Respondents wisely make no attempt to base their “party” test on the use of the word “parties” in Section 3. Section 3 provides that if the issue involved is referable to arbitration, the district court “shall on application of one of the parties stay the trial of the action.” From the context it is apparent that “parties” refers to the parties to the “*action*,” a category not necessarily limited to parties to the arbitration *agreement*.

Similarly, Section 4 provides that “[a] party aggrieved” by the failure of “another” to arbitrate under a written agreement may petition a district court to compel arbitration, provided that the district court otherwise has subject matter jurisdiction over “the controversy between the parties.” The context makes clear that the terms “party” and “parties” in Section 4 refer to the parties to the “*controversy*,” which are not necessarily the parties to the arbitration *agreement*.

* * * * *

The three textual features of Section 3 cited by respondents therefore do *not* preclude relief under Section 3 to non-parties otherwise entitled to enforce an arbitration agreement under applicable state law. Rather, if (1) non-party stay applicants are otherwise entitled to enforce the arbitration agreement under state law, (2) the plaintiff is bound by the agreement, and (3) the plaintiff's claim falls within the scope of the agreement, then the "issue involved in such suit or proceeding is referable to arbitration under such agreement," and arbitration can be "had in accordance with the terms of the agreement," provided such non-parties are not in "default in proceeding with such arbitration" by having previously refused to arbitrate or delayed unreasonably in asserting a request for a stay pending arbitration.

B. Respondents' Interpretation of Section 3 Is Inconsistent with Section 2's Anti-Discrimination Principle and Would Overturn Decades of Decisional Law.

As respondents rely exclusively on Section 3, they make no effort to harmonize their interpretation of that section with Section 2. But this Court has previously rejected the proposition that Section 3 can be read in isolation from Section 2. *See Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 201 (1956) ("We disagree with" the argument that "§ 3 of the Act stands on its own footing. . . . Sections 1, 2, and 3 are integral parts of a whole."); *see also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("A court must therefore interpret [a] statute as a symmetrical and coherent regulatory scheme, and fit,

if possible, all parts into an harmonious whole.” (citations and internal quotation marks omitted)). Respondents’ interpretation of Section 3 conflicts with Section 2 and, if accepted by this Court, would effectively overrule decades of decisional law that allows non-parties to enforce and be bound by arbitration agreements.

1. As petitioners explained in detail in their opening brief, Section 2 of the FAA is the “centerpiece” of the FAA. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985). Section 2 requires that state principles of law and equity generally applicable to contracts be made applicable to arbitration agreements. *See Perry v. Thomas*, 482 U.S. at 492–493 & n.9 (“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.”). Section 2 thus establishes a policy of non-discrimination, requiring that arbitration contracts be placed on the same footing as all other contracts. *See* Pet. Br. 4–5, 36.

It is Section 2’s anti-discrimination principle that petitioners rely upon—not, as respondents incorrectly assert, the general “federal policy favoring arbitration.” *See* Resp. Br. 36–41. Section 2 establishes that the question of *what is required* under a written agreement is answered by reference to state principles of law and equity generally applicable to contracts—principles that necessarily include the various legal and equitable doctrines that give non-parties rights and obligations under a contract.

Respondents' proposed standard—treating party status as the determinative factor regarding the availability of relief under the FAA—conflicts with Section 2's anti-discrimination principle, because it renders arbitration agreements *less* enforceable than contracts generally. If state law doctrines such as third-party beneficiary, agency or equitable estoppel are generally applicable to the enforcement of contracts, then Section 2 requires that such state doctrines apply to arbitration provisions.

2. Respondents attempt to evade this problem by arguing that non-party rights under an arbitration agreement can still be enforced through a district court's inherent power to stay proceedings before it, and if such a discretionary stay is denied, non-parties can request leave to appeal under 28 U.S.C. § 1292(b). Resp. Br. 31. There are several flaws with this argument.

