No. _____

In the
Supreme Court of the United States

SHRINIVAS SUGANDHALAYA LLP,
Petitioner,

v.

BALKRISHNA SETTY, individually and as general partner in Shrinivas Sugandhalaya Partnership with Nagraj Setty; SHRINIVAS SUGANDHALAYA (BNG) LLP, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") permit a nonsignatory to an arbitration agreement to compel arbitration based on the doctrine of equitable estoppel or similar principles of applicable law?

2. Is a foreign defendant's right to stay litigation under Section 3 of the Federal Arbitration Act (9 U.S.C. § 3) conditioned upon that defendant's right to compel arbitration?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Shrinivas Sugandhalaya LLP ("SS LLP"), an Indian limited liability partnership, is the petitioner here, and was a defendant below. No publicly owned corporation owns 10 percent or more of SS LLP's stock.

Balkrishna Setty, a resident and citizen of India (individually and as general partner in Shrinivas Sugandhalaya Partnership, an Indian partnership) is a respondent here, and was a plaintiff/counterclaim defendant below.

Shrinivas Sugandhalaya (BNG) LLP ("BNG LLP"), an Indian limited liability partnership, is a respondent here, and was a plaintiff/counterclaim defendant below.

R. Expo (USA) Ltd., Inc., a Washington corporation, is a respondent here, and was a defendant and counterclaim/third-party claim plaintiff below.

Designs by Dee Kay, Inc., a California Corporation, is a respondent here, and was a third-party claim defendant below.

STATEMENT OF RELATED PROCEEDINGS

- *Setty et al. v. Shrinivas Sugandhalaya et al.*, No. 18-355573 (9th Cir.) (memorandum decision affirming District Court's denial of motion to stay or compel arbitration issued on June 3, 2019; petition for rehearing and/or rehearing *en banc* denied August 12, 2019).
- *Setty et al. v. Shrinivas Sugandhalaya et al.*, No. 2:17-cv-01146-RAJ (W.D. Wash.) (order denying motion to stay or compel arbitration issued June 21, 2018; order granting motion to stay pending appeal and denying motion to stay pending arbitration issued November 15, 2018).

There are no additional proceedings in any court that are directly related to this case.

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INTRODUCTION

Petitioner SS LLP asks the Court to review two important issues involving the Federal Arbitration Act, 9 U.S.C. § 1 *et seq*. (the "FAA"). The first is whether foreign nonsignatories to an arbitration agreement can use equitable estoppel or similar principles of applicable law to compel arbitration in federal courts. The Ninth Circuit held categorically that "[a]s a non-signatory, SS LLP may not compel arbitration under the New York Convention." Pet. App. at 3. This Court recently granted a petition for a writ of certiorari to the Eleventh Circuit to decide whether that statement is correct. *GE Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*, 139 S. Ct. 2776 (Mem.) (U.S. Sup. Ct. June 28, 2019) ("*GE Power*"). That case is set for argument on January 21, 2019. SS LLP's petition seeks review of the same issue out of the Ninth Circuit, and this Court should grant SS LLP's petition on that issue for the same reasons.

But SS LLP also seeks review of a second issue under Section 3 of the FAA that likely has broader impact for both the enforcement of arbitration agreements and federal civil procedure generally. Section 3 gives parties in a lawsuit the right to stay litigation if the opposing party is suing "upon any issue referable to arbitration." 9 U.S.C. § 3. SS LLP asks this Court to affirm for foreign litigants the principle it first announced for domestic litigants shortly after the FAA was enacted: "there is no reason to imply that the power to grant a stay [under Section 3 of the FAA] is conditioned upon the existence of power to compel arbitration . . ." *Shanferoke Coal & Supply Corp. v.*

Westchester Service Corp., 293 U.S. 449, 453 (1935). As this Court subsequently explained, the "power to grant a stay is enough without the power to order that the arbitration proceed, for, if a stay be granted, the plaintiff can never get relief unless he proceeds to arbitration." *The Anaconda v. American Sugar Refining Co.*, 322 U.S. 42, 45 (1944).

The focus of Section 3 is on whether the opposing party's claims involve any issue "referable to arbitration," not on whether the moving party has the right to compel arbitration. 9 U.S.C. § 3; *accord Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630-31 (2009) (recognizing that the right to a stay under Section 3 is not limited to parties to the arbitration agreement). This Court's previous guidance regarding Section 3 should apply with equal if not greater force when the arbitration agreement is subject to the New York Convention (i.e., is not "entirely between citizens of the United States," 9 U.S.C. § 202). But as explained further below, this Court's focus on domestic principles of equitable estoppel (both in *Arthur Andersen* and in the upcoming *GE Power* case) may have the unintended effect of narrowing the circumstances in which mandatory stays under Section 3 remain available, especially for foreign litigants.

The facts of this case show why that is a danger. Here, two residents and citizens of India, brothers Nagraj and (respondent) Balkrishna Setty, are embroiled in a dispute over their competing claims to rights derived from a partnership they formed twenty years ago in India (the "Partnership"). In their Deed of Partnership, the brothers agreed to arbitrate:

> ARBITRATION: All disputes of any type whatsoever in respect of the partnership arising between the partners either during the continuance of this partnership or after the determination thereof shall be decided by arbitration as per the provision of the Indian Arbitration Act, 1940 or any statutory modification thereof for the time being in force.

Pet. App. 27.

