IN THE SUPREME COURT OF THE UNITED STATES

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ARTHUR ANDERSEN LLP, ET AL. :

Petitioners :

v. : No. 08-146

WAYNE CARLISLE, ET AL. :

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Washington, D.C.

Tuesday, March 3, 2009

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:19 a.m.

APPEARANCES:

M. MILLER BAKER, ESQ., Washington, D.C.; on behalf of the Petitioners.

PAUL M. De MARCO, ESQ., Cincinnati, Ohio; on behalf of the Respondents.

C O N T E N T S

P R O C E E D I N G S

(11:19 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 08-146, Arthur Andersen v. Carlisle.

Mr. Baker.

ORAL ARGUMENT OF M. MILLER BAKER

ON BEHALF OF THE PETITIONERS

MR. BAKER: Mr. Chief Justice, and may it please the Court:

The principal question before the Court today is whether nonparties to an arbitration agreement that are otherwise entitled to enforce that agreement under State law are foreclosed as a matter of law from seeking relief under section 3 of the Federal Arbitration Act.

Respondents' argument that section 3 forecloses such relief to nonparties is contrary to both the text of section 3 and the structure of the FAA. Nothing in the text of section 3 forecloses nonparty enforcement rights, and under the structure of the Act section 3 is a procedural device to enforce, rather than a substantive limitation upon, State-law arbitration rights made applicable by section 2.

I'll begin with the text of section 3. Under section 3, a stay is mandatory if the issue in

suit is, quote, "referable to arbitration under such an agreement." We contend that there are three elements to determine whether or not an issue is referable to arbitration under the agreement. First, the applicant must be able to enforce the agreement. Second, the plaintiff must be bound by the agreement. And, third, the claim must fall within the scope of the agreement.

Nothing in section 3 limits who can enforce the agreement. To answer that question we have to turn to section 2.

JUSTICE GINSBURG: Before you leave the text, it says as you -- "referable to arbitration under an agreement," but then it says "shall on application of one of the parties." How do we know whether that is parties to the litigation or parties to the arbitration agreement?

MR. BAKER: Your Honor, it's -- it's clear from the -- from the context it's referring to parties to the action. Likewise, in section 4 there's a reference to parties, and it's parties to the controversy. So section 3 refers to parties to the action in which the section 3 stay is sought. Section 4, likewise, the companion enforcement provision, refers to parties to the controversy.

CHIEF JUSTICE ROBERTS: And what -- what is

the "controversy"? Is it the controversy asserted to be subject to arbitration or something else?

MR. BAKER: Well, "controversy" is in -- in section 4, Your Honor, as opposed to section 3. But the controversy in this case is a tort claim against various defendants. And that -- the Petitioners in this case assert that they are entitled to enforce the arbitration clause, and under that clause this controversy is supposed to be arbitrated.

Now, section 2 is the primary substantive provision of the Act. Section 2 establishes that questions concerning the enforceability of an arbitration agreement, including who may enforce that agreement, are decided by State law. This Court's decision in Perry v. Thomas recognized and applied this principle.

In Perry, this Court remanded to State court to decide the question of whether nonparties could enforce an arbitration agreement. In so doing, this Court instructed the lower court to apply State law to determine the very question that's before this case, whether non -- before this Court, whether nonparties could enforce the arbitration agreement.

JUSTICE GINSBURG: In practice, are there decisions in which -- and I'm assuming that you are

right on the jurisdictional question -- in which a nonparty to the arbitration agreement but a party to the litigation has, in fact, succeeded in getting a stay under section 3?

I mean, one question is -- and that's the question on the merits -- assuming that a -- that a party to the litigation, not a party to the arbitration agreement, can come to court and say, court, stay the action pending arbitration. Have there been cases in which section 3 stays have been issued on the request of someone who is not party to the arbitration agreement but is a litigant in the case?

MR. BAKER: Yes, there have been, Your Honor. And there -- there are numerous cases. In fact, for the last 60 years it has been a recognized, settled principle of FAA law that nonparties to an arbitration agreement that are otherwise entitled to enforce the agreement are able to seek and obtain stays under section 3.

JUSTICE GINSBURG: Well, the question -- ability is one thing. It means they -- they have the capacity to apply under section 3. I was just wondering how in practice -- I mean, here's a case where you have three parties together counseling a certain tax shelter. One of them enters an arbitration agreement with the

enterprise that they are advising. The other two, sophisticated players, do not.

My question is, conceding jurisdiction, it seems to me unlikely that a court would listen to two such people who were perfectly equipped to get an arbitration agreement themselves and didn't.

MR. BAKER: Well, Your Honor, it depends upon the facts and the law. It may well be that those nonparties have no arbitration rights, in which case a section 3 stay would not be available -- available to them.

The question is whether they have rights under State law. If they do have rights under State law to enforce the arbitration agreement to which they are not parties, then they are entitled to a section 3 stay.

JUSTICE SOUTER: I -- I don't see that the -- that the section 3 stay follows from that. It may very well be that in whatever ultimate forum the case is thrashed out in that the -- that the non-signatories will be able to enforce the arbitration agreement.

The question here is whether they can get a stay in midstream in order to litigate that as a separate issue. And one argument for saying that they should not, that the stay right should be limited to signatories, is that the policy of the -- the Federal

Arbitration Act is to enforce arbitration agreements. It is not a policy simply to promote arbitration under all possible circumstances. It is a policy to enforce contracts because the contracts, in effect, were being given short shrift before the Act was passed.

If the policy is one to enforce contracts and, as Justice Ginsburg said, they had a chance to make an arbitration agreement and they didn't do it, then that is a good reason to say the Federal courts will not stay the proceedings in midstream for somebody who didn't get the agreement that that person could have gotten. What is your answer to that argument?

MR. BAKER: Section 2, Your Honor, sets the policy of the FAA, and section 2 establishes that State law determines the rights and obligations of nonparties to an arbitration agreement. If nonparties have rights --

JUSTICE SOUTER: Including -- and -- and you're saying that that covers, in effect, even a point of Federal procedure as to whether you get, in practical terms, an interlocutory appeal. That's a question of State law?