First, there is a vital difference between the *mandatory* stay provided by Section 3 and a district court's (inherent) *discretionary* authority to stay litigation before it. Indeed, when enacting the FAA, Congress provided for mandatory relief precisely because courts, when left to their own devices, had historically evinced hostility toward efforts to enforce arbitration rights. Pet. Br. 4–5. Respondents' proposed alternative would simply serve to take a class of arbitration rights and obligations protected under Section 2—the rights and obligations of non-parties under state doctrines of law and equity generally applicable to contracts—and exile them to the pre-FAA status quo, where such “rights” went unrecognized because of the lack of any mechanism to enforce them.

Second, under respondents' hypothetical regime, if a district court denied a discretionary stay to a non-party who had arbitration rights recognized by state law, and if either the district court or court of appeals denied permissive interlocutory review under Section 1292(b), then a non-party otherwise entitled to arbitrate would have to endure the full burdens of discovery and trial that arbitration is designed to avoid. Presumably on appeal from a final judgment in favor of the plaintiff, a court of appeals would set aside the judgment and order arbitration, but that would mean that the district court's erroneous refusal to stay the case had wasted judicial resources and imposed needless litigation costs on the parties—precisely what Section 16(a)(1)(A)'s provision for immediate appellate review is designed to avoid.

The implausibility of respondents' theory that the FAA limits enforcement rights to parties is especially apparent when considered in the context of Section 4 and non-parties who wish to compel arbitration to assert affirmative claims. A stay pending arbitration, if granted, is only of use to non-party *defendants* who have been sued in ordinary civil litigation; the stay of such an action requires the plaintiff to arbitrate if the plaintiff wishes to obtain relief. *See Anaconda*, 322 U.S. at 45 (“The concept [of Section 3] seems to be that a power to grant a stay is enough without the power to order the arbitration to proceed, for, if a stay be granted, the plaintiff can never get relief unless he proceeds to arbitration.”). If Section 4 is unavailable to non-parties, as it is under respondents' interpretation of the FAA, then non-party *plaintiffs* have no means (at least in federal court) to compel arbitration for the assertion of their own affirmative claims. Such non-party plaintiffs presumably could

resort to ordinary civil litigation to assert their causes of action, rather than arbitration, but the policies underlying the FAA are hardly served by denying non-parties the means to compel arbitration if such non-parties otherwise enjoy arbitration rights under applicable state law. Indeed, commencement of litigation might be understood to constitute a *waiver* of arbitration rights. 21 Richard A. Lord, *Williston on Contracts* § 57:17, at 155 (4th ed. 2001).

Several decades of decisional law recognize that non-parties may enforce and be bound by arbitration agreements under the FAA through myriad theories, including incorporation by reference, equitable estoppel, assumption, agency, alter ego/corporate veil piercing, assignment, successor in interest, and third party beneficiary. *See* Pet. Br. 34–36; *see also* *Fisser v. Int’l Bank*, 282 F.2d 231, 233 (2d Cir. 1960) (rejecting signature requirement and surveying the various theories by which non-parties can be bound to an arbitration agreement under the FAA). Acceptance by this Court of respondents’ theory that Sections 3 and 4 categorically do not apply to claims involving non-parties would lay waste to this precedent. Non-party defendants would instead have to rely on the discretion of district court judges to enforce arbitration rights recognized by state law, and non-party plaintiffs would have no recourse at all but to pursue ordinary civil litigation with defendants that refuse a demand to arbitrate.

3. Respondents further argue that non-party arbitration rights are contrary to the FAA’s policy of “volitional” arbitration. Resp. Br. 36–41. Yet petitioners’ arbitration rights exist solely because of respondents’ volitional choices. Respondents agreed to

arbitrate all claims “arising out of or relating to” their investment management agreements. J.A. 80, 99, 118. Had respondents expressly excluded non-party enforcement rights that otherwise exist under the applicable law governing the arbitration provision, then their wishes would of course be respected—the FAA operates “with regard to the wishes of the contracting parties.” *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995). But where, as here, the respondents expressly agreed, without limitation as to parties, to arbitrate all claims “arising out of or relating to” the investment management agreements, and then chose to assert claims of concerted misconduct against both parties and non-parties, J.A. 34–38, respondents cannot now object that they never “agreed” to arbitration, if the applicable law governing the arbitration provision permits non-party enforcement in these particular circumstances. Petitioners are not “coercing” respondents to accept anything not required by and under the agreements into which respondents voluntarily entered, under the law that governs those agreements.