Seeking to avoid that arbitration obligation but still assert his alleged Partnership rights, respondents Balkrishna Setty and his separate Indian company (respondent BNG LLP) sued brother Nagraj Setty's separate company, petitioner SS LLP, for allegedly using the Partnership's intellectual property without permission. But they deliberately did not sue Nagraj Setty, who signed the Deed of Partnership.

SS LLP moved to (1) stay the litigation pursuant to Section 3 and (2) compel arbitration pursuant to the FAA and the New York Convention. As SS LLP pointed out to the courts below, under Indian common law and the current version of the Indian Arbitration Act, nonsignatory SS LLP has the right to compel such arbitration as a "person claiming through or under" a signatory. The Indian Arbitration and Conciliation (Amendment) Act, 2015, § 4; *see also Chloro Controls India (P), Ltd. v. Severn Trent Water Purification, Inc.* (2013) 1 SCC 641, ¶ 167 (Indian Supreme Court decision holding that "[e]ven non-signatory parties to [arbitral] agreements can pray and be referred to arbitration").

The District Court denied SS LLP's motion. Ignoring the Indian law that governs the arbitration agreement, the District Court held that since SS LLP was not a signatory to the Deed of Partnership, it had no right to enforce the agreement's arbitration provisions or stay the litigation. Pet. App. 17-18. The Ninth Circuit affirmed the District Court's order. Pet. App. 1-4.

Both the District Court and the Ninth Circuit started their analysis by asking whether SS LLP—as a nonsignatory to the arbitration agreement—could compel arbitration. Both courts ignored Indian law on that subject. Once they concluded that SS LLP did not have the right as a nonsignatory to compel arbitration, their analysis ended (with no separate analysis of SS LLP's request for stay under Section 3).

That faulty analysis, which conflates the right to stay litigation with the right to compel arbitration, is too often followed in one form or another by many other federal courts. The Court should grant certiorari to return Section 3's jurisprudence to the original principles this Court announced in 1935, and return the focus to where Congress put it—simply, has the party moving for a stay shown there is an issue "referable to arbitration." 9 U.S.C. § 3.

OPINIONS BELOW

The District Court's order denying SS LLP's motion to stay and to refer the parties to arbitration (Pet. App. 13-19) is unpublished but is available at 2018 WL 3064778 (W.D. Wash. June 21, 2018). The District Court's order granting SS LLP's motion to stay pending

appeal but denying SS LLP's motion to stay pending arbitration (Pet. App. 5-12) is unpublished but is available at 2018 WL 5994987 (W.D. Wash. Oct. 15, 2018). The Ninth Circuit's memorandum decision affirming the District Court's denial of SS LLP's motion to stay or compel arbitration (Pet. App. 1-4) is available at 771 Fed. Appx. 456 (9th Cir. 2019). The Ninth Circuit's decision denying SS LLP's petition for reconsideration or rehearing en banc (Pet. App. 20-21) is unpublished.

JURISDICTION

The Ninth Circuit denied SS LLP's petition for reconsideration or rehearing *en banc* on August 12, 2019. SS LLP timely filed this petition within 90 days. This Court has jurisdiction under 28 U.S.C. § 1254(1). The District Court had original jurisdiction under 18 U.S.C. §§ 1331, 1338 and 15 U.S.C. § 1121, and supplemental jurisdiction under 28 U.S.C. § 1367. The Ninth Circuit had jurisdiction under 9 U.S.C. § 16.

STATUTORY AND OTHER PROVISIONS INVOLVED

1. Article II, § 1 of the New York Convention provides:

> Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. Article II, § 2 of the New York Convention provides: "The term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams."

3. Article V, § 1(a) of the New York Convention provides:

> Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
>
> > (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made;

4. 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.

5. 9 U.S.C. § 201 provides: "The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter."

6. 9 U.S.C. § 202 provides:

> An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states.

7. 9 U.S.C. § 206 provides: "A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States. Such court may also appoint arbitrators in accordance with the provisions of the agreement."

8. 9 U.S.C. § 208 provides: "Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States."

STATEMENT

1. "Congress' clear intent, in the Arbitration Act, [was] to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983). The FAA reflects a "'liberal federal policy favoring arbitration.'" *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (quoting *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24). Chapter 1 of the FAA "codifies the original Federal Arbitration Act of 1925, 43 Stat. 883" and applies generally to domestic agreements and awards. *Johnson Controls, Inc. v. Edman Controls, Inc.*, 712 F.3d 1021, 1024 (7th Cir. 2013). Chapter 2 of the FAA implements the New York Convention, an international agreement agreed to by 160 countries that provides baseline standards for the enforcement of foreign arbitration agreements or arbitral awards "when both or all countries concerned are" parties to that Convention. *Id.* at 1025-26; *see* http://www.newyorkconvention.org/countries (last visited November 6, 2019). All arbitration agreements are presumed to fall under the Convention; only those that arise out of a "relationship which is entirely between citizens of the United States" are excluded from the Convention's coverage, if all other factors are met. 9 U.S.C. § 202.

a. Chapter 1 makes written arbitration agreements "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. By referring to "such grounds as exist at law or in equity," the FAA incorporates "background principles of state contract law regarding the scope of agreements (including the question of who is bound by them)." *Arthur Andersen*, 556 U.S. at 630 (citation omitted). Chapter 1 therefore permits enforcement of an arbitration clause "against (or for the benefit of) a third party"—i.e., a nonsignatory—if enforcement would be permitted "under state contract law." *Id.* at 631.

