No. _____

In the Supreme Court of the United States

BIG PORT SERVICE DMCC,
Petitioner,

v.

CHINA SHIPPING CONTAINER LINES CO. LTD.,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner Big Port Service DMCC ("BPS") was permanently enjoined from pursuing an arbitration against Respondent China Shipping Container Lines Co. Ltd. ("CSCL") based solely on the district court's recognition of the decision of a Singapore court, which the district court read as holding that BPS and CSCL did not have an agreement to arbitrate. In reaching this conclusion, the district court expressly declined to determine whether this Court's four-factor test governing the grant of injunctive relief was satisfied. Rather, following case law from the Second Circuit, it concluded that an anti-arbitration injunction is automatically warranted whenever a court finds that the parties did not enter into a valid and binding agreement to arbitrate. The Second Circuit affirmed. This decision conflicts with the approach taken by the First, Seventh, Eighth, Ninth, and Eleventh Circuits, but is consistent with the Third and Fifth Circuits. For example, the Eleventh Circuit has recognized that there is no cause of action for "wrongful arbitration," and that anti-arbitration injunctions can be granted only under the All Writs Act.

The question presented is as follows:

Whether the Second Circuit erred in recognizing a cause of action for a party seeking to avoid arbitration and in concluding that courts have remedial power—untethered to any federal statute and unconstrained by this Court's precedents governing the grant of injunctive relief—to issue injunctions against arbitration.

PARTIES TO THE PROCEEDING

Petitioner is Big Port Service DMCC ("BPS"). BPS was respondent-appellant below.

Respondent is China Shipping Container Lines Co. Ltd. ("CSCL"). CSCL was petitioner-appellee below.

RULE 29.6 STATEMENT

National Venture Group Ltd. owns Big Port Service DMCC. No publicly held corporation owns 10% or more of Big Port Service DMCC's stock.

STATEMENT OF RELATED PROCEEDINGS

- *China Shipping Container Lines Co. Ltd. v. Big Port Service DMCC*, No. 1:15-cv-02006-AT-DCF, U.S. District Court for the Southern District of New York. Judgment entered Mar. 29, 2019.
- *China Shipping Container Lines Co. Ltd. v. Big Port Service DMCC*, No. 19-1111, U.S. Court of Appeals for the Second Circuit. Judgment entered Mar. 5, 2020.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Big Port Service DMCC ("BPS") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The Second Circuit's summary order is found at 803 F. App'x 481 (2d Cir. 2020) and reproduced at App. 1-9. The district court's decision is unreported, but is found at No. 1:15-cv-02006-AT-DCF, ECF No. 79 (S.D.N.Y. Jan. 15, 2019) and reproduced at App. 10-33. The district court's judgment is found at No. 1:15-cv-02006-AT-DCF, ECF No. 83 (S.D.N.Y. Mar. 29, 2019) and reproduced at App. 34-35.

JURISDICTION

The judgment of the Second Circuit was entered on March 5, 2020. App. 2. On March 19, 2020, this Court issued an order providing, in relevant part, that the deadline to file any petition for a writ of certiorari is extended to 150 days from the date of the lower court judgment. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

9 U.S.C. §§ 3-4, 9 U.S.C. § 16, and 28 U.S.C. § 1651 are reproduced at App. 36-39.

STATEMENT OF THE CASE

I. The Agreements

In September 2014, CSCL contracted with O.W. Bunker China Ltd. ("OW China") to supply marine fuel oil ("bunkers") for the MV XIN CHANG SU (the "Vessel"). A-1488-89.[1] OW China contracted with another member of the OW Group, O.W. Bunker Far East (S) Pte. Ltd. ("OW Singapore") to arrange for the fuel supply. A-183-84. OW Singapore then contracted with BPS to supply the bunkers, and BPS provided its Bunker Sales Confirmation, dated September 25, 2014, which identified OW Singapore as the "Buyer" and "jointly and severally [the Vessel], her masters, owners, managers, managing owners, operators, disponent owners, charterers and agents." A-1482-83. Furthermore, the Bunker Sales Confirmation provided that: (i) the parties have the right to seek legal action, including arbitration against the "Owners/Buyer"; (ii) BPS may seek a maritime lien against the Vessel; and (iii) "ALL OTHER TERMS IN ACCORDANCE WITH SELLERS' GENERAL TERMS AND CONDITIONS OF SALE." A-1483. It further provided that BPS "shall have the right to take any legal actions before the courts in any country either to . . . pursue the merits of a claim against the Owners/Buyer . . . by New York arbitration clause of 15(b) of Bimco Standard Bunker Contract . . . ." A-1483. Notably, Clause 18.1 of BPS's General Terms and Conditions provides that

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[1] Citations to "App. __" refer to the appendix filed with this Petition. Citations to "A-__" refer to the joint appendix filed with the Second Circuit.

if any dispute should arise of the agreement, the dispute "shall be referred to a three person arbitration panel in the City of New York . . . ." A-1499.

On September 26, 2014, OW China issued its Sales Confirmation to CSCL, which was subject to OW Bunker Group's Terms and Conditions of sales for marine bunkers, and OW Singapore confirmed the purchase of the bunkers from BPS in a Purchase Order Confirmation dated September 30, 2014. A-1488-89; A-1485-86. Notably, before the bunkers were supplied, CSCL and the master of the Vessel and the Vessel's agent corresponded with BPS to arrange for delivery of the bunker during October 2014, contrary to CSCL's later claims that it was not aware of BPS or the contract to supply the bunkers to the Vessel by Qiao Qi Ming, who was copied on such correspondence. A-1504-48; *contra* A-152-261 (Declaration of Qiao Qi Ming); A-155, ¶ 9 ("CSCL did not become aware of the contractual arrangement between OWB Far East and Big Port until Big Port contacted CSCL by e-mail on 12 November 2014 seeking payment for its invoice received an email from the Plaintiffs demanding payment in the sum of US$1,768,000."); *see also* A-1488-89 (sales confirmation of order from OW China to CSCL).

