NO. 18-_____

In the Supreme Court of the United States

COLIN SHILLINGLAW,

Petitioner,

v.

BAYLOR UNIVERSITY;
DR. DAVID E. GARLAND, in His Official Capacity as Interim President of Baylor University, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Texas

PETITION FOR A WRIT OF CERTIORARI

GAINES WEST
COUNSEL OF RECORD
JOHN "JAY" RUDINGER, JR.
KYLE T. CARNEY
WEST, WEBB, ALLBRITTON & GENTRY, P.C.
1515 EMERALD PLAZA
COLLEGE STATION, TX 77845
(979) 694-7000
GAINES.WEST@WESTWEBB.LAW

MARCH 6, 2019 *COUNSEL FOR PETITIONER*

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QUESTIONS PRESENTED

The Texas state courts below were faced with a choice: follow the mandate of a state legislature's "anti-SLAPP" statute or follow Congress and this Court's directive to enforce arbitration agreements under the Federal Arbitration Act ("FAA"). The Texas anti-SLAPP statute required a ruling on the motion to dismiss within 30 days of the mandated hearing under the Texas anti-SLAPP procedures, and the FAA required that the cases be stayed and referred to arbitration. Rather than refer the case to arbitration under the FAA, the trial court in Dallas, Texas, chose to dismiss the case pursuant to the state anti-SLAPP statute. Additionally, in full compliance with the parties' arbitration agreement, Shillinglaw non-suited his claims and immediately re-filed suit in Waco, Texas, but the Waco trial court granted summary judgment based on *res judicata* despite Shillinglaw's written motion to compel arbitration.

The questions presented are:

1. Whether the FAA preempts a conflicting state anti-SLAPP statute and precludes a state court from refusing either to compel arbitration or to stay litigation in favor of arbitration based on pending anti-SLAPP proceedings.

2. Whether the FAA preempts a state court's refusal to compel arbitration based on a state law doctrine of *res judicata* as a result of dismissal in a related case under state anti-SLAPP procedures occurring after the filing of the motion to compel arbitration.

PARTIES TO THE PROCEEDING

Petitioner is Colin Shillinglaw. Petitioner is a natural person and thus has no corporate disclosure statement to include.

Respondents are Baylor University. Dr. David Garland, Dr. Reagan Ramsower, J. Cary Gray, Ronald D. Murff, David H. Harper, Dr. Dennis R. Wiles, Pepper Hamilton, LLP.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Colin Shillinglaw respectfully petitions for a writ of certiorari to review the judgments of the Texas Supreme Court in two related appeals.

OPINIONS BELOW

The orders of the Texas Supreme Court denying Shillinglaw's petition for review and motion for rehearing in case number 18-0709 (the "Dallas Appeal") are unreported. App., *infra*, 3a–4a. The orders of the Texas Supreme Court denying Shillinglaw's petition for review and motion for rehearing in case number 18-0661 (the "Waco Appeal") are also unreported. App., *infra*, 1a–2a.[1]

In the Dallas Appeal, the opinion of the court of appeals, App., *infra*, 5a–20a, is unreported, but it is available at 2018 WL 3062451 and may be cited as *Shillinglaw v. Baylor University*, No. 05-17-00498-CV, 2018 WL 3062451 (Tex. App.—Dallas June 21, 2018, pet. denied). The trial court did not issue a written order expressly denying Shillinglaw's motion to compel arbitration and motion to stay; instead, the trial court dismissed the lawsuit under the Texas anti-SLAPP[2] statute, and those orders are unreported. App., *infra*, 23a–44a.

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[1] Under Supreme Court Rule 12.4, this single Petition for a Writ of Certiorari to the Texas Supreme Court is sufficient for review of both judgments because the issues "involve identical or closely related questions." *See* U.S. SUP. CT. R. 12.4.

[2] The "SLAPP" acronym stands for "strategic litigation against public participation." *NCDR, L.L.C. v. Mauze & Bagby, P.L.L.C.*, 745 F.3d 742, 746 n.3 (5th Cir. 2014).