Such "background principles" of domestic law include "'assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel.'" *Id.* (quoting 21 R. Lord, *Williston on Contracts* § 57:19, p. 183 (4th ed. 2001)). Concepts such as equitable estoppel prevent a party from "cherry-picking" the beneficial provisions of the contract while trying to avoid detrimental provisions (such as the requirement to arbitrate disputes.) *Invista S.A.R.L. v. Rhodia*, S.A., 625 F.3d 75, 85 (3rd Cir. 2010).

For example, in a situation analogous to the dispute here, a court allowed a nonsignatory to use equitable estoppel to invoke a partnership agreement's arbitration clause in a suit brought by the partnership. *26th Street Hospitality, LLP v. Real Builders, Inc.*, 879 N.W.2d 437 (N.D. 2016). The partnership sued one of the individual signatory partners and the nonsignatory company, arguing that the individual partner had contracted with the nonsignatory company

without the partnership's permission. Because the partnership's "claims [were] intertwined with [the individual partner's] power or authority under the Partnership Agreement," the court explained, "[i]t would be inequitable to allow the Partnership to rely on the Partnership Agreement in formulating its claims but to disavow the availability of the arbitration provision of that same agreement because [the third-party company] was not a signatory to the agreement." *Id*. at 449.

Of course, when the arbitration agreement at issue is governed by the laws of another jurisdiction (as here, the laws of India), the "background principles" that a court must consider include the principles of contract, agency and arbitration law in that foreign jurisdiction. *Scherck v. Alberto-Culver Co.,* 417 U.S. 506, 516 (1974); *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 187, 218 (1989) (noting a forum court determining rights arising from an arbitration agreement governed by foreign law should apply the applicable foreign law to the contract in order to effectuate the intent of the parties).

Chapter 1 also allows district courts to stay litigation upon the application of "one of the parties" when the litigation involves an "issue referable to arbitration under an agreement in writing for such arbitration." 9 U.S.C. § 3. This section applies even if the arbitration agreement is otherwise subject to the Convention, as the Convention has no provisions governing stays. *Scherk*, 417 U.S. at 511 n.5 (1974). The "parties" referred to in Section 3 are the parties to

the litigation, not the parties to the arbitration agreement. *Arthur Andersen*, 556 U.S. at 630 n.4.

b. Chapter 2 of the FAA implements the New York Convention in United States courts. *See* 9 U.S.C. § 201. "The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries." *Scherk*, 417 U.S. at 520 n.15. To that end, the Convention requires that "[e]ach Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration." Convention, Art. II § 1. The Convention defines "agreement in writing" to "include an arbitral clause in a contract or an arbitration agreement, signed by the parties." Convention, Art. II § 2.

The Convention's implementing provisions in Chapter 2 of the FAA incorporate the background principles set forth in Chapter 1. "Chapter 1 applies to actions and proceedings brought under" the Convention and related provisions, "to the extent that chapter is not in conflict" with them. 9 U.S.C. § 208.

2. Twenty years ago, brothers Nagraj and (respondent) Balkrishna Setty formed a partnership in India to carry on their father's incense business. In the brothers' Deed of Partnership (Pet. App. 22-28), the brothers agreed that they would arbitrate all disputes concerning their rights in the Partnership:

> ARBITRATION: All disputes of any type whatsoever in respect of the partnership arising between the partners either during the continuance of this partnership or after the determination thereof shall be decided by arbitration as per the provision of the Indian Arbitration Act, 1940 or any statutory modification thereof for the time being in force.

Pet. App. 27. The brothers, the Partnership and their respective companies continue to be domiciled in India.

In late 2014, "control of the manufacturing of incense products was effectively transferred from the Partnership to its partners," respondent Balkrishna Setty and (nonparty) Mr. Nagraj Setty. Pet. App. 14. Respondent Balkrishna Setty then formed respondent BNG LLP in 2014 in Bangalore, India to continue manufacturing and selling incense products; (nonparty) Nagraj Setty formed petitioner SS LLP in Mumbai, India shortly thereafter for the same purpose. Pet. App. 14-15. Since then, the brothers have had various disputes over their (and their companies') respective rights in the Partnership's trademarks, trade dress and other assets. Pet. App. 15. Those disputes ultimately led to this litigation.

3. Respondents Balkrishna Setty and BNG LLP initially sued SS LLP in federal court in Alabama. In the caption of his action, respondent Balkrishna Setty alleged that he is bringing all claims "individually and as general partner in Shrinivas Sugandhalaya Partnership with Nagraj Setty." *E.g.*, Pet. App. 1.

After the case transferred to the Western District of Washington, SS LLP moved to stay or dismiss the litigation in favor of arbitration, and to refer the parties to arbitration in India. The District Court eventually denied SS LLP's motion, holding that because SS LLP was not a signatory to the Deed of Partnership, it could neither compel arbitration nor stay the case. Pet. App. 13-19.

In the meantime, after failed mediation efforts in India and a breached settlement agreement with his brother Balkrishna, Nagraj Setty formally initiated arbitration proceedings in India, which process is ongoing. SS LLP filed a new motion to stay. The District Court denied that motion as well, although it did stay the litigation while SS LLP appealed. Pet. App. 5-12.

4. The Ninth Circuit affirmed the District Court's denial of SS LLP's motion to stay and to compel arbitration. Pet. App. 1-4.