On November 1 and 2, 2014, two barges completed supplying the bunkers to the Vessel in Kavkaz, Russia in November 2014. A-1551-52. On November 2, 2014, BPS issued an invoice for $1,768,000 addressed to the owners, masters, agent, operators, and charterers of the Vessel. A-1554. BPS was never paid for the bunkers supplied to the Vessel and, in December 2014,

sought to remedy this situation by arresting the Vessel in an *in rem* action in Singapore, where the Vessel was located. This action is discussed further below.

II. The Arbitration Proceeding

On December 14, 2014, BPS served a Demand for Arbitration on CSCL, as the owner of the Vessel, relating to its claim for the unpaid amount of $1,768,000 for the bunkers supplied to the Vessel in accordance with the rules of the Society of Maritime Arbitrators, Inc. ("SMA"). A-1556-82. CSCL did not respond to the demand for arbitration.

BPS notified CSCL on December 26, 2014 that CSCL's failure to appoint an arbitrator by January 3, 2015 would result in appointment of an arbitrator on its behalf in accordance with the rules of the SMA. A-1584-85. CSCL failed to take any action to appoint an arbitrator, and an arbitrator was appointed on its behalf, but resigned in light of: (i) CSCL's challenge to the appointment; and (ii) assurances requested by BPS that the arbitrator could not provide. A-42; A-58-61. A new arbitrator was appointed for CSCL pursuant to the rules of the SMA, and BPS asked that the arbitration proceed forward, including with the appointment of an arbitral chairman. A-63-64; A-73. CSCL responded that it would "not take a position on this issue out of concern that any position being given could prejudice its position in the Singapore court proceeding." A-67. The panel subsequently confirmed to CSCL and BPS that a tripartite panel had been constituted to consider BPS's claim. A-77-78; A-80.

On February 23, 2015, the chairman of the tribunal sent an agenda to respective counsel for the parties for the Notice of Initial Hearing to be held via conference call on March 3, 2015. A-80-81. The hearing took place on March 3, 2015, but CSCL did not participate. A-88. Following the hearing, the tribunal issued an order requesting that the parties address preliminary matters, including the status and effect of the pending litigation in Singapore and CSCL's "amenability to arbitration." A-88-91.

III. Proceedings in the District Court and in Singapore

On March 17, 2015, CSCL filed a petition in the United States District Court for the Southern District of New York, seeking, among other things: (i) preliminary and permanent injunctive relief enjoining the arbitration proceeding that was ongoing in New York; and (ii) a declaratory judgment that CSCL and BPS did not have an agreement to arbitrate. A-13-20. The district court issued an order on March 17, 2015 to set a hearing for BPS to show cause why it should not be preliminarily enjoined from proceeding forward with the ongoing arbitration, pending a determination of CSCL's declaratory-judgment claim. A-92-94. The district court stayed the action brought by CSCL in an order dated March 31, 2015 "pending the Court's receipt of the Singapore High Court's decision." A-369-70.

Prior to CSCL's initiation of the proceedings before the district court, BPS, on November 19, 2014, commenced an *in rem* admiralty action in Singapore to arrest the Vessel. A-1589-94. The High Court of

Singapore issued a warrant for the arrest of the Vessel by a registrar of the High Court on December 9, 2014. A-1596-1600. Following the issuance of the warrant for arrest of the Vessel, on December 15, 2014, BPS filed an application in the High Court of Singapore (A-550-81) to stay the *in rem* proceedings "in favour of arbitration in New York," pursuant to Clause 18.1 of BPS's General Terms and Conditions, which required all disputes relating to the supply of the bunkers to be heard by a tripartite panel of arbitrators in New York subject to the federal maritime law of the United States. A-553; A-558-59. CSCL filed its own application seeking to set aside the *in rem* warrant for arrest of the Vessel on December 29, 2014. A-582-83. Following a hearing, the Assistant Registrar denied BPS's motion for a stay and granted CSCL's motion to set aside the warrant of arrest in an order dated August 11, 2015 that set out the grounds for the Assistant Registrar's decision. A-584-629. The Assistant Registrar, applying Singaporean law, found that BPS could not establish a case of agency by estoppel, but declined to award CSCL any damages for the arrest. *Id.* ¶¶ 47, 77, 139. Regarding BPS's application for a stay, the Assistant Registrar applied Singaporean law and found that there was no contract between BPS and CSCL. *Id.* ¶¶ 79-80.

BPS appealed both adverse rulings, and CSCL appealed the Assistant Registrar's decision not to award damages for the arrest. A-740-43. The respective appeals were heard by a judge of the Singapore High Court in September 2015, and the High Court issued its decision on December 4, 2015. A-757-95. The High Court reversed the Assistant Registrar's

decision declining to award damages in connection with the wrongful arrest, but otherwise affirmed. *Id.* BPS then sought to appeal the High Court's decision, but the High Court denied BPS's request. A-796-824. Thereafter, BPS appealed this denial to the Singapore Court of Appeal. A-825-29; *see also* A-836-37 (BPS's separate request for appeal to the Singapore Court of Appeal). In November 2016, the Court of Appeal affirmed the denial of leave for BPS to appeal with respect to the denial of a stay, but granted BPS leave to appeal the High Court's wrongful-arrest order and reserved judgment on BPS's separate request to appeal the High Court's decision that BPS's writ should be struck out. A-830-35; *see also* A-836-837 (BPS's application that was held in abeyance in the November 2, 2016 order).

Following the November 2, 2016 order of the Singapore Court of Appeal, BPS sought leave to serve expert evidence on the effect of New York law and/or federal maritime law of the United States with respect to BPS's claim. A-838-39. Although the Singapore Court of Appeal denied BPS's application and its subsequent application for leave to serve expert evidence on April 7, 2017, it emphasized that "we stress that our view in this regard is not intended to be a comment on the viability on [sic] the plaintiff's claim in arbitration proceedings overseas." A-840-41.