In the Waco Appeal, the opinion of the court of appeals, App., *infra*, 45a–51a, is unreported, but it is available at 2018 WL 2727867 and may be cited as *Shillinglaw v. Baylor University*, No. 10-17-00259-CV, 2018 WL 2727867 (Tex. App.—Waco June 6, 2018, pet. denied). The order of the district court granting summary judgment and denying Shillinglaw's motion to compel arbitration is unreported. App., *infra*, 54a.

JURISDICTION

In the Dallas Appeal, the judgment of the Supreme Court of Texas was entered on December 7, 2018, having denied Shillinglaw's petition for review on September 14, 2018, and the motion for rehearing on December 7, 2018. *Id.* at 3a–4a.

In the Waco Appeal, the judgment of the Supreme Court of Texas was entered on December 21, 2018, having denied Shillinglaw's petition for review on September 28, 2018, and the motion for rehearing on December 21, 2018. *Id.* at 1a–2a.

For both of these cases, this Court's jurisdiction rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the Constitution, art. VI, cl. 2, provides in pertinent part:

> This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Consti-

> tution or Laws of any State to the Contrary notwithstanding.

Section 2 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2, provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Section 3 of the FAA, 9 U.S.C. § 3, provides:

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

Section 4 of the FAA, 9 U.S.C. § 4, provides:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the

party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

STATEMENT

This case presents a vitally important question about the balance between state and federal law concerning the conflict between state anti-SLAPP statutes and the directive of this Court's precedents under the FAA to provide streamlined processes in favor of arbitration. This Court has repeatedly admonished state courts for "judicial resistance to arbitration." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006). The liberal policy in favor of arbitration under the FAA includes "the statutory policy of rapid and unobstructed enforcement of arbitration agreements." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 23 (1983). The FAA displaces state law that either overtly or covertly frustrates that objective. *See*

Kindred Nursing Centers L.P. v. Clark, 137 S.Ct. 1421, 1424 (2017). The first question presented is whether the FAA preempts a conflicting state anti-SLAPP statute and precludes a state court from refusing either to compel arbitration or to stay litigation in favor of arbitration based on pending anti-SLAPP proceedings. And the closely related second question presented is whether the FAA preempts a state court's refusal to compel arbitration based on a state law doctrine of *res judicata* as a result of dismissal in a related case under state anti-SLAPP procedures occurring after the filing of the motion to compel.

This court should grant certiorari to correct the lower courts' hostility to arbitration in the context of a conflicting state anti-SLAPP statute and realign state law with the "emphatic federal policy in favor of arbitral dispute resolution." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985). Without such intervention, Texas courts, and courts across the country, will have free rein to craft a patchwork quilt of exceptions to arbitration using state anti-SLAPP statutes. This case provides the Court the opportunity to intervene before state courts throw into disarray the Court's coherent body of law supporting Congress's objective "to achieve 'streamlined proceedings'" in favor of arbitration. *Preston v. Ferrer*, 552 U.S. 346, 357 (2008) (quoting *Mitsubishi Motors Corp.,* 473 U.S. at 633).

A. Factual Background

Colin Shillinglaw was hired by Baylor University ("Baylor") in 2008 to serve as the Director for Football Operations with the Baylor football program. App., *infra*, 6a. During 2015, Baylor and its athletic depart-

ment became embroiled in a sexual assault and sexual harassment scandal that was investigated by Pepper Hamilton. *Id.* Pepper Hamilton presented its findings to the Baylor Board of Regents, and Baylor then suspended and terminated Shillinglaw's employment. *Id.* Shillinglaw then filed a lawsuit against Respondents for "libel, slander, tortious interference with existing contract, aiding and abetting, conspiracy, ratification, and retraction." *Id.*

B. Proceedings Below

1. The Dallas Case. Shillinglaw filed his lawsuit in a state district court in Dallas County, Texas, in January 2017, seeking to hold Baylor and its agents and employees accountable for defamation. *Id.* In March 2017, Respondents filed separate motions to dismiss under the Texas Citizens Participation Act (Texas's anti-SLAPP statute). *Id.* at 7a.

Shillinglaw then re-assessed all the claims and allegations in the trial court. Within his employment contract, Baylor had written a broad arbitration provision. *Id.* at 69a–70a. That broad arbitration provision provided, *inter alia*, that the FAA would govern "a dispute *of any nature* [that] arises out of this contract *or otherwise arises between them involving any transaction or event during the term of this contract.*" *Id.* at 69a. (emphasis added). Based on Baylor's own broad definition of an arbitral dispute, Shillinglaw determined that Respondents' anti-SLAPP motions to dismiss fell squarely within the arbitration agreement.