The Ninth Circuit's decision here relied exclusively on the Circuit's previous decision in *Yang v. Majestic Blue Fisheries, LLC*, 876 F.3d 966 (9th Cir. 2017), which held that nonsignatories to an arbitration agreement governed by the New York Convention have no right to compel arbitration. In *Yang*, the Ninth Circuit determined that the Convention's definition of an "agreement in writing" was limited to an agreement "*signed by the parties* or contained in an exchange of letters or telegrams." *Yang*, 876 F.3d at 999 (quoting New York Convention, art. II(2)) (emphasis in original). Thus, the Ninth Circuit in *Yang* concluded that the Convention categorically bars foreign nonsignatories

from seeking to compel arbitration. *Yang*, 876 F.3d at 1001.

Following its precedent in *Yang*, the Ninth Circuit here held that "[a]s a non-signatory, SS LLP may not compel arbitration under the New York Convention." Pet. App. 3. The Ninth Circuit also held that SS LLP could not rely on any other "traditional principles" of state law—such as equitable estoppel—because it was a nonsignatory: "Under the FAA, a non-signatory may invoke arbitration if state law permits. However, where the FAA allows what the Convention prohibits, the Convention controls." Pet. App. 3 (internal citations omitted). The Ninth Circuit ignored Indian arbitration, agency and contract law altogether.

As to SS LLP's original request for a stay of the litigation under FAA Section 3,[1] the Ninth Circuit held that SS LLP's ability to stay the litigation depended on its right to compel arbitration: "Because the New York Convention does not permit SS LLP to compel arbitration, the District Court did not abuse its discretion in denying a stay of proceedings pending arbitration." Pet. App. 4.

The Ninth Circuit denied SS LLP's petition for reconsideration or rehearing *en banc*. Pet. App. 20-21. This petition followed.

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[1] The Ninth Circuit did not reach the propriety of SS LLP's second motion to stay the litigation after the arbitral process started in India. Pet. App. 4.

REASONS FOR GRANTING THE WRIT

On the first issue presented, the Courts of Appeals are split. The First and Fourth Circuits hold that the Convention allows nonsignatories to compel a signatory to arbitrate, based on "traditional principles" such as equitable estoppel. But the Ninth and Eleventh Circuits hold that the Convention categorically does not allow nonsignatories to compel arbitration. This Court has already granted a petition to decide that circuit split in the *GE Power* case; it should grant SS LLP's petition on that issue as well.

But whether or not the Convention allows SS LLP, as a nonsignatory, to compel arbitration with a signatory, SS LLP should still have been entitled to stay the litigation if the litigation involved "any issue referable to arbitration." 9 U.S.C. § 3. For that stay request, SS LLP's status as a nonsignatory should not have mattered, and there could be no conflict with the Convention, which has no provisions for stays of litigation.

As this Court explained in the early years of the FAA, a defendant's right to a mandatory stay under Section 3 is not conditioned on the right to compel arbitration. *Shanferoke Coal*, 293 U.S. at 453; *The Anaconda*, 322 U.S. at 45. More recently, this Court again affirmed that nonsignatories such as SS LLP can obtain such a mandatory stay (without citing those earlier decisions). *Arthur Andersen*, 556 U.S. at 630-31. But the certiorari petition in *Arthur Andersen* presented the Section 3 issue solely in terms of equitable estoppel. Hence, the Court's analysis in *Arthur Andersen* focused only on whether a

nonsignatory could enforce the arbitral clause under "traditional principles" of contract and agency law, without ever addressing the breadth of its earlier holdings.

As a result, courts throughout the country, including the Ninth Circuit, conflate the analysis of a party's right to stay litigation with that party's right to compel arbitration. *Arthur Andersen*'s unintended consequence may have been to narrow the availability of stays of litigation under Section 3, and this Court's likely emphasis on equitable estoppel again in the *GE Power* case will only encourage further conflation. Especially with respect to foreign defendants, determining whether there is "any issue referable to arbitration" should be a simpler task for district courts if that issue does not also turn on whether that foreign defendant has the right to compel arbitration, which right may often be dependent upon principles of foreign law.

By granting SS LLP's petition on the second issue presented here, this Court can clarify that while the right to compel arbitration may require the non-signatory to show some recognized relationship with a signatory, the right to stay the litigation requires no such showing. Rather, pursuant to Congress' plain language in Section 3, and this Court's earlier holdings, a party moving for a stay should only be required to show that the litigation against it involves an issue that the opposing party is required to arbitrate (i.e., is "referable to arbitration"), and that the issue will impact the outcome of the claims against the moving party. Upon such a showing, the court "shall . . . stay

the trial of the action until such arbitration has been had." 9 U.S.C. § 3.

Even the most casual survey of case law under the FAA shows that courts struggle with determining what relationships suffice to allow enforcement of arbitration agreements by or against non-signatories. That struggle becomes more difficult when foreign law governs that relationship, as is often the case with agreements subject to the Convention. By returning Section 3's the focus to where it belongs, i.e, on whether an issue in the litigation may be within the scope of an arbitration clause, such that an arbitrator, rather than a district court judge, should consider the issue in the first instance, this Court can make district courts' analysis easier, and fulfill Congress' intent "to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Moses H. Cone Mem. Hosp.*, 460 U.S. at 22.

I. THE COURTS OF APPEALS ARE DIVIDED ON WHETHER NONSIGNATORIES CAN COMPEL ARBITRATION UNDER THE NEW YORK CONVENTION.

A. The First and Fourth Circuits Have Held That Nonsignatories Can Enforce Arbitration Agreements Under the New York Convention.

In *Sourcing Unlimited, Inc. v. Asimco Int'l, Inc.*, 526 F.3d 38 (1st Cir. 2008), the First Circuit held that the Convention incorporates the doctrine of equitable estoppel. There, the court applied the doctrine to compel arbitration of claims against a nonsignatory

defendant by an entity that had an arbitration agreement with the defendant's corporate parent, because the plaintiff's claims were "sufficiently intertwined with" the contract between the plaintiff and the corporate parent. *Id*. at 48.