After the decision from the Singapore Court of Appeal, BPS and CSCL notified the district court of the decisions by the Singapore courts, but the parties disputed the effect of the Singapore proceedings on the action pending in the district court. A-371-76. The

district court then lifted the stay, but denied counsel's request for a conference and directed the parties to file a joint letter on how they wished to proceed, including a request for CSCL to "specify whether it will seek to withdraw its petition for preliminary injunction given the posture of the case." A-7. On February 5, 2018, the parties submitted a joint letter outlining the issues that required further briefing, including whether the district court had subject-matter jurisdiction over CSCL's petition. A-522-23. The district court set a briefing schedule on the issues of collateral estoppel and/or res judicata and directed BPS to raise, as an affirmative defense, any argument regarding the lack of subject-matter jurisdiction. A-524.

Following briefing, CSCL moved for an order recognizing and giving preclusive effect to the Singapore Assistant Registrar's final decision and appeal court order against the Assistant Registrar's decision (collectively "Singapore judgment"). A-8. The district court issued an order on January 15, 2019, granting CSCL's motion for declaratory judgment, recognizing and giving preclusive effect to the Singapore judgment, and permanently enjoining the arbitration. App. 10-33. The district court found that it had jurisdiction to hear the dispute pursuant to 28 U.S.C. § 1333(1). App. 16-18. The district court then granted a declaratory judgment recognizing the Singapore judgment and giving it preclusive effect, and permanently enjoined the arbitration without further analysis. App. 20-27; App. 29-32. Notably, the district court stated that "it does not have to satisfy the traditional factors courts consider in granting injunctive relief in order to enjoin an arbitration[,]" and

held, in line with Second Circuit case law, that "[a] court's finding that there is no agreement to arbitrate is all that is required to enable it to enjoin an arbitration." App. 31-32 n.15. Moreover, the district court rejected BPS's request for additional discovery on the issue of whether a contract was formed between the parties based upon its decision that the Singapore judgment had preclusive effect. App. 30-31. Final judgment was entered on March 29, 2019. App. 34-35. BPS timely appealed the decision of the district court to the Second Circuit on April 23, 2019. A-11.

IV. Proceedings in the Second Circuit

After briefing and oral argument, the Second Circuit affirmed the district court's judgment. App. 1-9. Relying on its decision in *Garanti Financial Kiralama A.S. v. Aqua Marine & Trading Inc.*, 697 F.3d 59 (2d Cir. 2012), the Second Circuit agreed that the district court had jurisdiction over the case under 28 U.S.C. § 1333(1). App. 4 ("That 'mirror-image' suit—BPS suing CSCL to compel arbitration on a maritime contract—is one over which the federal courts would have jurisdiction.").

The Second Circuit further rejected BPS's arguments that: (i) the district court erred in giving recognition to the Singapore judgment; (ii) comity does not apply to preliminary decisions like the Singapore judgment; and (iii) the district court's decision violated the "strong federal policy favoring arbitration." App. 4. The Second Circuit concluded that the Singapore judgment resolved the issue of whether the parties had agreed to arbitrate, and found that the Singapore judgment was "a full decision addressing the existence

of the arbitration agreement at issue."[2] App. 5. The Second Circuit also rejected BPS's argument that recognition of the Singapore judgment violates public policy. App. 5.

The Second Circuit also rejected BPS's contention that the Singapore judgment did not consider the relevant U.S. law or the arbitrability of BPS's claims, and that the question of arbitrability "was not necessary to support the Singapore Judgment." App. 6-8. Relying upon the factors that the Second Circuit outlined in *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 400 (2d Cir. 2011) concerning collateral estoppel (i.e., issue preclusion), the Second Circuit concluded that the Singapore judgment precluded BPS "from relitigating the existence of an arbitration agreement between it and CSCL." App. 6. The Second Circuit concluded that the question of arbitrability was litigated in Singapore and "was necessary to the Singapore Judgment . . . because the foreign action was dismissed based on the absence of a contract between CSCL and BPS . . . ." App. 7.

Finally, the Second Circuit rejected BPS's argument that the district court erred by permanently enjoining

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[2] However, the Second Circuit failed to address the Singapore judgment's acknowledgement that it was not deciding the arbitrability of BPS's claims. Had the Second Circuit addressed this, it would have concluded that the Singapore courts did not issue a final judgment adjudicating the parties' dispute. *See* A-841 (In the Singapore Court of Appeal's denial of BPS's appeal and extension of time, the court noted: "we stress that our view in this regard is not intended to be a comment on the viability on [sic] the plaintiff's claim in arbitration proceedings overseas.").

the arbitration. Relying on, *inter alia*, its decision in *In re American Express Financial Advisors Security Litigation*, 672 F.3d 113, 140 (2d Cir. 2011), the Second Circuit concluded that an anti-arbitration injunction is appropriate whenever a court determines that the parties have not entered into a binding and valid arbitration agreement. App. 8. Because the Second Circuit found that the district court properly gave preclusive effect to the Singapore judgment, it therefore concluded that the district court's anti-arbitration injunction was appropriate. App. 8.

REASONS FOR GRANTING THE WRIT

I. The Courts of Appeals Have Reached Conflicting Results as to When a Court Is Permitted to Enjoin an Arbitration

The Second Circuit here found that it was permissible to enjoin an arbitration based on a general, undefined remedial power, untethered to the traditional factors that are generally considered prior to granting injunctive relief. This conclusion aligns with decisions from the Third and Fifth Circuits. However, the Second Circuit's approach is irreconcilable with the approach taken by the Eighth, Ninth, and Eleventh Circuits, which hold that the power to enjoin an arbitration resides in the All Writs Act, and is permissible only if the requirements of the All Writs Act are met. The Second Circuit's decision also contrasts with the approach taken by the First and Seventh Circuits. This Court's review is needed to clarify the circumstances under which a court is permitted to issue an anti-arbitration injunction.