MR. BAKER: Your Honor, that brings us to the question of appellate jurisdiction, but first let me deal with the merits. Section 3, as this Court has

recognized on various occasions, is a procedural device to enforce the substantive policy of section 2. It has no substantive component on its own.

Section 2 establishes -- settles the question of who may enforce or is bound by an arbitration agreement. It settles that question by directing a court to look to State law. Section 3 is --

JUSTICE SOUTER: And the question here is: What is the procedure to be followed in a Federal court when there is disagreement about that? And to say that that is a question of State law strikes me as a stretch.

MR. BAKER: Your Honor, section 3 is a procedural device to enforce State law arbitration rights. Section -- likewise, section 4 is the same thing.

JUSTICE SCALIA: Why do you say that section 2 -- it isn't at all clear to me that section 2 says State law determines whether somebody not a party to the arbitration agreement can -- can enforce it.

MR. BAKER: Your Honor, that was the reading of this Court in the Perry v. Thomas decision in 1987. This Court construed section 2 as being a touchstone for choice of law and that section 2 required the court concerning questions concerning the enforceability of an arbitration agreement to look to State law to answer

those questions.

JUSTICE SCALIA: Including enforceability by whom?

MR. BAKER: Absolutely. That was the precise question before the court in Perry, and this Court remanded to the California Court of Appeals to determine whether non-signatories to an arbitration agreement could enforce that agreement. The California Court of Appeals on remand held that they could under a theory of agency, which is indistinguishable in principle from the theory that the Petitioners are asserting here today.

Respondents' theory, their interpretation of the Federal Arbitration Act would wipe out six decades of FAA case law recognizing that nonparties have enforcement rights.

JUSTICE GINSBURG: Do we have any situation -- and this one is really peculiar because the one party who has the arbitration agreement with Carlisle is now out of it, and is not going to get back in, because -- is it Bricolage -- is bankrupt, so there is an automatic stay of any litigation against Bricolage.

The one party that has the arbitration agreement is out of the picture, so you have an

arbitration agreement effectively with no one, that two parties who have no arbitration agreement are trying to enforce: The difference between parties to the litigation joining in an ongoing arbitration brought by either party to the arbitration agreement, and relying on an arbitration agreement effectively without two parties to it.

MR. BAKER: Your Honor, the bankruptcy of Bricolage has no effect whatsoever on our rights under State law to enforce the agreement. It is what it is, but --

JUSTICE GINSBURG: But if you have a party to the agreement who is no longer in the picture, doesn't that change things?

MR. BAKER: Well, the Respondents might -- might contend so, and they -- they are free to argue on remand the question of whether or not that bankruptcy in any way affects our rights, whether we can prevail under equitable estoppel in this case. But for purposes of this Court, the question that we -- that the Court has to decide is whether or not as a matter of law a nonparty is foreclosed from seeking relief under section 3, and section 3 does not foreclose such relief because section 2 establishes the principle that this -- that a court is to look to State law to determine the question

of who can enforce an arbitration agreement.

So we're saying that Respondents' theory of the case would wipe out 60 years of FAA case law recognizing that nonparties have arbitration rights. Theories such as third-party beneficiary, assignment, agency, estoppel, including equitable estoppel, assumption, successor in interest, none of those cases can survive effectively if this Court were to affirm the decision of the Sixth Circuit.

I will now turn to section 16 and the question of appellate jurisdiction. Respondents, like the court below, erroneously conflate the merits of the section 3 issue with appellate jurisdiction. Thus if you reject their interpretation of section 3, necessarily their appellate jurisdiction argument fails. But that -- their theory of appellate jurisdiction nevertheless should be rejected on its own merits.

Under section 16, and that's found at page 3 of the blue brief -- an appeal may be taken from an order refusing a stay of any action under this title. This establishes a broad category of orders that are immediately appealable. The Sixth Circuit below used a signatory test to determine whether it had appellate jurisdiction. Now, this test is legally erroneous, as Respondents concede. For 70 years -- excuse me -- 80

years, the Federal Arbitration Act has been understood not to contain a signatory requirement.

JUSTICE SOUTER: May -- may I ask you this? Let's assume State law said we -- we don't recognize stays at this stage of the game. Therefore, we will not give a stay to anyone. Would State law prevail?

MR. BAKER: Your Honor, State law controls the question of who may enforce the agreement, who has rights and obligations under the agreement. Sections 3 and 4 control the question of whether relief is available in Federal court. The procedural devices to enforce State-law arbitration rights may vary from State to Federal court, but the principle of who --

JUSTICE SOUTER: But isn't that the problem? That's what I'm getting at. Isn't that the problem for you in this case? Because you keep arguing that their substantive rights under the agreement are issues of State law, but the question before us is not one of ultimate substantive right. At some point there will be an -- an appellate process open to them and they can assert those substantive rights if they didn't get them at trial.

The issue here is not substantive right. The issue here is a procedural right, and it's a procedural right which depends upon the terms of the

Federal statute, and that's why it seems to me that it may very well be that the Federal statute determines not only the procedural right, the stay, but who may ask for it, that being a sensible Federal question rather than a State question.

MR. BAKER: Your Honor, the premise of your question drives a wedge between section 2 and section 3 that is inconsistent with this Court's -- Court's decision in Bernhardt. This Court in Bernhardt said that section 3 cannot be read apart from section 2. Section -- this Court has never characterized section 3 or section 4 as containing any substantive elements. Such --

JUSTICE SOUTER: And your argument depends upon, as Justice Scalia pointed out a moment ago, reading section 2 as in effect incorporating State law for purposes of determining substantive rights.

MR. BAKER: It absolutely does.

JUSTICE SOUTER: Okay, but that still begs the question whether the -- whether the incorporation of State law to determine substantive rights controls the question of what law determines procedural rights, when a Federal procedural right is claimed, which is what is involved here.