Indeed, respondents’ own authorities undermine their argument on this point. Respondents quote *Domke* for the proposition that the federal policy favoring arbitration “cannot be construed to include parties that were not intended to be part of the original contract.” Resp. Br. 38 (quoting 1 Larry E. Edmonson, *Domke on Commercial Arbitration* § 13:1, at 13-2 (3d ed. 2008)). But the very next sentence from *Domke* states: “However, even though the arbitration is contractual by nature, a nonsignatory to an arbitration agreement may nonetheless be bound by the agreement under an accepted theory of agency or

contract law.” *Id.* In a footnote to that passage, *Domke* further explains that “[a] non-signatory to a contract may be deemed a party to arbitration under the Federal Arbitration Act through application of contract and agency principles. The fact that the party is not covered by the arbitration clause is not dispositive.” *Id.* at n.2 (citation omitted).

Similarly, respondents quote at length the Fifth Circuit’s broad statement that “to be enforceable, an arbitration clause must be in writing and signed by the party invoking it.” Resp. Br. 39 (quoting *Westmoreland v. Sadoux*, 299 F.3d 462, 465 (5th Cir. 2002)). Respondents fail to acknowledge, however, that in *Westmoreland* the Fifth Circuit recognized that [t]here are two circumstances under which a nonsignatory *can* compel arbitration,” *id.* at 467 (emphasis added), one of which is the very theory of equitable estoppel that petitioners argued in the Sixth Circuit below: “[W]hen the signatory to the contract containing a [sic] arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract.” *Id.*

* * * * *

At bottom, then, petitioners ask that the Court resolve this case just as it did in *Perry v. Thomas*—by recognizing that, under the FAA, state law controls the question of who is entitled to enforce a given arbitration agreement. Such a rule is mandated by the text of Section 2, is necessary to protect the long-recognized rights of non-parties to an agreement to enforce that agreement in certain situations, and is fully consonant with the FAA’s focus on “volitional”

arbitration. As the FAA therefore does *not* categorically bar petitioners from receiving relief under Section 3, this Court should remand the case so that petitioners' equitable estoppel argument can finally be considered.

II. SECTION 16 PROVIDES APPELLATE JURISDICTION OVER ALL DENIALS OF SECTION 3 RELIEF.

Respondents' entire jurisdictional theory hinges on the premise that petitioners, as non-parties to the arbitration agreement, could not obtain relief under Section 3. If this Court rejects respondents' interpretation of Section 3, then respondents' appellate jurisdiction argument necessarily fails. That said, this Court should also reject respondents' jurisdictional theory, which is contrary to the text of Section 16 and this Court's cases.

1. Section 16 confers jurisdiction over a broad category of orders: those denying motions seeking Section 3 relief. *See Omni Tech Corp. v. MPC Solutions Sales, LLC*, 432 F.3d 797, 800 (7th Cir. 2005) (Easterbrook, J.) ("If a § 3 motion is made and denied, then appellate jurisdiction exists to determine whether the denial was proper."). In resisting this reading, respondents insist that Section 16 requires more—that for a stay request to actually constitute a motion "under Section 3," the appellate court must first determine, in respondents' words, "an easily ascertainable fact," Resp. Br. 42, *i.e.*, whether the appellant is a "party." Thus, though they claim otherwise, respondents' objections inescapably *are* based upon resolution of part of the merits of petitioners' claim: whether petitioners, who claimed a

right to a mandatory stay of judicial proceedings under Section 3, were categorically barred from receiving such relief because of their non-party status. Respondents' argument therefore conflicts with this Court's cases, which teach that "[a]ppel rights cannot depend on the facts of a particular case." *Carroll v. United States*, 354 U.S. 394, 405 (1957). Instead, appellate jurisdiction "must be determined by focusing upon the *category* of order appealed from, rather than upon the strength of the grounds for reversing the order." *Behrens v. Pelletier*, 516 U.S. 299, 311 (1996) (emphasis added).