A. The First Circuit Has Found that the Federal Arbitration Act Implies the Power to Enjoin an Arbitration

The First Circuit has concluded that the Federal Arbitration Act ("FAA") implies the power to enjoin an arbitration. *Societe Generale de Surveillance, S.A. v. Raytheon European Mgmt. & Sys. Co.*, 643 F.2d 863 (1st Cir. 1981). There, demands for arbitration had been filed in Boston and Switzerland. *Id.* at 866. SGS, the party seeking to avoid arbitration in Boston, requested a temporary restraining order from the U.S. District Court for the District of Massachusetts enjoining the arbitration. *Id.* REMSCO, the party seeking to have the arbitration proceed, in turn sought an order compelling arbitration in Boston. *Id.* The district court issued a temporary restraining order prohibiting the Boston arbitration from proceeding, and denied REMSCO's motion to compel arbitration in Boston. *Id.* at 866-67.

On appeal, the First Circuit rejected REMSCO's argument that the FAA "removes the district court's power to enjoin the Massachusetts arbitration." *Id.* at 867. Rather, the First Circuit concluded that the FAA "expressly provides federal courts with the power to order parties to a dispute to proceed to arbitration where arbitration is called for by the contract." *Id.* at 868 (citing 9 U.S.C. § 3). The First Circuit then concluded that: (i) enjoining an arbitration is not inconsistent with the FAA; (ii) "to enjoin a party from arbitrating where an agreement to arbitrate is absent is the concomitant of the power to compel arbitration where it is present"; and (iii) enjoining the arbitration

was consistent with state law. *Id.* The First Circuit further concluded that reading the FAA not to permit an injunction against arbitration "might actually interfere with arbitration in the unusual case, arguably present here, where one such arbitration proceeding may interfere with another[,]" given the separate arbitration in Switzerland. *Id.*

B. The Eighth, Ninth, and Eleventh Circuits Have Found that a Court's Power to Enjoin an Arbitration Comes from the All Writs Act

The Eighth, Ninth, and Eleventh Circuits—in contrast to the First Circuit—have taken a narrower view of the power to enjoin an arbitration. This is perhaps best illustrated by the Eleventh Circuit's decision in *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092 (11th Cir. 2004). There, the Eleventh Circuit concluded that: (i) "'[w]rongful arbitration' . . . is not a cause of action for which a party may sue"; and (ii) to the extent that a court has the power to enjoin an arbitration, that power comes from the All Writs Act. *Id.* at 1098, 1104.

In finding that the power to enjoin an arbitration comes from the All Writs Act, the Eleventh Circuit recognized that "[t]here are at least three different types of injunctions a federal court may issue." *Id.* at 1097.

First, the Eleventh Circuit explained that a court may issue "a 'traditional' injunction, which may be issued as either an interim or permanent remedy for certain breaches of common law, statutory, or

constitutional rights. Granting such injunctions fall within the long-recognized, inherent equitable powers of the court." *Id.* (footnote omitted). The Eleventh Circuit further recognized that a party may obtain a traditional injunction only if: (1) the moving party has a substantial likelihood of success on the merits; (2) the moving party will suffer irreparable injury unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) an injunction would not be adverse to the public interest. *Id.*; *see also Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (setting forth the standard for granting a preliminary injunction). "The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success." *Winter*, 555 U.S. at 32 (internal quotation marks omitted); *see also eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006) (setting forth the standard for granting a permanent injunction); *Klay*, 376 F.3d at 1097 (recognizing that the standard for granting a traditional preliminary injunction is largely the same as the standard for granting a permanent injunction). The Eleventh Circuit concluded that a court may not enjoin an arbitration by way of a traditional injunction because "'[w]rongful arbitration[]' . . . is not a cause of action for which a party may sue." *Klay*, 376 F.3d at 1098.

Second, the Eleventh Circuit found that a court may issue "a 'statutory' injunction[,]" which "is available where a statute bans certain conduct or establishes certain rights, then specifies that a court may grant an

injunction to enforce the statute." *Id.* The Eleventh Circuit recognized that even when a statute specifically provides for an injunction, there is usually an "implicit[] require[ment] that the traditional requirements for an injunction be met in addition to any elements explicitly specified in the statute." *Id.*; *accord eBay*, 547 U.S. at 391-93 (recognizing that the traditional test for injunctive relief applies for the purposes of granting a permanent injunction under the Patent Act); *Hecht Co. v. Bowles*, 321 U.S. 321, 329-30 (1944) (recognizing that an equitable remedy provided by statute is presumed to be subject to the standards of traditional equity practice). The Eleventh Circuit concluded that a statutory injunction is not available to enjoin an arbitration because nothing in the FAA or in any other federal statute provides for an anti-arbitration injunction. *Klay*, 376 F.3d at 1099. Indeed, the Eleventh Circuit recognized that although the FAA "permits a federal court to compel arbitration based on an arbitration clause in a written contract," the FAA "does not permit a court to enjoin arbitration based on an issue's nonarbitrability." *Id.* at 1099 n.8 (citing 9 U.S.C. § 4).

Third, the Eleventh Circuit recognized that courts have the power to issue injunctions under the All Writs Act. *Id.* at 1099 (citing 28 U.S.C. § 1651). The All Writs Act "does not create any substantive federal jurisdiction[,]" but rather "is a codification of the federal courts' traditional, inherent power to protect the jurisdiction they already have, derived from some other source." *Id.* In contrast to "traditional injunctions," which "are predicated upon some cause of action," injunctions under the All Writs Act "[are]

predicated upon some other matter upon which a district court has jurisdiction." *Id.* at 1100. The Eleventh Circuit then concluded that "[i]f the injunction in this case is to be upheld, it must be under the All Writs Act." *Id.* at 1104.