MR. BAKER: That's -- that's correct. And

sections -- it is a Federal question as to what sections 3 and 4 require.

JUSTICE SOUTER: And regardless of State law, the answer to the Federal question is independent of it.

MR. BAKER: That's not correct, Your Honor.

JUSTICE SOUTER: Then I'm -- I'm missing the logic of your argument.

MR. BAKER: The logic of the argument is that section 3 and section 4, as this Court has said on several occasions, are devices to enforce the principle of arbitration enforceability outlined in section 2. Section 2 establishes the substantive principle here. Sections 3 and 4 are mere procedural devices. Under --

JUSTICE SOUTER: But they are Federal procedural devices, and State law could not contradict them. That's -- that's what we got into when I said what if State law said there could be no stay? You agree at that point that of course the Federal law would prevail?

MR. BAKER: That would apply to -- that would apply to the question of the -- the action in that court, but in the Federal court the threshold --

JUSTICE SOUTER: It would apply to what the judge is supposed to do at that moment when somebody

says, I want a stay. And the judge at that point consults Federal law, not State law, doesn't he?

MR. BAKER: That -- on the procedural question of what procedural mechanism --

JUSTICE SOUTER: Well, just stick to my question. He says: I want a stay. Does the judge look to State law or Federal law?

MR. BAKER: The judge first looks to the question of who can enforce the agreement, and to ask that -- to answer that question, the judge has to look to State law.

JUSTICE ALITO: Why is that necessarily so? I don't understand your answer to that question, or your statement that your argument is dependent on the resolution of that choice of law issue.

Are the courts of appeals unanimous on the question of whether the enforceability of an arbitration agreement by a nonparty is a question of State law? I think there's at least a Fourth Circuit decision that says it's a question of Federal law, but why -- why do we have to decide that and why is your argument dependent on it?

Suppose that is -- suppose that were a question of Federal law, what would that -- I mean, it might change the ultimate outcome of whether there's an

entitlement to a stay, but I don't see why it has any effect on a question of whether there is jurisdiction.

MR. BAKER: I don't think it has any question -- effect on the question of jurisdiction, Your Honor.

JUSTICE ALITO: Nor does it mean that you necessarily cannot enforce the arbitration agreement, does it?

MR. BAKER: It means that -- well, you have to look to a source of law to determine whether a nonparty has rights under an arbitration agreement. I'm aware of that Fourth Circuit case. Your Honor, I believe that the court was incorrect. I believe this Court's decisions in Perry and ensuing cases make it clear that State law determines the rights and obligations of nonparties to an arbitration agreement. That's a settled principle. And so that is a threshold question that has to be --

JUSTICE GINSBURG: But if you read section 3, if you interpret, as you do, the word "parties" to mean parties to the litigation, then for purposes of jurisdiction the only thing is, is this person a party to the litigation? Yes. End of case; they can move for a stay. Then whether they're entitled to one because of this equitable estoppel theory which is determined by

the State law is a merits question.

You are making a more complex jurisdictional argument than I understand. What's wrong with the simple argument that section 3 says parties; that means parties to the litigation; the -- the Petitioners here are parties to the litigation; therefore, they can move for a stay of the arbitration? And then we go to the merits and say, do they have a good reason for staying the arbitration?

But you're presenting a more complex argument on the jurisdictional point which I don't quite understand.

MR. BAKER: Your Honor, I'm not sure I understand the question. Are you referring to appellate jurisdiction or jurisdiction under the FAA?

JUSTICE GINSBURG: First, is there jurisdiction -- yes, appellate jurisdiction. If you -- if there's an application to stay, is that appealable? Why isn't -- why isn't the answer clearly yes?

MR. BAKER: The answer, Your Honor, is clearly yes. If we're talking about --

JUSTICE GINSBURG: But your step -- you seem to be involving some merits question of State law in that question.

MR. BAKER: Your Honor, I turned to the

merits first because the Sixth Circuit below erroneously conflated two entirely distinct concepts. The first is appellate jurisdiction --

JUSTICE GINSBURG: But you shouldn't do that. You should tell us, this is the jurisdictional argument. If we pass that threshold, then we get to the merits.

MR. BAKER: All right. Well, I'll start with jurisdiction, Your Honor.

JUSTICE GINSBURG: Good.

(Laughter.)

MR. BAKER: All right. Section 16 makes it clear that all one needs to have for appellate jurisdiction is a motion under section 3 for a stay pending appeal, and that is denied. That establishes a broad category of orders. The Sixth Circuit didn't apply that test. The Sixth Circuit used a --

JUSTICE GINSBURG: May I ask -- may I ask? Suppose it's somebody who has interest in the litigation but is not a party either to the arbitration agreement or to the litigation?

MR. BAKER: If a -- if a party -- if a litigant makes a section 3 stay and they claim no right to enforce the arbitration agreement, the denial of that stay would be appealable, all right, because section 16

--

JUSTICE GINSBURG: I'm asking if somebody who is not a litigant, who can -- if somebody who is an interested spectator moves for a stay of litigation to which that person is not a party, and the court says of course not. Would that be reviewable on appeal?

MR. BAKER: No, because they -- the spectator is not even a party, Your Honor, to the litigation. Section 3 contemplates parties to the litigation seeking a stay.

On the question of appellate jurisdiction, if a litigant makes a request for a section 3 stay and the stay request is denied, there is clearly appellate jurisdiction under section 16. That is -- in our view.

JUSTICE GINSBURG: And that's your jurisdictional argument.

MR. BAKER: That's our jurisdictional argument, that the mere request for relief under section 3 and the denial of that request triggers appellate jurisdiction.

JUSTICE GINSBURG: And you're saying that's all that's before us because it was thrown out on --

MR. BAKER: That's not all that's before you. Unfortunately, the Sixth Circuit below conflated the question of whether there's appellate jurisdiction

with whether non-signatories can seek relief under section 3. That's why it's essential for the Court to reach the second questioned presented, which is whether non-signatories as a matter of law are foreclosed from seeking relief under section 3.