The Fourth Circuit has also twice held that equitable estoppel applies to arbitration agreements subject to the Convention. *See Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d 355 (4th Cir. 2012); *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411 (4th Cir. 2000).

Aggarao involved a plaintiff injured while employed aboard a ship. Plaintiff brought his claims against both his employer (a signatory) and other entities associated with the ship (nonsignatories). Applying traditional principles of equitable estoppel, the Fourth Circuit held the Convention allowed "a nonsignatory to an arbitration clause [to] compel a signatory to the clause to arbitrate the signatory's claims against the nonsignatory despite the fact that the signatory and nonsignatory lack[ed] an agreement to arbitrate." 675 F.3d at 375 (citations omitted).

International Paper involved a distribution chain. "Well-established common law principles," the Fourth Circuit reasoned, "dictate that in an appropriate case a nonsignatory can enforce, or be bound by, an arbitration provision within a contract executed by other parties." 206 F.3d at 416-17. Those principles "also appl[y] to nonsignatories to arbitration agreements governed by the Convention." *Id.* at 418 n.7. Because the plaintiff sought to benefit from the

contract at issue, the plaintiff was equitably estopped from avoiding arbitration. *Id.* at 418.

B. The Ninth and Eleventh Circuits Have Held That Nonsignatories Cannot Enforce Arbitration Agreements Under the New York Convention.

The Ninth Circuit's decision in this case (Pet. App. 1-4) relied entirely on its previous decision in *Yang*, which, like *Aggarao*, involved a maritime suit against a nonsignatory to an employment agreement containing an arbitration clause. *Yang*, 876 F.3d. at 998. In *Yang*, the Ninth Circuit held that "the Convention Treaty does not allow nonsignatories or non-parties to compel arbitration." *Id.* at 1001. The Ninth Circuit held that cases interpreting Chapter 1 of the FAA "offer no guidance in interpreting the Convention Act's requirement that an agreement in writing be signed by the parties." *Id.* at 1002. In the Ninth Circuit's view, "[t]o the extent [Chapter 1 of] the FAA provides for arbitration of disputes with non-signatories or non-parties, it conflicts with the Convention Treaty and therefore does not apply." *Id.* (citing 9 U.S.C. § 208). The Ninth Circuit repeated that reasoning here. Pet. App. 3-4.

The Eleventh Circuit adopted the same rule as the Ninth Circuit in the context of a subcontracting arrangement. *Outokumpu Stainless USA, LLC et al. v. Converteam SAS,* 902 F.3d 1316 (11th Cir 2018). In so doing, the Eleventh Circuit followed the Ninth Circuit's reasoning that the Convention's requirement of an "agreement in writing" meant an agreement "signed by the parties." *Outokumpu*, 902 F.3d at 1325-26.

This Court granted GE Power's petition to review the Eleventh Circuit's decision. *GE Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC,* 139 S. Ct. 2776 (Mem) (U.S. Sup. Ct. June 28, 2019). It should also grant SS LLP's petition to review the Ninth Circuit's opinion here, and decide that division of authority.

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DECISIONS REGARDING THE RIGHT TO A STAY UNDER SECTION 3 OF THE FAA.

The Ninth Circuit's holding that SS LLP categorically had no right to a Section 3 stay because, as a non-signatory, it cannot compel arbitration under the Convention conflicts with this Court's previous holdings regarding the scope and applicability of Section 3. This Court's earliest decisions interpreting that section held that the right to a stay is not conditioned on the right to compel. *Shanferoke Coal*, 293 U.S. at 453; *The Anaconda*, 322 U.S. at 45. Shortly after the United States signed on to the Convention, this Court confirmed that Section 3 continued to govern the right to stay even when the Convention may apply. *Scherk*, 417 U.S. at 511. And in *Arthur Andersen*, this Court held that non-signatories can stay litigation under Section 3 when "traditional principles" of state law allow that non-signatory to enforce the arbitration agreement. 556 U.S. at 630-31.

Hence, this Court has concluded that a party's right to stay litigation under Section 3 of the FAA is not dependent on whether that party also has a right to compel arbitration, and certainly is not dependent on

whether that party is a signatory to the arbitration agreement. But as explained below, this Court's case-specific reliance on principles of equitable estoppel in its *Arthur Andersen* decision and its likely emphasis on that issue again in the upcoming *GE Power* case may unintentionally limit the availability of stays under Section 3, and undermine the utility and enforceability of arbitration agreements.

In enacting the FAA, Congress assumed that Section 3 stays would be used to "stop a lawsuit begun by the party resisting arbitration, and then, if the stay didn't induce him to arbitrate, . . . the party wanting arbitration would bring a separate action under section 4." *Matterhorn, Inc. v. NCR Corp.*, 763 F.2d 866, 871 (7th Cir. 1985) (citing S. Rep. No. 536, 68th Cong., 1st Sess. 3 (1924)). Thus, as originally envisioned, Congress expected Section 3's stay provision to be the primary enforcement mechanism against those who sought to evade their arbitration obligation by suing in federal courts on "issues referable to arbitration."