Even if respondents were correct that Section 3 relief is unavailable to petitioners, at *worst* that would only serve to defeat petitioners' Section 3 motion, not the existence of appellate jurisdiction. For example, in *Richardson v. McKnight*, 521 U.S. 399 (1997), this Court considered an immunity appeal by prison guards employed by a private contractor. This Court cited *Mitchell v. Forsyth*, 472 U.S. 511 (1985), and *Behrens* for the proposition that appellate jurisdiction existed under the collateral order doctrine. 521 U.S. at 402. It then ruled against the prison guards on the merits, holding that they were not entitled to qualified immunity as a matter of law because they were privately employed. *Id.* at 412. If this Court had followed respondents' rule, it would have dismissed the guards' appeal for lack of appellate jurisdiction because the guards' claim of immunity did not "fit" within the class of persons entitled to claim immunity. Instead, this Court followed the rule of *Behrens* and *Carroll* and exercised jurisdiction on the basis that the order appealed from was within the *category* of orders made appealable by the collateral order doctrine: denials of *claims* to immunity from suit.

Indeed, this Court has made clear that appellate jurisdiction is not defeated even by an otherwise frivolous appeal. *See Behrens*, 516 U.S. at 311 (appellate jurisdiction exists even in face of pre-existing categorical rule barring relief sought below). Respondents make no mention of *Behrens*, nor do they attempt to reconcile their jurisdictional argument with its rationale. As a result, even if respondents were correct that Section 3 relief is unavailable in this case, appellate jurisdiction existed in the court of appeals to make that determination.

2. Respondents also argue that petitioners' jurisdictional test makes a motion's label a "jurisdictional determinant [that] would allow opportunistic parties bent on delay to achieve it by manufacturing their own interlocutory appellate jurisdiction." Resp. Br. 33. This argument is unavailing for several reasons.

First, petitioners do not contend that the mere "label" on a motion is determinative in the absence of an actual request for relief under Section 3. What is determinative is whether a litigant actually sought (and was denied) a stay on the basis of Section 3.

Second, both district courts and courts of appeals are well-equipped to deter and, if necessary, punish attempts to manipulate Section 3 and Section 16. A district court may sanction a litigant for filing a frivolous Section 3 motion, *see* Fed. R. Civ. P. 11, and retain jurisdiction of the case pending appeal of the Section 3 denial by certifying the appeal as frivolous, *see* Pet. Br. 28 (discussing certification procedures for immunity appeals approved by *Behrens* and applied by some circuits in Section 16 appeals). For its part, a

court of appeals can dispose of frivolous appeals through summary procedures, *see* Pet. Br. 28–29, and can sanction frivolous appellants, *see* Fed. R. App. P. 38.

Respondents’ argument that it is “difficult to imagine how any such district court certification could short-circuit any such appeal once interlocutory appellate jurisdiction vests,” Resp. Br. 34, misapprehends the point of certification. The reason for certification is not to “short-circuit” the appeal, which no district court has authority to do, but rather to allow the district court to retain jurisdiction of the case pending appeal of the Section 3 denial, which would otherwise be lost under the divestiture rule of *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982). *See Apostol v. Gallion*, 870 F.2d 1335, 1337–1340 (7th Cir. 1989) (Easterbrook, J.) (outlining certification process for district courts to use to retain jurisdiction pending frivolous immunity appeals); *Bradford-Scott Data Corp. v. Physician Computer Network*, 128 F.3d 504, 506 (7th Cir. 1997) (Easterbrook, J.) (directing district courts to apply *Apostol’s* certification process to frivolous Section 16 appeals under the FAA).

3. In the face of widespread commercial practice and several decades of decisional law holding that the FAA, like its New York antecedent, contains no signature requirement, *see* Pet. Br. 38–42, respondents do not defend the actual holding of the Sixth Circuit below: that only *signatories* to an arbitration agreement may invoke Section 3—and by logical extension Section 4, *see Kimberlin v. Renasant Bank*, 295 Fed. Appx. 18 (6th Cir. 2008)—and that non-

signatories therefore are unable to appeal Section 3 and 4 denials through Section 16(a)(1). Pet. App. 2a.