The court below -- I'll turn back to appellate jurisdiction to -- Your Honor. The court below used a fact-based test; that is, is the party seeking relief a signatory to the agreement? That -- that cannot be the law. Eighty years of FAA law establishes that you don't have to be a signatory to enforce an arbitration agreement. In addition, it violates this Court's rule that you look to categories of orders, rather than the facts of a given case to determine appellate jurisdiction.

JUSTICE BREYER: Now, what are the instances in which somebody who is not a signatory might seem to have a right to enforce it? I can think of one. Suppose he's a third-party beneficiary of the contract. Are there others?

MR. BAKER: Well, absolutely, Your Honor.

JUSTICE BREYER: What?

MR. BAKER: There's assignment, successor in interest, assumption, estoppel.

JUSTICE BREYER: Okay.

MR. BAKER: There's a whole --
JUSTICE BREYER: I mean, which one applies here?
MR. BAKER: Well, estoppel, and there are --
JUSTICE BREYER: Estoppel? I don't understand estoppel.
MR. BAKER: Well, Your Honor, it's a theory that was --
JUSTICE BREYER: I know what estoppel is in the law.
(Laughter.)
MR. BAKER: More precisely, it's equitable estoppel, but the -- the practice treatises have entire chapters devoted to --
JUSTICE BREYER: I know, but I haven't unfortunately had a chance to read all the practice treatises. So, could you explain to me quite simply what is the theory of equitable estoppel that allows someone who is not a signatory to an arbitration contract to have it enforced?
MR. BAKER: Yes, Your Honor. The theory here is that the Respondents asserted claims of -- of concerted misconduct, of conspiracy against the Petitioners, some of whom were -- one of -- well, none of whom were signatories to the arbitration agreement

and Bricolage which did -- was a signatory to the agreement, that claim of concerted misconduct, in our view, where the Respondents are relying upon the agreement, that is the agreement that they entered into with Bricolage to -- is the theory upon which they are now seeking relief from us. They are claiming that this contract that contains the arbitration clause was an instrumentality for the fraud that was perpetrated on them. Because of that they are now estopped from seeking -- claiming that they are not -- not obligated to arbitrate under the agreement.

JUSTICE BREYER: In other words, whenever I sign a contract with anybody -- I sign one with Smith, I ask him to buy some wheat, I sell him some wheat, and there's an arbitration clause. And now I sue all kinds of other people, and the contract is part of the lawsuit. Are there many cases like that? Maybe it was a shipper, or something, who they sent the contract to, and he had to figure out what to do on the basis of the contract. Or maybe there was a cousin who told me to go to see Smith in the first place. Maybe -- I don't know. There are a lot of people. So, now all those people have to go to arbitration?

Because you're saying whenever I go in and have a contract with X and there's an arbitration

clause, then in any future lawsuit where I sue anybody and that contract is an essential part of it, the breach thereof, he could put me in arbitration. Boy, that sounds extreme. I mean, I guess there are -- there'd have to be several treatises on this, but it doesn't sound intuitively sensible.

MR. BAKER: Well, Your Honor, we're not saying that that applies in every case. There's more --

JUSTICE BREYER: Oh, okay. That's all I wanted to know, was what's the theory in this case.

MR. BAKER: The theory of equitable estoppel.

JUSTICE BREYER: If that's the theory, I -- unless I think it always applies, I could just say I don't have to decide about a third-party beneficiary.

MR. BAKER: Your Honor --

JUSTICE BREYER: I just have to decide whether you can enforce it. Now -- so you'd better say some other things.

(Laughter.)

JUSTICE KENNEDY: Well, of course, one of --

MR. BAKER: Well, Your Honor, give me --

JUSTICE KENNEDY: One of the things you're going to say is that, with all due respect, Justice Breyer, this conflates the merits with the

jurisdictional problem, which is exactly the mistake that the court of appeals made. Is that your theory of the case?

MR. BAKER: Well, that's -- that's the first error of the court of appeals, but the court of -- the second error of the court of appeals was to decide -- was to hold as a matter of law that section 3 does not allow nonparties to enforce an arbitration agreement.

The question of the merits of equitable estoppel is not before this court, Your Honor, and it may well be on remand in the Sixth Circuit that --

JUSTICE BREYER: I wouldn't have asked my question if you hadn't said we have to go beyond the question whether they had jurisdiction and answer the merits, which is whether you can in fact enforce it.

MR. BAKER: Your Honor --

JUSTICE BREYER: Now you're saying, no, we don't.

MR. BAKER: Your Honor, the merits -- there are two parts to the merits. The first is whether as a matter of law nonparties are foreclosed from seeking relief under section 3. That -- that is all this Court need decide. That is what the question --

JUSTICE BREYER: I could just rely on my third-party beneficiary example?

MR. BAKER: As an example? Exactly. A third-party beneficiary can enforce an agreement as a matter -- is entitled to enforce -- to use section 3.

JUSTICE SCALIA: If he can do it under State law?

MR. BAKER: If he can do it under State law. Absolutely, Justice Scalia.

The question of whether or not we satisfied the requirements of equitable estoppel is not before the Court. That's a question to be decided on remand by the Sixth Circuit.

Unless there are any further questions, I'd like to reserve the balance of my time.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. De Marco.

ORAL ARGUMENT OF PAUL M. De MARCO

ON BEHALF OF THE RESPONDENTS

MR. De MARCO: Mr. Chief Justice, and may it please the Court:

Estoppel is what you invoke when you have no contract to invoke, and this version of equitable estoppel is what you invoke when you have no arbitration agreement to invoke.

I want to come to a question that was just asked by -- by Justice Breyer. Section 3 mandates only

stays in aid of contract-based arbitration obligations. They are not fungible, these arbitration agreements. They cannot just be picked up by anyone and advanced as a ground for arbitration.

This Court has consistently said, in Volt, for example, at page 478: The FAA does not require parties to arbitrate.