This Court confirmed that expectation. In *Shanferoke Coal*, this Court considered the question of whether a federal court that might not be able to compel arbitration could nonetheless issue a stay of litigation under Section 3. *Shanferoke Coal*, 293 U.S. at 452. There, the arbitration agreement between the plaintiff and defendant provided that only the Supreme Court of the State of New York could order arbitration. *Id.* When the plaintiff sued instead in federal court, the defendant moved only for a stay of litigation under Section 3 (rather than to compel arbitration under Section 4). This Court approved of that approach:

> Section 3 of the United States Arbitration Act provides broadly that the court may "stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement." We think the Court of Appeals was clearly right in concluding that there is no reason to imply that the power to grant a stay is conditioned upon the existence of power to compel arbitration in accordance with § 4 of the Act. . . .. There is, on the other hand, strong reason for construing the clause as permitting the federal court to order a stay even when it cannot compel the arbitration.

Id. at 452-53 (internal citations omitted).

A decade later, this Court again examined Section 3, and again confirmed that a party's right to stay litigation is not predicated on its right to compel arbitration: "The concept seems to be that a power to grant a stay is enough without the power to order that the arbitration proceed, for, if a stay be granted, the plaintiff can never get relief unless he proceeds to arbitration." *The Anaconda*, 322 U.S. at 45. As more recently explained by the Seventh Circuit, "[a] plaintiff who wants arbitration moves for an order to arbitrate. A defendant who wants arbitration is often content with a stay [pursuant to Section 3], since that will stymie the plaintiff's effort to obtain relief unless he agrees to arbitrate." *Cabinetree of Wis., Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.2d 388, 389 (7th Cir. 1995) (citations omitted).

The Court revisited Section 3 again shortly after Congress adopted the Convention. *See Scherk*, 417

U.S. at 520 n. 15 (describing how the United States acceded to the Convention in 1970, and Congress then enacted Chapter 2 of the FAA). In *Scherk*, the district court refused to stay the litigation while the parties arbitrated certain claims before the International Chamber of Commerce in Paris, France, and indeed enjoined the parties from proceeding with that arbitration.[2] *Scherk*, 417 U.S. at 510. This Court reversed, approving the continued application of Section 3 even after adoption of the Convention,[3] and noting the importance of allowing disputes involving foreign nationals to be decided by arbitration:

> A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction. Furthermore, such a provision obviates the danger that a dispute under the agreement might be submitted to a forum hostile to the interests of one of the parties or unfamiliar with the problem area involved.

Scherk, 417 U.S. at 517.

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[2] Like the situation here, the plaintiff's lawsuit involved claims that the defendant had made fraudulent representations regarding trademarks. *Scherk*, 417 U.S. at 509.

[3] The Convention has no provisions regarding stays, thus although Section 3 "is part of Chapter 1 of the FAA, it is applicable to cases under Chapter 2 and the Convention." *Alghanim v. Alghanim*, 828 F. Supp. 2d 636, 643 (S.D.N.Y. 2011).

But the Court's more recent examination of stays under Section 3 may have muddied the clarity of its own previous holdings. In *Arthur Andersen*, this Court accepted a petition for certiorari on the following issue:

> Whether Section 3 of the FAA allows a district court to stay claims against non-signatories to an arbitration agreement when the non-signatories can otherwise enforce the arbitration agreement under principles of contract and agency law, including equitable estoppel.

Arthur Andersen, LLP v. Carlisle, No. 08-146, 2008 WL 3199724, at *i (U.S. Aug. 4, 2008).

Accordingly, the Court's opinion only discussed situations where the nonsignatory could otherwise enforce the agreement using (e.g.) equitable estoppel: "Because 'traditional principles' of state law allow a contract to be enforced by or against non-parties to the contract through 'assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel,' the Sixth Circuit's holding that nonparties to a contract are categorically barred from § 3 relief was error." *Arthur Andersen*, 566 U.S. at 631 (quoting 21 R. Lord, *Williston on Contracts* § 57:19, at 183 (4th Ed. 2001)).

This Court also implicitly rejected the reasoning applied by the Ninth and Eleventh Circuits to the New York Convention's "agreement in writing" language:

> Respondents argue that, as a matter of federal law, claims to arbitration by non-parties are not "referable to arbitration *under* an agreement in writing," 9 U.S.C. § 3 (emphasis added), because

> they "seek to bind a signatory to an arbitral obligation beyond that signatory's strict contractual obligation to arbitrate." Perhaps that would be true if § 3 mandated stays only for disputes between parties to a written arbitration agreement. But that is not what the statute says. It says stays are required if the claims are "referable to arbitration under an agreement in writing." If a written arbitration provision is made enforceable against (or for the benefit of) a third party under state contract law, the statute's terms are fulfilled.

Arthur Andersen, 566 U.S. at 630-31 (internal citations omitted).

Because the petition for certiorari in *Arthur Andersen* asked this Court to examine only whether nonsignatories "who can otherwise enforce the arbitration agreement" using traditional state law principles are entitled to a Section 3 stay, this Court had no reason to re-examine its earlier broader holdings in *Shanferoke Coal* and *The Anaconda*. Indeed, this Court's *Arthur Andersen* decision did not even cite to those precedents. But this Court did foreclose the ability of non-parties to the litigation (such as Nagraj Setty here) to seek such a stay: "we would not be disposed to believe that [Section 3 of the FAA] allows a party to the contract who is not a party to the litigation to apply for a stay of the proceeding." 566 U.S. at 630 n.4.

Hence, this Court's Section 3 holdings teach (1) that a nonsignatory party's right to obtain a Section 3 stay is not conditioned upon that party's right to compel

arbitration (whether under Section 4 or the New York Convention) but (2) an actual signatory to the arbitration agreement who is not sued in federal court has no standing to pursue a stay of existing litigation, even if the issues may be otherwise "referable to arbitration."