Shillinglaw then nonsuited his claims in Dallas and filed a separate lawsuit in Waco, Texas, asserting similar claims against Baylor, and he moved the Waco

trial court to compel arbitration. *Id.* at 7a. On the same day, in the Dallas County trial court, Shillinglaw filed a response to Respondents' anti-SLAPP motions, in which he attached the petition and motion to compel that was filed in Waco, and he argued that the Dallas case should be sent to arbitration in Waco. *Id.* Additionally, Shillinglaw filed a combined motion to stay and sur-reply to Respondents' anti-SLAPP motions, in which he asked "the trial court [to] stay the proceedings in Dallas County and allow arbitration to proceed" in Waco. *Id.* at 15a n.8, 46a–47a. All of these requests to either compel or stay litigation in favor of arbitration pursuant to the FAA were filed before the trial court ruled on the pending anti-SLAPP motions. *See id.* at 7a, 15a. n.8.

Despite Shillinglaw's requests to either compel arbitration or stay litigation pending arbitration in Waco, the Dallas trial court granted Respondents' motions to dismiss. *Id.* at 7a, 47a. In addition to Shillinglaw's requests for arbitration before the adverse rulings, Shillinglaw twice requested that the trial court reconsider its decisions, comply with the FAA and this Court's decision in *Kindred Nursing Centers L.P. v. Clark*, 137 S.Ct. 1421 (2017), and refer the parties' dispute to arbitration. App., *infra*, 7a, 76a–80a. However, the trial court chose to ignore this Court's direction in *Kindred* and instead carried out the proceedings under the Texas anti-SLAPP statute, awarded Respondents a combined total of $325,710.54 in attorney fees for less than ninety days of legal work, and thereafter denied a motion for reconsideration. *Id.* at 7a–8a, 17a.

2. The Waco Case. As explained above, prior to the Dallas court's ruling, Shillinglaw nonsuited his

claims and filed suit in a Waco state court along with a motion to compel arbitration pursuant to this Court's directive in *Kindred*. *Id.* at 7a, 46a–47a. The district court in Waco waited until after the Dallas court's orders dismissing the case under the Texas anti-SLAPP statute became final, and then the Waco court granted summary judgment for Respondents on the ground that *res judicata* operated to bar Shillinglaw's claims and denied Shillinglaw's motion to compel arbitration. *Id.* at 47a, 51a.

3. The Dallas Appeal. Shillinglaw filed an appeal of the orders dismissing his claims under the anti-SLAPP procedures,[3] and the Texas Fifth District Court of Appeals, sitting in Dallas, affirmed. *Id.* at 5a–6a.

Shillinglaw raised three issues on appeal, two of which are directly relevant to this Petition for a Writ of Certiorari. *Id.* The first issue that Shillinglaw argued was that the trial court erred when it failed to order Respondents' anti-SLAPP motions to arbitration. *Id.* The Dallas appellate court overruled this issue because it held that Shillinglaw could not compel non-signatories to arbitrate and that Shillinglaw waived arbitration with respect to Baylor. *Id.* at 8a, 15a–16a. Although the Dallas appellate court's rendition of the facts was accurate overall, the court incorrectly concluded that Shillinglaw "did not . . . request that the Dallas County trial court compel arbitration." *Id.* at 7a. This statement incorrectly framed a legal conclusion as a factual finding, in which the court determined

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[3] The Dallas Appeal was initiated as an interlocutory appeal but was eventually consolidated with the appeal of the final judgment awarding attorney fees under the anti-SLAPP proceedings. App., *infra*, 8a n.3.

that Shillinglaw had failed to provide a proper written request for arbitration because it had reasoned that the motion filed in Waco and attached to a motion in Dallas was insufficient. *See id.* However, regardless of its conclusion about the motion to compel, the Dallas appellate court acknowledged in a footnote that Shillinglaw had filed a written motion to stay and nevertheless concluded that Shillinglaw had waived the right to arbitration. *Id.* at 15a n.8, 16a.