JUSTICE BREYER: Well, I thought the first issue -- I never got past the first issue.

MR. De MARCO: Yes, sir.

JUSTICE BREYER: And the first issue was, does he have a right to appeal? And I read the statute, and to me section 16 says yes. He asked for a stay. It was denied, and it says an appeal may be taken from an order refusing a stay. So there's an order refusing a stay; he appealed. Why can't he appeal?

MR. De MARCO: Because the stay that he requested was distinctly outside section 3, not as a merits question, but so far outside question -- section 3 that we can say he should not -- that the stay was not requested under section 3; it was not denied under section --

JUSTICE BREYER: Is there any -- is there any other example in the law -- I can't think of one -- where you say this party has so silly an argument, which

is really what you're saying --

MR. De MARCO: Right.

JUSTICE BREYER: -- that we don't even let him appeal.

MR. De MARCO: Yes. There are --

JUSTICE BREYER: It seems to me I've gotten a lot of appeals where the appeal, I don't think, is too meritorious, but nonetheless I never heard of saying you can't appeal.

MR. De MARCO: Right. There are sort of what I would call the Trojan Horse appeals, where a party actually has moved to compel discovery and they characterized it as an injunction. When that was denied, they said: An injunction was denied; we have the right under 1292(a). The court of appeals is perfectly able to pierce that and say: No, that's a discovery motion; that's outside of the injunctive area.

And here why we're saying this, Your Honor -- and we recognize what they say about the Behrens case -- this is an instance where we're asking the Court to, in a sense, pull the veil on these section 3 --

JUSTICE BREYER: As to that, if you did that, I got your first point. I understand it. I agree with it.

As to the second point, you say -- I was

surprised because I hadn't quite taken that in -- that we are now supposed to reach what we would call the merits of the appeal. Now, there you just heard your co-counsel say: Look, you don't have to decide whether my equitable theory is good or not. You haven't read these treatises, I have; which is a fair comment.

MR. De MARCO: Right.

JUSTICE BREYER: And -- and all I want you to say is that sometimes, at least, a third party could enforce a contract to arbitration that two others make.

The statute doesn't say he can't. The statute doesn't say he has to be the one who signed it. And if you think of a third-party beneficiary or an assignment, for example, you would think, of course, there are other people, say an assignee, who could enforce it.

MR. De MARCO: Right. And there's a reason why those -- in those cases, the third -- I will call them nonparties were allowed to enforce. Let me preface that by saying not all of those were -- we've heard a lot about State law and Federal law. Not all of those are tightly grounded in Federal law.

But take your example of the third-party beneficiary, they cite a case called J.P. Morgan in which the woman was incompetent, the agreement with the

nursing home was signed as -- on her behalf. I think that's clear in that kind of case that the nonparty is -- is asserting the right through the contract, because of the contract, dependent on the contract.

Here, by -- by claiming equitable estoppel not only aren't the Petitioners asserting rights that flow to them from the contract, because they have no contract; they are actually saying -- this is the gist, it gets back to your question, what's the gist of their equitable estoppel theory? It's as we quote in footnote 13: The gist of it is that equitable principles prevent Respondents from claiming that they have no obligation to arbitrate with the Petitioners despite the lack of an agreement.

Their very theory assumes that what section 3 says must exist is absent. Their very theory says we don't have an agreement of our own to assert, and therefore, we need equitable principles to fill the void. Now, where do these equitable principles come from?

JUSTICE GINSBURG: Then you might say that they haven't stated a claim on which relief can be granted, but that is the merits question. We are supposed to be dealing with the question of whether the denial of the stay -- there was a denial of a stay -- is

appealable under section 16. And to decide that question I don't think you get into how meritorious their claim was for the stay.

MR. De MARCO: Your Honor, the -- the fact that they have filed a motion, and as I referred to it, the concern that we have -- and I think the concern that animated DSMC and Universal when they took up this issue -- was the Trojan Horse stay motion. We have to keep in mind not every stay that is filed pending arbitration, a stay pending arbitration, is necessarily filed under section 3, because in footnote 23 of Moses H. Cone this Court recognized another kind of stay pending arbitration, and that's a discretionary stay.

JUSTICE SOUTER: Okay. And what is the criterion for identifying a section 3 stay?

MR. De MARCO: The criterion, Your Honor, is that the -- that the right to the stay must be -- the right to -- the statute speaks in terms of referable to arbitration under an agreement. What does that mean? "Referable to arbitration" is the arbitration obligation. "Under" in that means dependent on, because of. So the arbitrability of it depends on a written agreement. That's what section 3 --

JUSTICE SOUTER: And your -- and your position is that the statute should be so construed that

only a signatory to the written agreement has a right to the stay, indeed has a right to request the stay under article 3?

MR. De MARCO: Yes.

JUSTICE SOUTER: What is your reason for saying that?

MR. De MARCO: Just to clarify, the statute being section 3?

JUSTICE SOUTER: Yes.

MR. De MARCO: Yes. The reason for that is this Court has been very clear in its interpretations of the FAA in general. The FAA in general, the Court has said, requires -- does not require parties to arbitrate when they have not agreed to do so. So that sets the standard. If there is no agreement, you cannot force that signatory, which didn't have an agreement with that non-signatory, to arbitrate.

JUSTICE KENNEDY: Well, what do you do with third-party beneficiary, assignment, assumption?

MR. De MARCO: All of those examples, Justice Kennedy -- in all of those examples the right to enforce the agreement, let's say the right to procure a stay based on the agreement, flows from the intention of the parties to the original agreement.

The examples they use -- assignment, they

cite a case where there is -- there was an express assignment, and in the assignment the court said they actually assigned the agreement with the arbitration clause in it to the successor. They cite an assumption case. It was an express signed assumption. Those are all cases of contract-based arbitration.

JUSTICE KENNEDY: Well, in a way that was where one of the parties, without the other party's consent, say, assigned a third-party beneficiary. Here in a way it's a fortiori because the party who is objecting, by his or its own actions, caused the agreement to come into play. That's their theory.