The Eleventh Circuit then reversed the district court's anti-arbitration injunction. In reversing, the Eleventh Circuit noted that courts generally should not enjoin an arbitration simply "out of fear of possible *res judicata* effects" that could prevent the dispute from being adjudicated on the merits separately in federal court. *Id.* at 1110-11.

The Ninth Circuit likewise has held that the power to enjoin an arbitration comes from the All Writs Act. *Hartley v. Stamford Towers Ltd. P'ship*, 36 F.3d 1102, 1994 WL 463497 (9th Cir. Aug. 26, 1994) (unpublished). There, the Ninth Circuit held that the district court properly enjoined an arbitration, where the injunction was issued for the purpose of enforcing the district court's prior judgment in a class-action case. *Id.* at *4.

The Eighth Circuit has also held that a federal court has the right to uphold its judgments by way of an anti-arbitration injunction under the All Writs Act. Specifically, the Eighth Circuit explained that "[n]o matter what, courts have the power to defend their judgments as res judicata, including the power to enjoin or stay subsequent arbitrations." *In re Y & A Grp. Sec. Litig.*, 38 F.3d 380, 382 (8th Cir. 1994). The Eighth Circuit then: (i) found that the power to enjoin an arbitration comes from the All Writs Act; and (ii) concluded that an injunction under the All Writs

Act was proper to enjoin an arbitration covering the same subject matter as an earlier federal consent judgment. *Id.* at 383-84.

C. The Seventh Circuit Has Found that the Propriety of an Anti-Arbitration Injunction Is Governed by Traditional Equitable Principles

The Seventh Circuit has held that an anti-arbitration injunction is proper only if traditional principles of equity are satisfied. *AT&T Broadband, LLC v. Int'l Broth. of Elec. Workers*, 317 F.3d 758 (7th Cir. 2003). There, the Seventh Circuit affirmed the denial of an anti-arbitration injunction because the party seeking an injunction could not show irreparable harm. *Id.* at 761-63. In particular, the Seventh Circuit explained that "[i]f AT&T loses in the arbitration, the union will seek to enforce its victory; AT&T can defend on the theory that it had not agreed to arbitrate this kind of dispute." *Id.* at 762. For this reason, the Seventh Circuit "ha[s] held it sanctionably frivolous to seek an anti-arbitration injunction." *Id.* (citations omitted); *see also Trustmark Ins. Co. v. John Hancock Life Ins. Co. (U.S.A.)*, 631 F.3d 869, 872 (7th Cir. 2011) (holding that irreparable harm must be shown in order to issue injunctions against arbitration). Under the Seventh Circuit's approach, an anti-arbitration injunction will rarely be warranted.

D. The Second, Third, and Fifth Circuits Have Found that Courts Have a Broad Remedial Power to Enjoin an Arbitration

The Second, Third, and Fifth Circuits—in contrast to the First Circuit, and in even sharper contrast to the Seventh, Eighth, Ninth and Eleventh Circuits—have found that courts have a broad power to issue injunctions against arbitration.

The Second Circuit has adopted a broad view of courts' power to enjoin an arbitration. *In re Am. Express Fin. Advisors Sec. Litig.*, 672 F.3d 113 (2d Cir. 2011). There, a class action ended in a Settlement Agreement, and the U.S. District Court for the Southern District of New York retained jurisdiction over all disputes arising from the Settlement Agreement. *Id.* at 121-22. Two class members ("the Belands") subsequently commenced arbitration proceedings. *Id.* at 123. Prior to the scheduled arbitration hearing, the defendants filed a motion with the district court, seeking to enforce the Settlement Agreement by way of enjoining the arbitration proceeding. *Id.* at 124-25. The district court granted the motion and ordered the Belands to dismiss their arbitration complaint with prejudice. *Id.* at 125-26. The Belands then appealed to the Second Circuit. *Id.* at 126.

On appeal, the Second Circuit recognized that although the FAA "explicitly authorize[s] a district court to stay litigation pending arbitration" and also authorizes a court "to compel arbitration," the FAA "nowhere . . . explicitly confer[s] on the judiciary the

authority to . . . enjoin a private arbitration." *Id.* at 140 (citing 9 U.S.C. §§ 3-4). Nevertheless, the Second Circuit held that "at least where the court determines . . . that the parties have not entered into a valid and binding arbitration agreement, the court has the authority to enjoin the arbitration proceedings." *Id.*

In reaching this conclusion, the Second Circuit recognized that the Eighth, Ninth, and Eleventh Circuits had found that the power to enjoin an arbitration is based on the standards set forth in the All Writs Act. *Id.* at 141 n.20 (citing *Klay*, 376 F.3d at 1099; *In re Y & A Grp. Sec. Litig.*, 38 F.3d at 382-83; *Hartley*, 1994 WL 463497, at *3-4). Nevertheless, the Second Circuit found that the power to enjoin an arbitration could be found based "on a reading of the FAA, FINRA Rule 12200, and the Settlement Agreement." *Id.* The Second Circuit particularly emphasized that because the district court retained jurisdiction over the Settlement Agreement, "the district court here could properly enjoin the private arbitration of claims already settled and released by class members such as the Belands." *Id.* The Second Circuit therefore did not reach the question of whether the All Writs Act, in an appropriate case, could provide a separate basis for enjoining an arbitration. *Id.* However, the Second Circuit's decision makes clear its view that the All Writs Act does not define the outer bounds of a district court's ability to enjoin an arbitration. *Id.*

Although the Second Circuit cited the First Circuit's decision in *Societe Generale de Surveillance* (*see id.* at

141), the Second Circuit—unlike the First Circuit—did not find that the power was limited to an implied power under the FAA. Rather, the Second Circuit found that the power to issue an anti-arbitration injunction is far-reaching, and can be exercised when parties have entered into a settlement agreement over which a district court has retained jurisdiction. *Id.* at 141 n.20. The Second Circuit has subsequently confirmed its broad view of a court's power to enjoin an arbitration, explaining that "[f]ederal courts generally have remedial power to stay arbitration[,]" and noting that it "routinely enjoin[s] out-of-state arbitrations." *Goldman, Sachs & Co. v. Golden Empire Schs. Fin. Auth.*, 764 F.3d 210, 213-14 (2d Cir. 2014) (citations omitted).