In the second issue relevant to this Petition, Shillinglaw argued that the trial court's application of the Texas anti-SLAPP statute disfavored arbitration and, thus, the FAA preempted the trial court's application of the anti-SLAPP statute. *Id.* at 6a. The Dallas appellate court declined to address this issue, holding that Shillinglaw "failed to effectively present his request for arbitration to the Dallas County court." *Id.* at 16a. The court did not address whether the written motion to stay implicated the preemption issue and, thus, passed on this issue without addressing whether the FAA required a stay. *See id.*

The Texas Supreme Court denied both the petition for review and the motion for rehearing raising these issues without issuing any opinion. *Id.* at 3a.

4. The Waco Appeal. Shillinglaw filed an appeal of the Waco court's judgment denying his motion to compel arbitration and granting summary judgment against his claims on the ground that the Dallas court's orders dismissing his claims under the anti-SLAPP procedures barred his claims in Waco by operation of *res judicata*. *Id.* at 45a, 48a. The Texas Tenth District Court of Appeals, sitting in Waco, affirmed. *Id.*

Relevant to this Petition for a Writ of Certiorari, Shillinglaw argued that the Waco trial court erred by granting summary judgment based on *res judicata* because "the trial court did not have authority to enter the order of dismissal because it was required [by the FAA] to order the parties to arbitration." *Id.* at 49a. Without analyzing the issue concerning the trial court's authority under the FAA and the FAA's preemptive effect announced by this Court in *Kindred*, the Waco court of appeals summarily determined that this issue was "not before" the appellate court because the argument went "to the merits of the Dallas County trial court's judgment." *Id.* Thus, the Waco court of appeals rejected the argument that the trial court did not have authority under the FAA to deny the motion to compel and instead decided the *res judicata* issue against Shillinglaw. *Id.* at 49a–51a.

The Texas Supreme Court denied both the petition for review and the motion for rehearing raising this and related issues without issuing any opinion. *Id.* at 1a.

REASONS FOR GRANTING THE PETITION

The decisions below conflict with the FAA and this Court's precedents with respect to an important conflict between state anti-SLAPP statutes and the FAA. Over half the states across the nation have anti-SLAPP statutes, and a number of those states interpret their anti-SLAPP statutes broadly—encompassing a potentially breathtaking number of arbitration agreements. Without this Court's intervention, anti-SLAPP motions will become the new strategy to resist enforcement of arbitration agreements, and state courts seeking to circumvent the FAA will use anti-SLAPP pro-

cedures to create a patchwork quilt of exceptions to arbitration. Review is warranted in this case to reaffirm the longstanding principles of the FAA under this Court's precedents and to protect the enforcement of the FAA in state court where arbitration is most often sought.

A. The decisions below conflict with the FAA and this Court's precedents.

1. The FAA preempted the Texas Anti-SLAPP statute and precluded the Dallas court from refusing to stay litigation in favor of arbitration.

The Dallas trial court ignored the strong directive of the FAA and this Court to enforce arbitration and instead chose to dismiss the case pursuant to the Texas anti-SLAPP statute. The Texas Supreme Court ignored federal law and declined to address whether the trial court's refusal to stay the case disfavored arbitration and was preempted by the FAA.

This Court has been clear in its directive: a court must compel arbitration of otherwise arbitrable claims when a motion to compel arbitration is made. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985); *see* 9 U.S.C. § 4. Similarly, upon a motion to stay, Section 3 of the FAA requires a trial court to "stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement." 9 U.S.C. § 3.

The FAA displaces all conflicting state laws. *Kindred Nursing Centers L.P.*, 137 S.Ct. at 1426. This Court has repeatedly held—most recently in *Kindred*

—"[t]he Federal Arbitration Act . . . requires courts to place arbitration agreements on equal footing with all other contracts." *Id.* at 1424 (internal quotation marks omitted). Even state laws of general applicability that covertly disfavor arbitration are preempted by the FAA. *Id.*; *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339–42 (2011).