MR. De MARCO: Well, let me tease that out a bit. The -- one of the -- the problems in this area, this equitable estoppel that has developed as an ersatz form of equity principle, it is not tied to section 3, nor is it tied to State law. It is -- it is perfectly ad hoc, so it's an amorphous concept that we've seen develop over the last 30 years.

JUSTICE BREYER: Your proper -- I see. This is actually a pretty difficult question to me, and -- because it seems to me sometimes they have to be able to enforce it, the assignee, the third-party beneficiary.

MR. De MARCO: Right.

JUSTICE BREYER: And now what I don't know,

is -- what they're doing -- it's true that section 3 and all the other sections, they talk about the agreement, but they don't say that the individual who is asking for the stay has to be the same person who signed it, as they couldn't. So how do we know which among all the possible people in the case who hasn't signed it should and should not be able to enforce it?

Their argument is look to State law, okay? And your argument is derive some principles yourself. Really.

MR. De MARCO: Right.

JUSTICE BREYER: And so, so -- is it possible to answer this case by saying he's wrong in thinking you always look to State law. It may depend on what the State law says. So that's the answer to the question. You should have had your appeal. Go appeal, and let the courts below work that out first, knowing that the State law is relevant but not always determinative. Then we'll get some -- we'll get some case law on this and we'll be in a better position to figure out what the right answer is.

MR. De MARCO: Justice Breyer, the question of arbitrability does not always depend on State law. In Volt, in First Options, this Court said sometimes it does, but it does when the issue is -- was a contract

formed? Is a contract valid? How are we going to interpret that contract?

Here where equitable estoppel is concerned, that's not the consideration. Therefore, because you can -- you can interpret the contract until the cows come home, you're never going to find the Petitioners in it. So that the question --

JUSTICE BREYER: Well, you see it's a little hard. I can imagine a case where they're sitting in the room drawing up the contract, they put it in the arbitration agreement. There are four other people directly related to the room. The parties look around and say, hey, we have arbitration here, I hope everybody understands everybody is going to have to do this. And they all say, okay, don't worry about it.

Now, I'd say, hey, maybe they're estopped. And there they're going right through the contract.

MR. De MARCO: Right.

JUSTICE BREYER: So I hate to write the words "equitable estoppel is never relevant." I would rather write the words "I'm uncertain State law is relevant policy." You know, it's not true that it's always relevant.

MR. De MARCO: I think the safest ground is to clear up first this question of how arbitrability is

decided. And I think Justice Alito asked the question: Is -- is there unanimity among the courts of appeals?

The Fourth Circuit case that I -- I think was mentioned -- I believe that's the Bailey case. I don't even think there's unanimity, unfortunately, within the Fifth Circuit. But there -- there -- the better view, I think, that is expressed in the Fourth Circuit case is that when the issue that's pivotal is contract interpretation, arbitrability in that narrow sense, that's State law. When it's not, it's Federal law.

And I think that's why you see these equitable estoppel cases not talking at all about State law. It is sort of an ersatz, ad hoc version of Federal equity that's being --

JUSTICE SOUTER: Okay. Why shouldn't the Federal law be even simpler than that? And I -- I proposed one, and -- and probably because I don't understand the law well enough, it may -- may have been simply simplistic.

But my suggestion was the -- the issue before us should be construed narrowly as being the question: Who can ask for a stay? And the answer to that would be only a person -- or one possible answer to that would be only a person who has signed the

arbitration agreement, because the Federal policy is to enforce agreements, not force arbitration. And, therefore, it is sensible as a matter of Federal policy to say, we're not going to stop this trial in mid-track for arbitration unless you who are asking for it to be stopped signed an arbitration agreement yourself, and it's that agreement that you're trying to enforce.

Now, that is maybe a -- a too simplistic approach, but tell me what's good or bad about that approach.

MR. De MARCO: I think that it's the correct approach to say that we are not talking generically about the enforceability of arbitration agreements. We are talking in the context, under section 3, of an existing lawsuit. That one party says, hey, I want to stay this lawsuit. So it is a different enforcement mechanism than -- than the -- than the generic law.

JUSTICE SOUTER: Okay. That opens the door to my simplistic theory. Now --

MR. De MARCO: It does.

JUSTICE SOUTER: -- is it a good theory or a bad theory?

MR. De MARCO: It's a good theory because then, once you've opened that door to the -- the ability to ask for a stay, you must ask: Well, what are the

ground rules for asking for this stay?

And while my friend continuously returns to State law, our point is you don't depart from the terms of section 3 itself, because section 3 itself tells you the circumstances under which the mandatory stay provision applies. And those circumstances are only when it is referable to arbitration under a written agreement.

JUSTICE SOUTER: Okay. But it seems to me that that's not enough, because "under the written agreement" leaves open the question of whether the written agreement can be enforced right here and now by getting a stay only by somebody who signed it or by a third-party beneficiary or -- or somebody dependent on the contract plus some other legal theory.

My simplistic suggestion was: Keep it simple and simply say the -- "under the agreement" means an agreement signed by you, and the reason we confine it to an agreement signed by you is not because the phrase "under this agreement" tells us that. It doesn't. That leaves the question open.

We say it is going to be confined to an agreement signed by you because that's really the -- the nub of the Federal policy. We want to enforce agreements, and we want to confine this extraordinary

remedy of a stay to people who went to enough trouble to make -- and I don't know whether that's a good idea or not. And -- I mean it's favorable to you, so it's in your interest to say it's a good idea, but I may be getting into trouble by that. And that's what I want you to tell me.

MR. De MARCO: Well, that's consistent with the Federal policy as this Court has expressed that Federal policy. It has -- it has said repeatedly the Federal policy is not a general policy to encourage this form of dispute resolution but, rather, it is to give effect to parties when and if they agree to arbitration. So I agree that that is, and should be, the starting point of the analysis. Is -- and -- and it was expressed in -- in Mitsubishi this way: That -- that the intent of the FAA is to give effect to arbitration agreements, to put them on equal footing with all other agreements, but not more so. And I believe what -- what Petitioners are asking for is the "more so."