If there was any doubt about the breadth of the Second Circuit's holding in *In re American Express Financial Advisors Securities Litigation* and its cases that followed, that doubt was dispelled by the Second Circuit's decision in the instant case. Here, the district court enjoined BPS from proceeding with the arbitration despite the fact that: (i) there was no settlement agreement between the parties over which the district court retained jurisdiction; and (ii) there was no judgment from—or pending proceeding in—a United States court that considered BPS's claims on the merits. Nevertheless, the district court—based solely on its interpretation of the Singapore judgment—determined that BPS's arbitration could not proceed. Indeed, the district court concluded that "it does not have to satisfy the traditional factors courts consider in granting injunctive relief in order to enjoin an arbitration[,]" and held, in line with Second Circuit

case law, that "[a] court's finding that there is no agreement to arbitrate is all that is required to enable it to enjoin an arbitration." App. 31-32 n.15. The Second Circuit affirmed, holding that a permanent injunction was warranted based solely on the district court's decision to "accord[] preclusive effect to the Singapore Judgment, which held that BPS and CSCL had not entered into a valid and binding arbitration agreement." App. 8.

The Third Circuit has taken a similarly broad view of courts' power to enjoin an arbitration. In particular, the Third Circuit held that "[i]f a court determines that a valid arbitration agreement does not exist or that the matter at issue clearly falls outside of the substantive scope of the agreement, it is obliged to enjoin arbitration." *PaineWebber Inc. v. Hartmann*, 921 F.2d 507, 511 (3d Cir. 1990), *abrogated on other grounds by Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002); *see also John Hancock Mut. Life Ins. Co. v. Olick*, 151 F.3d 132, 136 (3d Cir. 1998) (citing 9 U.S.C. §§ 3-4) ("[T]he FAA allows a district court to compel, or enjoin, arbitration as the circumstances may dictate."); *Dorco Co. v. Gillette Co.*, C.A. No. 18-1306-LPS-CJB, 2019 WL 1874466, at *2 (D. Del. Mar. 18, 2019) (quoting *PaineWebber Inc.*, 921 F.2d at 511) ("Where, as here, the Court has determined 'that the matter at issue clearly falls outside of the substantive scope of the agreement, it is obliged to enjoin arbitration.'").

The Fifth Circuit likewise has adopted a broad view of courts' power to issue anti-arbitration injunctions. *Miller Brewing Co. v. Fort Worth Distrib. Co.*, 781 F.2d 494 (5th Cir. 1986). There, the Fifth Circuit held that

an anti-arbitration injunction was warranted in order to enforce the res judicata effect of a Texas state-court judgment. *Id.* at 498-501.

II. This Case Is the Proper Vehicle for the Court to Address This Important Issue

This case is an ideal vehicle to address the question presented. There can be no doubt that the Second Circuit has adopted a rule whereby a court may permanently enjoin an arbitration based solely on its conclusion that the parties have not entered into an agreement to arbitrate. The district court, applying Second Circuit precedent, concluded that: (i) "it does not have to satisfy the traditional factors courts consider in granting injunctive relief in order to enjoin an arbitration"; and (ii) "[a] court's finding that there is no agreement to arbitrate is all that is required to enable it to enjoin an arbitration[.]" App. 31-32 n.15 (citations omitted). And the Second Circuit affirmed, finding that because the district court had concluded that the parties had not agreed to arbitrate, "the district court had the authority to permanently enjoin the arbitration proceeding." App. 8.

Moreover, the question presented is important. As one leading commentator has recognized, "[T]he question of whether US courts may enjoin an arbitration in the absence of such agreement remains controversial." Jennifer L. Gorskie, *US Courts and the Anti-Arbitration Injunction*, 28 ARB. INT'L 295, 295 (2012). The article noted that "[o]n a purely textual reading, there is no basis in the FAA, nor in the New York Convention or Panama Convention, for a court to enjoin arbitration." *Id.* at 296. Accordingly, courts in

many countries "refuse to issue anti-arbitration injunctions in nearly all circumstances, even where the court doubts the existence of the arbitration agreement." *Id.* However, the "lack of clarity" as to the propriety of anti-arbitration injunctions from United States courts "is contributing to confusion in the case law, and may even threaten to expand the potential reach of the anti-arbitration injunction far past what our international brethren would consider appropriate." *Id.*

This Court's guidance is needed so parties can have certainty as to when a court is permitted to enjoin an arbitration. As it stands now, some circuits permit anti-arbitration injunctions as a matter of course, others allow anti-arbitration injunctions only when the requirements of the All Writs Act are met, one circuit has all but prohibited anti-arbitration injunctions, and at least one other circuit takes an intermediate approach. Moreover, as explained in more detail *infra*, the circuits do not agree on when the All Writs Act can support the issuance of an anti-arbitration injunction to address concerns related to preclusion by a prior federal judgment.

The need for this Court's guidance is especially acute here, given that the Second Circuit—where a significant percentage of arbitration-related disputes occur (*cf.* INT'L CHAMBER OF COM., ICC DISPUTE RESOLUTION BULLETIN 2018 ISSUE 2: EXTRACT 61 (2018), https://cdn.iccwbo.org/content/uploads/sites/3/sites/3/2018/07/2017-icc-dispute-resolution-statistics.pdf (stating that New York law was the most frequently chosen choice of law provision where parties

chose the United States as the forum for the governing law of the contract))—has adopted a broad rule favoring the issuance of anti-arbitration injunctions. This rule conflicts with the strong federal policy in favor of arbitration. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 345-46 (2011) ("[T]he FAA was designed to promote arbitration. [This Court's cases] have repeatedly described the Act as 'embod[ying] [a] national policy favoring arbitration' . . . and 'a liberal federal policy favoring arbitration agreements, notwithstanding substantive or procedural policies to the contrary[.]'") (citations omitted); *David L. Threlkeld & Co. v. Metallgesellscheft, Ltd.*, 923 F.2d 245, 248 (2d Cir. 1991) (citing *Rodriguez de Quijas v. Shearson/Am. Express, Inc.,* 490 U.S. 477 (1989)) (recognizing that "federal policy strongly favors arbitration as an alternative dispute resolution process," noting that "federal arbitration policy requires that 'any doubts concerning the scope of arbitrable disputes should be resolved in favor of arbitration,'" and explaining that "[t]he policy in favor of arbitration is even stronger in the context of international business transactions.").