In an overt affront to this Court's clear directive to favor arbitration, the lower state courts placed the Texas anti-SLAPP statute in direct conflict with federal law under the FAA when those courts acknowledged, and yet entirely disregarded, Shillinglaw's motion for stay. When the trial court was faced with competing mandates—on the one hand, the Texas state law mandate to rule on the anti-SLAPP motion[4] and, on the other hand, Congress's mandate to stay litigation in favor of arbitration—the Dallas trial court should have complied with the FAA and stayed litigation pending arbitration. The Dallas court of appeals' explicit acknowledgment of the motion to stay and refusal to address the preemption issue underscores the overt conflict between the FAA and the anti-SLAPP statute.

Further, this Court has held that the FAA "preempts any state rule discriminating on its face against arbitration. . . . And not only that: The [FAA] also dis-

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[4] The Texas anti-SLAPP statute provides that a trial court "must" rule on a motion to dismiss within 30 days after the evidentiary hearing, and "a court shall dismiss a legal action" unless the non-moving party meets its evidentiary burden under the statute. TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(a)–(d) (West). The language of the statute does not provide a court the ability to refrain from ruling on an anti-SLAPP motion when faced with a motion to compel or a motion to stay under the FAA. *See id.*

places any rule that *covertly accomplishes the same objective. . . .*" *Kindred Nursing Centers L.P.*, 137 S.Ct. at 1423 (emphasis added). The Dallas court of appeals also engaged in covert disfavored treatment of arbitration by applying a state law waiver rule in a manner not found in any context outside of this conflict with the Texas anti-SLAPP statute.

The Dallas court of appeals rejected Shillinglaw's preemption argument on the ground that Shillinglaw waived the right to request arbitration. Yet, in any context outside of a conflict with the anti-SLAPP statute, Texas courts apply a strong presumption against waiver and require a showing of actual prejudice against the nonmovant. *Henry v. Cash Biz, LP*, 551 S.W.3d 111, 116 (Tex. 2018). For example, the Texas Supreme Court has held that the following conduct does not constitute waiver*:*

- filing suit;
- moving to dismiss a claim for lack of stand-ing;
- moving to set aside a default judgment and requesting a new trial;
- opposing a trial setting and seeking to move the litigation to federal court;
- moving to strike an intervention and opposing discovery;
- sending 18 interrogatories and 19 requests for production;
- requesting an initial round of discovery, noticing (but not taking) a single deposition, and agreeing to a trial resetting;

> seeking initial discovery, taking four depositions, and moving for dismissal based on standing.

Perry Homes v. Cull, 258 S.W.3d 580, 590 (Tex. 2008); *see also G.T. Leach Builders, LLC v. Sapphire V.P., LP*, 458 S.W.3d 502, 512–13 (Tex. 2015) (holding no waiver despite the fact that the party moving for arbitration asserted counterclaims, sought change of venue, moved to designate responsible third parties, moved for continuance, moved to quash depositions, designated experts, and waited six months to move for arbitration). Moreover, while Shillinglaw asserted the right to arbitrate within 70 days of filing his lawsuit and before taking any discovery, Texas courts have held that no waiver occurred where parties delayed for long time periods between eight months and two years after the initiation of a lawsuit. *E.g.*, *In re Fleetwood Homes of Tex.*, L.P., 257 S.W.3d 692, 694 (Tex. 2008); *In re Vesta Ins. Grp., Inc.*, 192 S.W.3d 759, 763 (Tex. 2006).

The primary difference between this case and the examples above is the conflict with Texas's anti-SLAPP statute, which Texas courts have strictly enforced against a broad variety of claims. *E.g.*, *Elite Auto Body LLC v. Autocraft Bodywerks, Inc.*, 520 S.W.3d 191, 205 (Tex. App.—Austin 2017, pet. denied) (applying the Texas anti-SLAPP statute to trade secret misappropriation claims). But "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Moses H. Cone Mem'l Hosp.*, 460 U.S. 1, 24. "[A]s a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract

language itself or an *allegation of waiver*, delay, or a like defense to arbitrability." *Id.* at 24–25 (emphasis added).

Faced with the contrary mandate of the Texas anti-SLAPP statute, the lower state courts completely abdicated their duty to comply with the supreme law of the land under the FAA. It was wholly inappropriate for the lower state courts to overtly disregard Shillinglaw's motion to stay, and, with respect to the motion to compel, the lower state courts covertly disfavored arbitration by flipping the federal law presumption against waiver upside down in the face of the Texas anti-SLAPP statute. By ignoring the well-established presumption against waiver, the lower state courts defied this Court's precedent in both *Kindred* and *Concepcion*.