JUSTICE STEVENS: Mr. De Marco, can I ask you this question? In section 3 do you agree with his reading of the word "parties," or do you think "parties" just means parties to the contract?

MR. De MARCO: With my friend's reading?

JUSTICE STEVENS: Yes.

MR. De MARCO: Justice Stevens, I have to be honest and say I'm concerned about that argument because I think Congress has used the word "parties" throughout the FAA rather haphazardly to mean three different things, maybe four: Party to the agreement, party to the action, party to the arbitration, or party-like person. And I would be concerned about hanging it on -- on that. So my -- my answer is, because of the way it's used in sections 3, 4, 5, 9, I'd be concerned about -- about resting on that.

JUSTICE STEVENS: You are concerned about -- does that mean you agree with him that "parties" means parties to the --

MR. De MARCO: Yes.

JUSTICE STEVENS: -- action, not parties to the contract?

MR. De MARCO: I -- actually in section 3, what I would say is it's equivocal, and the rest of the FAA doesn't help us understand that. So it's an -- it's an issue on which I would not hang my hat, because it is equivocal.

JUSTICE BREYER: What would you think about saying that some parties -- some parties to the case who are not parties to the contract can as third parties, nonetheless, enforce arbitration? We have listed a few

examples, assignees, et cetera. When considering whether this is one of them, judge, the key question -- we can tell you what the key question is and what it isn't. What it is has to do with the intent of the persons who did sign the contract.

MR. De MARCO: Right.

JUSTICE BREYER: Something related to that. We don't have to be specific.

MR. De MARCO: Right.

JUSTICE BREYER: What it isn't is a case management device. Because what I think the temptation would be for the judge is to -- is to -- let's send them all off to arbitration if we can, and then I would not have to worry about this case for a while. And they'll come back, and they'll figure it out.

MR. De MARCO: Right.

JUSTICE BREYER: So is that -- is that right, or is it wrong? What's your insight or guess on that?

MR. DE MARCO: I think it's -- it's correct.

JUSTICE BREYER: I'm just looking for ways of separating these sheep from goats.

MR. De MARCO: Yes. The only way, I think, to give effect to what the Court has said, which is nobody is going to be forced to arbitrate when they

haven't agreed to arbitrate, is for judges to take section 3 seriously when it is proffered as the basis for a stay motion and to -- and to apply it as it is written.

JUSTICE GINSBURG: But you -- you just told us that section 3 was ambiguous. You don't know if the reference to "parties" means parties to the arbitration agreement or parties in the litigation. So how can we take it -- we take it seriously, yes, and say there's an ambiguity. We don't know from the text which is the proper reference, parties to the agreement or parties to the litigation.

MR. De MARCO: Justice Ginsburg, by declining Justice Stevens's invitation of sorts to read "parties" a particular way, I did not mean to -- to suggest that the referable -- issue referable to arbitration under a written agreement is ambiguous. I don't think that's ambiguous.

I think as applied here in this case, it's clear that the -- the Petitioners' claim of arbitrability does not flow, to use Justice Breyer's terms, from that which the parties to the Bricolage agreement intended. They don't claim that the parties to that agreement intended for them to be covered, as would be the case with a third-party beneficiary or --

JUSTICE ALITO: If the "parties" in -- in section 3 means parties to the arbitration agreement, would that mean that a -- someone who is not a party to the litigation could file a stay motion under section 3, someone who is not a party to the litigation but is a party to the arbitration agreement?

MR. De MARCO: If it were limited to parties to the -- if it were interpreted as parties to the arbitration agreement, then it would suggest that a party outside the litigation -- let's say a party that's conducting an arbitration pursuant to an arbitration agreement -- could intervene.

That's what happened in DSMC. The -- the -- one of the contracting parties intervened and said, we are engaged in this arbitration. We want you to stop this, what had been claimed to be, nonarbitrable litigation.

JUSTICE ALITO: Well, once they intervene, they are a party to the litigation as well.

MR. De MARCO: Pardon me?

JUSTICE ALITO: Once they intervene they are a party to the litigation as well.

MR. De MARCO: That's true. Yes. I think it was -- there it was an intervention for the limited purpose of seeking a stay. I -- I take your point,

though, that -- I -- I think we have to be careful in -- in judging the -- a stay motion, to focus on the language of section 3 under the "under a written agreement" language, and when -- when that is the focus, I think it's clear that theories such as equitable estoppel, an outlier among all those theories that were listed -- assumption, assignment -- an outlier among them -- uniquely says, despite the lack of a written agreement to arbitrate, equity requires; equity says it should be arbitrated. That -- that I think is incompatible with the language of section 3. After all --

JUSTICE GINSBURG: But you would recognize that there is some appeal possibility, because you already said or at least you said in your brief that 12 might -- to get this question settled about the equitable estoppel and going to arbitration -- that the district court in its discretion could give a 1292(b) order and say, I want to get this issue settled on appeal before I go on with the case.

MR. DE MARCO: Right.

JUSTICE GINSBURG: That would be all right?

MR. De MARCO: There is an appellate pathway and that is 1292(b). That has always existed for discretionary stays. I think it applies when a party

attempts, perhaps labels its motion a section 3 stay, but misses the mark by not truly grounding it in section 3. When it misses the mark, their outlet -- their pathway to interlocutory appeal ought to be 1292(b), particularly because section 16(b) indicates Congress felt that was a compatible accommodation in the stay -- in the arbitration context.

JUSTICE GINSBURG: Well, the district judge could say, I'm going to treat this as a 1292(b) issue, and I'm going to grant the stay so that the court of appeals can tell -- can tell me what the law is?

MR. De MARCO: That's correct, Justice Ginsburg. They -- I want to be clear that the rule we propose as to these claimants asserting equitable estoppel does not preclude them from seeking a stay -- stays even based on equitable estoppel.