A defendant's status as a party (or potential party) to the arbitration should not govern the analysis under Section 3 of the FAA. Certainly, a defendant who can enforce the arbitration agreement through "traditional principles" of law will be entitled to a stay, so long as some issue in the litigation is referable to arbitration under that agreement. But as this Court implicitly recognized in *Shanferoke Coal* and *Arthur Andersen*, Congress used the passive voice ("issues referable to arbitration") in Section 3 for a reason—the right to obtain a stay is not dependent on a party's right to compel arbitration. The only thing a defendant has to show to obtain a Section 3 stay is that the plaintiff's claims involve an issue that the plaintiff has agreed to arbitrate, whether or not that defendant will be a party to the arbitration. By prohibiting a plaintiff from pursuing issues in federal court that the plaintiff agreed to arbitrate, Section 3's stay provision ensures the primacy of arbitration. *E.g.*, *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985) (when litigation involves both arbitrable and nonarbitrable issues, arbitration should still proceed).

Regardless of whether the Ninth Circuit was correct in holding that foreign nonsignatories such as SS LLP have no right to compel arbitration under the New York Convention, the Ninth Circuit was wrong (and

disregarded this Court's previous decisions) in holding that foreign nonsignatories also have no right to stay the litigation under Section 3.

III. THE QUESTIONS PRESENTED ARE IMPORTANT.

The FAA reflects an "emphatic federal policy in favor of arbitral dispute resolution" *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985). Likewise, the New York Convention's goal is to "encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed . . . in the signatory countries." *Scherk*, 417 U.S. at 520 n.15. Congress's policy in favor of arbitration should "appl[y] with special force in the field of international commerce." *Mitsubishi Motors*, 473 U.S. at 631.

This Court has already recognized the importance of the first issue by accepting the petition for certiorari in *GE Power*. The Ninth Circuit's decision here renders arbitration agreements subject to the New York Convention less effective than their domestic counterparts. *Compare, e.g., Allianz Global Risk U.S. Ins. Co. v. Gen. Elec. Co.*, 470 Fed. Appx. 652, 654 (9th Cir. 2012) (affirming District Court's grant of domestic nonsignatory's motion to compel arbitration based on equitable estoppel principles). A circuit split about the ability of nonsignatories to enforce international arbitration agreements creates exactly the kind of enforcement uncertainty that the New York Convention was designed to combat.

The Convention's purpose is to "encourage the recognition and enforcement of commercial arbitration agreements in international contracts and . . . unify the standards by which agreements to arbitrate are observed . . . in the signatory countries." *Scherk*, 417 U.S. at 520 n.15. To fulfill those purposes, arbitration agreements subject to the New York Convention must be enforceable to at least the same degree as domestic agreements. For arbitral agreements subject to the Convention (which will almost always involve at least one foreign signatory, 9 U.S.C. § 202), the agreement may very well be governed by the laws of a foreign jurisdiction. Determining whether foreign nonsignatory defendants can compel arbitration under the New York Convention is an issue of paramount national (and international) importance, which importance this Court has already recognized by accepting a similar petition on the same issue in *GE Power*.

But reiterating to federal courts that a nonsignatory's right to stay litigation under Section 3 is not dependent on whether that party can compel arbitration is equally important, and may have even broader application, especially with respect to agreements subject to the Convention.

District courts faced with a *stay* motion should not have to engage in difficult determinations regarding which nonsignatories should be considered "parties" to an arbitral agreement such that they can *compel* arbitration, whether by using domestic principles (such as equitable estoppel) or principles of applicable foreign law. Section 3 is focused only on whether the claims

against the moving party raise an "issue referable to arbitration," regardless of whether that party can compel arbitration. Once a nonsignatory demonstrates such an issue, the court "shall . . . stay the trial of the action until such arbitration be had." 9 U.S.C. § 3.[4]

By confirming that focus, this Court can give district courts an easier task in deciding stay motions. Under the FAA, "an arbitration agreement must be enforced notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 20. Any doubts about whether the issue is arbitrable should be resolved in favor of arbitration. *Id*. at 24-25. "[A]s with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability." *Mitsubishi Motors*, 473, U.S. at 626. That presumption in favor of arbitration applies with "special force" when the agreement is subject to the Convention. *Id.* at 631.

If the litigation involves an "issue referable to arbitration," Section 3 mandates a stay. The signatory to the agreement is then faced with a choice: arbitrate with its counterparty (whether or not that is the party who moved for a stay), or abandon the issue to proceed again in court against the nonsignatory; either way, the primacy of arbitration is protected. *E.g.*, *Invista S.A.R.L.*, 625 F.3d at 85-86 (arbitrators decided which issues were arbitrable against which parties, mooting

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[4] Although the statute says stay the "trial," courts interpret that to include most pretrial proceedings as well. *Corpman v. Prudential-Bache Securities, Inc.*, 907 F.2d 29, 31 (3rd Cir. 1990).

nonsignatory's appeal of denial of motion to stay). Returning Section 3 to Congress's and this Court's original understanding that the right to a Section 3 stay does not depend on the right to compel arbitration will make district courts' decisions regarding stay motions easier.