As a result, the decisions of the lower courts in the Dallas Appeal created a conflict with a long line of this Court's holdings, including the more recent opinions in *Kindred* and *Concepcion*, which require compliance with the FAA and enforcement of arbitration against state law to the contrary. Texas courts are certainly free to construe Texas statutes broadly, but these state courts should have yielded to the conflicting directive of federal law under the FAA and this Court's precedents. Thus, the Petition for a Writ of Certiorari should be granted to correct the error and restore the proper balance between state and federal law. Absent this Court's intervention, state courts across the country will follow Texas's lead to circumvent arbitration requests by allowing state anti-SLAPP statutes to prevail over the FAA.

2. The Waco Court had no authority under the FAA to deny a valid written request to compel arbitration by waiting until after anti-SLAPP proceedings in a related case became final and then concluding that a state law doctrine of *res judicata* barred suit, which was an issue for arbitration.

As explained above, Shillinglaw immediately non-suited his claims in Dallas and then filed a lawsuit in Waco along with a written motion to compel arbitration in accordance with the terms of the arbitration agreement that was authored by Baylor. Instead of referring the case to arbitration, the Waco trial court waited until after the anti-SLAPP dismissals became final in the related Dallas case and then granted summary judgment on the ground that *res judicata* barred the suit and precluded arbitration. But whether the suit was barred by *res judicata* was a matter for the arbitrator to decide, and the lower courts entirely failed to address whether the FAA preempts a court from declining to enforce arbitration by waiting until pending anti-SLAPP proceedings become final in a related case.

Congress enacted the FAA "[t]o overcome judicial resistance to arbitration." *Buckeye Check Cashing, Inc.*, 546 U.S. at 443. It is "beyond dispute that the FAA was designed to promote arbitration." *Concepcion*, 563 U.S. at 345. And a "prime objective of an agreement to arbitration is to achieve 'streamlined proceedings.'" *Preston*, 552 U.S. at 357 (quoting *Mitsubishi Motors Corp.*, 473 U.S. at 633).

Congress clearly expressed its intent in the FAA "to move the parties to an arbitrable dispute out of

court and into arbitration as quickly and easily as possible." *Moses H. Cone Mem'l Hosp*, 460 U.S. at 22. Both Section 3 and Section 4 of the FAA "call for an expeditious and summary hearing, with only restricted inquiry into factual issues." *Id.* When courts create state law procedural obstacles to Congress's intent as expressed in the FAA, such state judicial action "frustrate[s] the statutory policy of rapid and unobstructed enforcement of arbitration agreements." *Id.* at 23.

Shillinglaw sought to arbitrate his claims in Waco, but the Waco trial court created state law obstacles to arbitration by waiting until after the anti-SLAPP dismissals became final in the related Dallas case and only then determined that the claims were not arbitrable by applying *res judicata*. Such state court intransigence against arbitration is preempted by the FAA because it frustrates the goal of providing streamlined proceedings to enable the parties to arbitrate their disputes. *See Preston*, 552 U.S. at 357; *Moses H. Cone Mem'l Hosp*, 460 U.S. at 22. Hence, the lower state courts' refusal to submit the parties' dispute to arbitration flies in the face of this Court's precedents.

The lower courts in both the Dallas and Waco appeals rubber stamped the trial courts' acquiescence to the Texas anti-SLAPP statute, despite the conflicting mandate under the FAA to provide a streamlined process to reach arbitration. The Dallas court of appeals rejected Shillinglaw's argument that he should have been able to arbitrate the dispute on the basis that his rights were waived during the anti-SLAPP proceedings. And the Waco court of appeals rejected the argument that the FAA's preemptive effect had any

bearing upon the trial court's use of *res judicata* to deny the motion to compel.

Those decisions provide a wide path for any state court seeking to circumvent arbitration when arbitrable disputes become ensnared in anti-SLAPP litigation. Because the lower courts chose to resolve the conflict between the state anti-SLAPP statute and the FAA against arbitration, this Court should grant the Petition for a Writ of Certiorari to bring Texas law in harmony with federal law. The Court's much needed review would prevent courts throughout Texas and across the nation from ignoring the FAA when federal law comes into conflict with state anti-SLAPP statutes.