Allowing anti-arbitration injunctions to issue as a matter of course unduly frustrates the strong federal policy in favor of arbitration. This case illustrates the danger of granting anti-arbitration injunctions reflexively. Based on its view (strongly disputed by BPS) that the Singapore judgment was a final decision that resolved the dispute between the parties, the district court enjoined the arbitration. Had the district court allowed the arbitration to proceed, the dispute would have been adjudicated by a group of arbitrators

having expertise in the area of international maritime disputes. A-558. Those arbitrators would have been in an especially good position to analyze the factual details necessary to a determination of whether the Singapore proceedings resulted in a final decision (as CSCL has argued and the district court has held) or merely an interlocutory decision (as BPS maintains). *See, e.g.*, *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 239 (1987) (recognizing that "access to expertise" is a benefit of arbitration) (internal quotation omitted); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985) (recognizing that "adaptability and access to expertise are hallmarks of arbitration" and that "[t]he anticipated subject matter of the dispute may be taken into account when the arbitrators are appointed"); *cf. Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 717 F.2d 602, 607 (D.C. Cir. 1983) ("As the affidavits make clear, the determinations of foreign law that would have to be made to evaluate the availability of adequate alternative fora are extremely difficult and would require a great deal of expertise not readily available to us.").

III. The Second Circuit's Decision Is Incorrect

The Second Circuit erred in finding that a court has a broad remedial power to enjoin an arbitration, unmoored from the traditional prerequisites to obtaining injunctive relief. Under the correct analysis, a court should be permitted to issue an anti-arbitration injunction only if the requirements under the All Writs Act are satisfied. Accordingly, this Court should adopt the reasoning of the Eleventh Circuit. The Court

should further conclude that the All Writs Act does not permit injunctive relief where, as here, the arbitration poses no obstacle to a federal court's jurisdiction. But even if the Court concludes that a court can issue an anti-arbitration injunction as a remedy outside of the All Writs Act, the Second Circuit erred in finding that an anti-arbitration injunction can be issued as a matter of course, without conducting an analysis under this Court's traditional four-factor test for determining the propriety of injunctive relief.

A. An Anti-Arbitration Injunction Is Justified Only When the Conditions of the All Writs Act Are Satisfied

1. Because There Is No Cause of Action for "wrongful arbitration," the Second Circuit Erred in Upholding the District Court's Grant of Substantive Relief

As the Eleventh Circuit correctly held, "'Wrongful arbitration' . . . is not a cause of action for which a party may sue." *Klay*, 376 F.3d at 1098. This holding is well-supported, since nothing in the FAA or any other statute explicitly confers a general power for courts to enjoin an arbitration. *Cf. Hall Street Assocs. v. Mattel, Inc.*, 552 U.S. 576, 581-82 (2008) ("As for jurisdiction over controversies touching arbitration, the [Federal Arbitration] Act does nothing, being something of an anomaly in the field of federal-court jurisdiction in bestowing no federal jurisdiction but rather requiring an independent jurisdictional basis.") (internal quotation marks omitted). Rather, the FAA mentions anti-arbitration injunctions only in the

context of describing appellate jurisdiction. 9 U.S.C. § 16(a)(2) (providing that a party can take an interlocutory appeal from an order granting, continuing, or modifying an anti-arbitration injunction); 9 U.S.C. § 16(b)(4) (providing that an appeal generally cannot be taken from an order refusing to enjoin an arbitration). However, nothing in the Act describes the circumstances under which an anti-arbitration injunction is permissible. As described below, the lack of a substantive cause of action for "wrongful arbitration" leads to the conclusion that the power to enjoin an arbitration is derived from the All Writs Act. But even if this Court held that the power to enjoin an arbitration comes from a court's traditional remedial powers, there is no basis for the Second Circuit's conclusion that a party can obtain an anti-arbitration injunction without satisfying this Court's longstanding requirements governing the issuance of injunctive relief.

Moreover, because there is no cause of action for "wrongful arbitration," the Second Circuit erred in upholding the district court's decision to entertain CSCL's suit and grant CSCL affirmative relief. The FAA specifically contemplates the appropriate procedure when parties disagree on whether a dispute is arbitrable. In particular, the FAA provides that when a party refuses to arbitrate, the aggrieved party "may petition any United States district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement." 9 U.S.C. § 4. Here, CSCL, believing that it had no obligation to arbitrate, was entitled to refuse to participate. BPS, in turn, could have filed a petition to compel arbitration,

and if the district court found that BPS's petition lacked merit, it would have denied the petition. However, nothing in the FAA contemplates a district court granting affirmative relief to a party seeking to avoid arbitration. Indeed, the district court's refusal to permit any discovery (App. 30-31) illustrates the stark contrast between: (i) proceedings to compel arbitration under 9 U.S.C. § 4; and (ii) the truncated proceedings that were utilized in CSCL's request for an anti-arbitration injunction. In § 4 proceedings, parties are generally entitled to conduct at least limited discovery. *See Guidotti v. Legal Helpers Debt Resolution, L.L.C.*, 716 F.3d 764, 774-76 (3d Cir. 2013) (recognizing that in proceedings concerning a petition to compel arbitration under 9 U.S.C. § 4, parties are generally entitled at least to limited discovery); *see also* 9 U.S.C. § 4 (providing for a trial in actions to compel arbitration where the parties raise an issue as to the "making of the agreement for arbitration"). Had CSCL's wrongful-arbitration claim been subject to the procedural protections generally afforded in § 4 proceedings, BPS would have had the opportunity to present additional evidence demonstrating, *inter alia*, that the Singapore judgment was interlocutory and therefore not entitled to preclusive effect.