Instead, respondents propose a significantly different test: that only parties to an arbitration agreement (a category that respondents admit may include non-signatories, Resp. Br. 39 n.20) can appeal under the FAA.⁴ In not defending the holding of the decision below, respondents pull the props out from under the jurisdictional rationale of that decision and its progenitor, *DSMC Inc. v. Convera Corp.*, 349 F.3d 679 (D.C. Cir. 2003).

The decision below, following *DSMC*, stressed the need for “clear, predictable, bright-line rules that can be applied to determine jurisdiction with a fair degree of certainty from the outset.” Pet. App. 8a (quoting *DSMC*, 349 F.3d at 683). According to the Sixth Circuit below, “[a]sking whether the parties are *signatories* to a written agreement to arbitrate satisfies these criteria.” *Id.* (quoting *DSMC*, 349 F.3d at 683) (emphasis added). Although this test is legally erroneous both because appellate jurisdiction cannot turn the *facts* of individual cases, *see Behrens*, 516 U.S. at 311, and because the FAA contains no signature requirement, *see* Pet. Br. 39–43, the “signatory” test at least purports to be “clear, predictable, [and] bright-line.” Pet. App. 8a.

⁴ Although all signatories to an arbitration agreement are necessarily parties thereto, not all parties are necessarily signatories, especially given widespread commercial practices involving the use of arbitration provisions in unsigned form contracts. *See* Pet. Br. 41.

Respondents’ “party” test for appellate jurisdiction, however, is far removed from the signatory test of the decision below. In cases where a non-signatory’s status as a *party* to an arbitration agreement is in dispute, as it frequently is, respondents’ “party” test would require a “multifactor factual and legal inquiry” of the sort that the Sixth Circuit below eschewed. See Pet. App. 8a (quoting *DSMC*, 349 F.3d at 683). That is to say, a court of appeals would have to review, *as a matter of appellate jurisdiction*, a district court’s factual findings to determine whether a non-signatory appellant is a party. Cf. *Daisy Mfg. Co. v. NCR Corp.*, 29 F.3d 389, 392–395 (8th Cir. 1994) (in Section 16 appeal from denial of Section 4 motion to compel arbitration, reviewing and reversing district court factual determination that non-signatory’s course of conduct did not reflect willingness to arbitrate); *Deloitte Noraudit A/S v. Deloitte Haskins & Sells*, 9 F.3d 1060, 1063–1064 (2d Cir. 1993) (reversing, on basis of estoppel, district court factual determination that non-signatory was not bound by arbitration agreement); *Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840, 845–846 (2d Cir. 1987) (reviewing district court factual findings as to whether non-signatory was a party to arbitration agreement).

Thus, respondents’ “party” test would (in the case of non-signatories whose status as parties is disputed) “require [a court of appeals] to delve deeply into the merits of a case before even deciding whether [it] had interlocutory appellate jurisdiction,” Pet. App. 8a (quoting *DSMC*, 349 F.3d at 684), which is precisely the approach that the decision below and *DSMC* rejected. Petitioners’ test, by contrast, is clear, predictable, bright-line and—unlike the signatory test of the decision below and *DSMC*—consonant with the

text of Section 16 and this Court's rule that appellate jurisdiction is determined on the basis of categories of orders, rather than the facts of individual cases. So long as Section 3 relief has been sought and denied, then a court of appeals has jurisdiction to proceed to the merits of the Section 16 appeal. *See* Pet. Br. 18–29.

* * * * *

Respondents' entire jurisdictional theory rests on an erroneous interpretation of Section 3, and for that reason fails. But even if respondents' interpretation of Section 3 were correct, their jurisdictional argument would still fail, because petitioners' appeal to the court of appeals was from the category of orders made immediately appealable by Congress in Section 16(a)(1)(A): denials of stay requests based on Section 3. This Court should therefore hold that the court of appeals had appellate jurisdiction over petitioners' appeal from the district court's order denying their Section 3 stay motion.

CONCLUSION

For these reasons, as well as those set forth in petitioners' opening brief, this Court should reverse the Sixth Circuit and remand with instructions to consider petitioners' arguments that the district court erred in not granting a Section 3 stay.

Dated: February 2009 Respectfully submitted,

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