This Court often grants certiorari to ensure the consistent enforcement of arbitration agreements—including in the international context. *See, e.g.*, *BG Grp., PLC v. Republic of Argentina*, 134 S. Ct. 1198, 1205 (2014) (granting certiorari "[g]iven the importance of the matter for international commercial arbitration"); *New Prime Inc. v. Oliveira*, No. 17-340, 2019 WL 189342, at *9 (U.S. Jan. 15, 2019) ("grant[ing] certiorari only to resolve existing confusion about the application of the Arbitration Act"); *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 528 (2019) (granting certiorari "[i]n light of disagreement in the Courts of Appeals over whether the 'wholly groundless' exception is consistent with the Federal Arbitration Act"). It should do the same here.

IV. THE NINTH CIRCUIT'S DECISION IS WRONG.

The decision below is wrong, as was the Ninth Circuit's earlier decision in *Yang*. Those decisions misconstrue the New York Convention and the FAA, leaving international arbitration agreements with less protection than domestic agreements.

Chapter 2 of the FAA (implementing the Convention) states that "Chapter 1 applies to actions and proceedings brought under this chapter to the

extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States." 9 U.S.C. § 208. As this Court has recognized, the provisions of Chapter 1 "allow a contract to be enforced by or against nonparties to the contract through," by, among other mechanisms, equitable estoppel. *Arthur Andersen*, 556 U.S. at 631. Chapter 1 thus permits enforcement of a domestic arbitration clause "against (or for the benefit of) a third party" nonsignatory, *id.*, where, as here, "a signatory to the written agreement [i.e., respondent Balkrishna Setty] must rely on the terms of that agreement in asserting its claims against the nonsignatory." 21 *Williston on Contracts* § 57:19.

Neither the Convention nor Chapter 2 of the FAA speaks to the availability of equitable estoppel or other common-law enforcement mechanisms, nor does the Convention mention stays of litigation. There is no conflict here.

Rather, the Indian signatories to the arbitration agreement—nonparty Nagraj Setty and respondent Balkrishna Setty—agreed that "[a]ll disputes of any type whatsoever in respect of the partnership arising between the partners" shall be arbitrated "as per the provision of the Indian Arbitration Act, 1940 or any statutory modification thereof for the time being in force." Pet. App. 14. Indian common law, as well as the most recent version of the Indian Arbitration Act, explicitly allows nonsignatories to enforce arbitration agreements. Under Indian law, "[e]ven non-signatory parties to [arbitral] agreements can pray and be referred to arbitration . . ." *Chloro Controls India (P), Ltd. v. Severn Trent Water Purification, Inc.*, (2013)

1 SCC 641, ¶ 167. The most recent 2015 "statutory modification" of the 1940 Indian Arbitration Act allows "parties" to the arbitration agreement, as well as "any person claiming through or under" a party, to be referred to arbitration. The Indian Arbitration and Conciliation (Amendment) Act, 2015, § 4. SS LLP is a "person claiming through or under" a party to the Deed of Partnership (i.e., through its owner, Nagraj Setty).

The enforceability of such agreements should not depend on the domestic law of the jurisdiction in which enforcement is sought. *Scherk*, 417 U.S. at 516. Rather, parties specify in their contracts the laws of a foreign jurisdiction to avoid "the danger that a dispute under the agreement might be submitted to a forum hostile to the interests of one of the parties or unfamiliar with the problem areas involved." *Id*. at 516.

Under Indian law, the signatories to the Deed of Partnership agreed to the broadest possible arbitration clause available: "[a]ll disputes of any type whatsoever in respect of the partnership . . . ." Pet. App. 27. To those who come from a legal regime derived from the laws of the England and Wales (such as the Indian parties here), "in respect of" is to be construed as broadly as possible in favor of arbitration. *Heyman v. Darwins, Ltd.*, [1942] A.C. 356, 360, 366 (House of Lords); *Branch Manager, Magma Leasing and Finance Ltd. and Anr. v. Potluri Madhavilata and Anr.*, (2009) 10 SCC 103 (Indian Supreme Court); *see also AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 650 (1986) (recognizing that a clause requiring arbitration "with respect to" the

interpretation or performance of the contract was a broad clause giving rise to a presumption of arbitrability).

Under Indian law, the Deed of Partnership's arbitration clause should encompass respondent Balkrishna Setty's and his company BNG LLC's claims against nonsignatory SS LLP, and SS LLP should be entitled to enforce that arbitration requirement. Instead, the Ninth Circuit's decision puts SS LLP and all other foreign defendants sued in on issues arising out of foreign arbitral agreements in a legal no-man's-land, unable to compel arbitration (because they are not signatories) and also unable to stay the claims against them, even though a federal court is being asked to decide a dispute "referable to arbitration." 9 U.S.C. § 3.

The Ninth Circuit here relied on its earlier decision in *Yang*, which in turn examined the Convention's requirement that an arbitration agreement be "signed by the parties" to be enforceable. New York Convention, Article II, § 2. But that provision only prohibits unwritten arbitration agreements. Once an "agreement in writing" exists—i.e., one "signed by the parties" to that agreement even if those parties are not all before the court—Article II § 2 is satisfied; that provision says nothing about who can enforce the agreement.

Moreover, the New York Convention has no provisions for staying litigation, so there can never be a conflict between it and Section 3. And this Court has already decided that there is no such signatory requirement with respect to relief under Section 3.

Arthur Andersen, 556 U.S. at 630-31; *accord Contracting NW v. City of Fredericksburg*, 713 F.2d 382, 386-87 (8th Cir. 1983) (Section 3 is "broad enough to permit the stay of litigation between nonarbitrating parties as long as that lawsuit is based on issues referable to arbitration"). Simply put, by importing a signatory requirement back into Section 3, the Ninth Circuit here directly contradicted *Arthur Anderson*'s holding.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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