B. The decisions below are exceptionally important because those precedents risk creating a patchwork quilt of exceptions to arbitration based on state Anti-SLAPP statutes.

1. This court should grant review to definitively resolve whether and, if so, when, the FAA preempts state law anti-SLAPP procedures that present obstacles to arbitration.

This Court's intervention is needed to clarify that, no matter how broad state anti-SLAPP statutes are construed, lower courts may not refuse to enforce arbitration agreements and ignore the FAA in violation of this Court's precedents. The Texas courts below resolved the two competing directives of the FAA and the Texas anti-SLAPP statute in favor of state law. These decisions were exceptionally important because they have significant implications not only in Texas but also in states across the country that have enacted, or are contemplating enacting, anti-SLAPP statutes.

Over half of the states across the country have enacted anti-SLAPP statutes. *See State Anti-SLAPP Laws*, PUB. PARTICIPATION PROJECT, https://anti-slapp.org/your-states-free-speech-protection/#reference-chart (last visited Feb. 26, 2019); *State Laws: SLAPPs*, DIGITAL MEDIA L. PROJECT, http://www.dmlp.org/legal-guide/state-law-slapps (last visited Feb. 26, 2019). A number of these states have anti-SLAPP statutes that apply to an array of disputes broader than defamation claims.

For example, California courts have applied the California anti-SLAPP statute to employment discrimination claims, negligence claims, and breach of contract claims. *E.g.*, *Hunter v. CBS Broad. Inc.*, 221 Cal. App. 4th 1510, 1513, 165 Cal. Rptr. 3d 123, 125 (2013) (holding that the anti-SLAPP statute applied to claims of age and gender discrimination); *Rivera v. First Data-Bank, Inc.*, 187 Cal. App. 4th 709, 713, 115 Cal. Rptr. 3d 1, 3 (2010) (holding that the anti-SLAPP statute applied to negligence and breach of contract claims).

Texas courts have also construed the Texas anti-SLAPP statute broadly according to its terms. *E.g.*, *Lippincott v. Whisenhunt*, 462 S.W.3d 507, 509 (Tex. 2015). The Texas anti-SLAPP statute has been applied to tortious interference with contract and fraudulent *lis pendens* claims. *Serafine v. Blunt*, 466 S.W.3d 352, 360 (Tex. App.—Austin 2015, no pet.). It has been applied to trade secret misappropriation, unfair competition, breach of fiduciary duty, and civil conspiracy claims. *Elite Auto Body LLC*, 520 S.W.3d at 205. And it has been applied to claims in probate proceedings. *Collins v. Collins*, No. 01-17-00817-CV, 2018 WL 1320841, at *1 (Tex. App.—Houston [1st Dist.] Mar. 15, 2018, pet. denied) (mem. op., not designated for publica-

tion). The Texas Supreme Court has even held that state governmental entities have abrogated their sovereign immunity for purposes of the fee shifting provisions of the Texas anti-SLAPP statute. *State ex rel. Best v. Harper*, 562 S.W.3d 1, 19 (Tex. 2018).

While state courts fluctuate and continue to work out the precise contours of the broad scope of state anti-SLAPP statutes, at least one principle should remain constant: federal law preempts conflicting state law. U.S. CONST. art. VI, cl. 2. In particular, where, as here, state anti-SLAPP statutes conflict with or disfavor streamlined access to arbitration, the FAA displaces all such state law. *See Kindred Nursing Centers L.P.*, 137 S.Ct. at 1426; *Preston*, 552 U.S. at 357. Any state contemplating the enactment of their own version of an anti-SLAPP statute should be warned that the FAA will preempt any attempt to overtly or covertly disfavor arbitration. This Court should grant review to clarify this principle and prevent state anti-SLAPP statutes from becoming a wide-scale obstacle to arbitration.

2. This court should grant review to prevent state courts from disfavoring arbitration through subtle rules in the anti-SLAPP context and to maintain fair enforcement of arbitration agreements.

If the decisions below are allowed to stand, courts in other jurisdictions will be emboldened to craft subtle rules using existing or proposed anti-SLAPP procedures to create obstacles to arbitration or find that the right to arbitration was altogether waived. This would lead to both blatant disregard for this Court's

precedents on the FAA and allow for uneven enforcement of arbitration agreements across the country.