And the best example that I can give you is one in the D.C. Circuit, in the post-DSMC era. There's a case called Toledano, in which the party was asserting exactly the same theory that -- that Petitioners are: Equitable estoppel entitles us to a stay. And what the court said there is, well, DSMC has come down and said you cannot under section 3 predicate a stay on equitable estoppel, because you are by definition saying I am not subject to a written agreement; that's the predicate for

section 3.

So what the District Court did in that -- in that case, it entertained the stay as a discretionary stay, and it granted it. It granted it on the very same ground that my friend is insisting should be the ground for a mandatory stay in the post-DSMC era; it's a basis in the District of Columbia for a discretionary stay. It worked exactly the same way.

The difference was you -- you were true to the language of section 3 and you were true to the language of section 16(a)(1)(A); you don't have the runaway stays in the D.C. Circuit that you have in the Fifth Circuit and the Eleventh Circuit and to some extent in the Fourth Circuit; and you don't have the interlocutory appeals from those except under 1292.

I want to come back to a -- to a question that was -- that was asked by Justice Ginsburg about Bricolage. If Bricolage were, let's say, back in the picture, or does the fact that Bricolage is out of the picture make a difference?

The only sense in which an issue in this case was ever referable to arbitration under an agreement in writing is under the Bricolage agreement. Once Bricolage departed the case, that obligation that -- that Respondents may have had to arbitrate with

Bricolage became inoperative, and what I see Petitioners attempting to do is to disaggregate that the obligation that Respondents undertook to arbitrate with Bricolage from Bricolage's reciprocal obligation, detach it, and run away with it as if it's a fungible commodity and say we are now owed this obligation, when -- contrary to everything this Court has ever said.

That's not the way the FAA works, because with the FAA the starting point, as this Court said in Mitsubishi, is did the parties agree to arbitrate that dispute? And if we're talking about the -- the absence of Bricolage, I think we're -- we're dealing with a case where even among the equitable estoppel cases, this case will turn out to be an outlier because of Bricolage's absence.

I say that because we're also dealing with accountants who were their accountants for 25 years before Bricolage came along. We're dealing with a law firm that had a written retention agreement, had a contract with them and didn't think to put it in that contract, saying, "oh, pay no attention to that, let me show you this contract that they signed with someone else."

It gets back to Justice Breyer's point: If I -- let's say I unilaterally published in The

Washington Post, "I am through with litigation, henceforth I will arbitrate every dispute with every other human being that I get involved in." That's not a section 3 agreement to arbitrate.

Agreement imports the notion of an exchange of arbitration obligations, which we do not have here. Bricolage is gone. There's no question that this -- that the premise of this equitable estoppel argument is the absence of a -- of an agreement to arbitrate should be overlooked because of equity. In this --

JUSTICE GINSBURG: Bricolage did move to compel. It did move for a stay, did make a section 3 --

MR. De MARCO: Yes.

JUSTICE GINSBURG: -- application, and then it -- it became bankrupt and got the benefit of the automatic stay in bankruptcy.

MR. De MARCO: Right.

JUSTICE GINSBURG: But -- and I take it that Andersen and Curtis are saying, we have a right to be substituted for Bricolage. That's --

MR. De MARCO: That's what their -- that's apparently their argument, and the problem is how do they fill that gap. They attempt to fill it with State law. I think State law does not apply, the language of section 3 applies, Your Honor, and section 3 cannot get

them there from here.

CHIEF JUSTICE ROBERTS: Thank you, Mr. De Marco.

Mr. Baker, you have four minutes remaining.

REBUTTAL ARGUMENT OF M. MILLER BAKER
ON BEHALF OF THE PETITIONERS

MR. BAKER: Thank you, Your Honor.

On the question of appellate jurisdiction, the Petitioners here made a motion for relief under section 3, and that motion was denied. Therefore, there is jurisdiction under section 16 to reach the question of whether we were entitled to relief under section 3.

Respondents have made a very important concession that decides this case. Respondents concede that under section 3 nonparties can enforce an arbitration agreement through the mechanism of section 3. That decides this case. This case should be remanded to the Court of Appeals to decide the question of whether on these facts, these nonparty Petitioners can actually enforce section 3.

The -- the Petitioners' quarrel is with the doctrine of equitable estoppel. They don't like it, but there's nothing in the text of section 3 that allows this Court or any court to distinguish between the various doctrines or legal theories that nonparties may

seek to which -- to enforce section 3. We happen to have used section 3, happen to have invoked equitable estoppel as the basis for invoking section 3, but it could have been assignment, it could have been third-party beneficiary.

They have -- Respondents have conceded the principle that section 3 is available to provide relief to nonparties who are otherwise entitled to enforce the agreement. They just think that on the merits we don't satisfy the requirements of equitable estoppel. That's a question to be decided on remand.

Equitable estoppel, I will say very briefly, presupposes the existence of a written arbitration agreement. In the absence of a written arbitration agreement, Petitioners here would not have any ability to assert this theory of equitable estoppel. So -- so it's not completely separated from or detached from the existence of a written arbitration agreement.

I'd like to turn to Justice Souter's signatory test for allowing relief under section 3. With all respect, this defies 80 years of case law interpreting the Federal Arbitration Act. It defies the history of the Federal Arbitration Act. It's settled that Congress, in enacting this Act, chose New York law, and the New York Arbitration Act lad a much more

stringent requirement for arbitrating existing disputes which required a signature. Congress, as we outlined in our brief, did not choose that section of the New York law as a model when it enacted the FAA in 1925.

1292(b) -- the right to appellate jurisdiction is illusory because if that is denied, a nonparty with arbitration rights would be forced to litigate and lose the very things that arbitration is designed to avoid -- that is, the cost and time of being in litigation in a district court. Not only that, the district court will suffer the loss of judicial efficiency by having to litigate -- litigate a case before it or adjudicate a case that should be in arbitration.

Unless there are any further questions, I will conclude the argument.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is submitted.

(Whereupon, at 12:19 p.m., the case in the above-entitled matter was submitted.)