Populous states with substantial economies such as California and Texas already have broad anti-SLAPP statutes that encompass a vast array of litigation. *E.g.*, *Elite Auto Body LLC*, 520 S.W.3d at 205. Undoubtedly, there is significant overlap in cases involving both anti-SLAPP disputes and arbitration. Thus, if the decisions below stand, the lower courts' refusal to enforce arbitration in these cases will send a signal to other courts across the nation that they too can simply use state anti-SLAPP statutes to circumvent the FAA and deny access to arbitration anywhere in the nation.

The result of courts using anti-SLAPP statutes to thwart requests for arbitration will lead to uneven enforcement of arbitration, as it has in the case at bar. Typically, various repeat players, such as securities brokers and institutional employers welcome arbitration. *See Rostad & Rostad Corp. v. Inv. Mgmt. & Research, Inc.*, 923 F.2d 694, 697 (9th Cir. 1991). Just as the *Rostad* defendants engaged in what a judge characterized as a "man bites dog" attack on their own arbitration agreement, the institutions that typically promote arbitration will turn to state law under anti-SLAPP statutes to avoid arbitration when it suits their needs, like Baylor did in this case. *See id.*

Thus, without a clear and unequivocal statement from this Court that the FAA preempts conflicting rules under state anti-SLAPP statutes, the enforcement of arbitration agreements is sure to become more uneven as it becomes less streamlined. This will lead to a patchwork quilt of unfettered and unrestrained judge-made exceptions to arbitration. The Court's

review in this case is warranted to prevent states from placing enforcement of the FAA into disarray.

3. This court should grant review to preserve arbitration rights in state judicial forums.

"State courts rather than federal courts are most frequently called upon to apply the" FAA. *Nitro-Lift Techs., L.L.C. v. Howard*, 568 U.S. 17, 17 (2012). "It is a matter of great importance, therefore, that state supreme courts adhere to a correct interpretation of the" FAA. *Id.* at 17–18. Hence, this Court has gone to great lengths to ensure that state courts adhere to federal law under the FAA. *See id.*

For example, in *Nitro-Lift*, this Court summarily vacated a decision by the Oklahoma Supreme Court that "disregard[ed] this Court's precedents on the FAA." *Id.* at 20. The Oklahoma court usurped the arbitrator's role by deciding the merits of a contract dispute despite the existence of a valid arbitration provision. *Id.* at 20–21. But "it is a mainstay of the Act's substantive law that attacks on" the merits "are to be resolved 'by the arbitrator in the first instance, not by a federal or state court.'" *Id.* (quoting *Preston*, 552 U.S. at 349). This Court then held that the state court's violation of this principle "require[d] that the decision below be vacated." *Id.*

And in *KPMG LLP v. Cocchi*, this Court reviewed the decision of "the Fourth District Court of Appeal of the State of Florida" to uphold "a trial court's refusal to compel arbitration of respondents' claims after determining that two of the four claims in a complaint were nonarbitrable." *KPMG LLP v. Cocchi*, 565 U.S. 18, 19 (2011). There, this Court held that the failure of the

state court to conduct its analysis "with care to assess whether any individual claim must be arbitrated" was "subject to immediate review." *Id.* at 22.

Similarly, here, the state courts below, and even the Texas Supreme Court, chose to ignore Shillinglaw's motions to stay and to compel arbitration and instead *assumed* the role of the arbitrator by determining that his requests for arbitration were either untimely or barred by the effect of the Texas state anti-SLAPP statute. These decisions by the lower courts blatantly disregarded this Court's precedents requiring arbitration under a valid arbitration agreement. Immediate review is appropriate in this case to preserve the important state law forum where parties most frequently seek to enforce arbitration agreements.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal or vacatur for reconsideration in light of *Kindred*.

Respectfully submitted,

GAINES WEST
COUNSEL OF RECORD
JOHN "JAY" RUDINGER, JR.
KYLE T. CARNEY
WEST, WEBB, ALLBRITTON & GENTRY, P.C.
1515 EMERALD PLAZA
COLLEGE STATION, TX 77845
(979) 694-7000
GAINES.WEST@WESTWEBB.LAW

COUNSEL FOR PETITIONER

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