Because there is no cause of action afforded to a party who merely wants to avoid an arbitration, the Second Circuit erred in upholding the district court's grant of affirmative relief. "In the declaratory judgment context, the normal principle that federal courts should adjudicate claims within their jurisdiction yields to considerations of practicality and wise judicial administration." *Wilton v. Seven Falls*

Co., 515 U.S. 277, 288 (1995). Here, the district court should have declined to issue a declaratory judgment, given that the FAA in no way suggests that a party seeking to avoid arbitration is entitled to affirmative relief. But at the very least, the district court should be instructed to reconsider its decision to entertain CSCL's suit, in view of the fact that there is no cause of action for "wrongful arbitration."

2. The All Writs Act Would Not Have Permitted the Issuance of an Injunction Here

As the Eleventh Circuit correctly found, "The simple fact that litigation involving the same issues is occurring concurrently in another forum does not sufficiently threaten the court's jurisdiction as to warrant an injunction under th[e] [All Writs Act]." *Klay*, 376 F.3d at 1102-03. This conclusion is correct, and applies with even greater force where—as here—the alleged "litigation involving the same issues" is not occurring in a United States forum. Indeed, the injunction here was based entirely on the determination that the Singapore judgment was to be given binding effect.

Case law from the Second Circuit itself has demonstrated that the injunction that the district court issued here could not have been granted under the All Writs Act. *Citigroup, Inc. v. Abu Dhabi Inv. Auth.*, 776 F.3d 126 (2d Cir. 2015). There, Citigroup filed suit seeking an anti-arbitration injunction against Abu Dhabi Investment Authority ("ADIA") where: (i) Citigroup and ADIA were involved in an earlier arbitration; (ii) the arbitrators returned an award in

favor of Citigroup; (iii) the district court confirmed the award; (iv) ADIA appealed to the Second Circuit; and (v) ADIA served Citigroup with a new notice of arbitration during the pendency of the Second Circuit appeal. *Id.* at 127-28. In support of its request for an injunction, Citigroup invoked, *inter alia*, the All Writs Act, and alleged that the second arbitration was barred by res judicata due to the district court's judgment confirming the arbitration award. *Id.* The district court refused to grant relief under the All Writs Act, finding that Citigroup's res judicata concerns were not sufficient to justify relief under the All Writs Act. *Id.*

The Second Circuit affirmed. In its decision, the Second Circuit recognized that other courts have employed the All Writs Act "to enjoin arbitrations that threaten to undermine federal judgments." *Id.* at 129. However, the Second Circuit concluded that where the federal judgment at issue "simply confirm[s] the arbitration award" in "a summary proceeding that merely makes what is already a final arbitration award a judgment of the court[,]" relief under the All Writs Act is unwarranted. *Id.* at 132-33 (internal quotation marks omitted). In particular, the Second Circuit recognized that the district court, in confirming the arbitration award: (1) "did not review the merits of any of ADIA's substantive claims or the context in which those claims arose," and (2) simply applied the deferential review under the FAA. *Id.* "Under these circumstances, a district court unfamiliar with the underlying circumstances, transactions, and claims, is not the best interpreter of what was decided in the arbitration proceedings, the result of which it merely confirmed." *Id.* at 133. Accordingly, the Second Circuit

concluded that an anti-arbitration injunction could not be properly issued under the All Writs Act.

Under the All Writs Act standard, which the Second Circuit properly articulated in *Citigroup*, the Second Circuit would have reversed the district court's anti-arbitration injunction here. Indeed, the case for All Writs Act relief here is far less compelling than that in *Citigroup*. Here, unlike *Citigroup*, there was no federal judgment at all, let alone a federal judgment that was entered after a "review [of] the merits of any of [BPS's] substantive claims or the context in which those claims arose." *Id.* Rather, the district court enjoined the arbitration merely on the basis of the Singapore judgment, even though the Singapore court "stress[ed]" that its decision was "not intended to be a comment on the viability" of "the plaintiff's claim in arbitration proceedings overseas." A-841.

Under these circumstances, relief under the All Writs Act is not appropriate. The All Writs Act permits courts to issue injunctions only "in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a); *see also Clinton v. Goldsmith*, 526 U.S. 529, 534 (1999) ("While the All Writs Act authorizes employment of extraordinary writs, it confines the authority to the issuance of process 'in aid of' the issuing court's jurisdiction."). "Although that Act empowers federal courts to fashion extraordinary remedies when the need arises, it does not authorize them to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate." *Pa. Bureau of Corr. v. U.S. Marshals Serv.*, 474 U.S. 34, 43 (1985);

see also Goss Int'l. Corp. v. Man Roland Druckmaschinen Aktiengesellschaft, 491 F.3d 355, 365-66 (8th Cir. 2007) (holding that it is inappropriate to enjoin a foreign proceeding under the All Writs Act where a judgment had already issued in the parallel United States litigation, and recognizing that the binding effect of the United States judgment could be vindicated by pleading res judicata in the foreign proceeding). Similarly here, CSCL would be free to raise res judicata or collateral estoppel as defenses in the arbitration proceeding, and the arbitrators could decide in the first instance the question of whether the Singapore proceedings resulted in a final judgment as to the parties' disputes. *See Citigroup*, 776 F.3d at 131-32 (recognizing that arbitrators generally should decide, in the first instance, the preclusive effect of a prior federal judgment). If All Writs Act relief is not warranted to prevent a party from arbitrating the question of the preclusive effect of a prior United States federal judgment, then surely All Writs Act relief cannot lie where—as here—the question before the arbitrators is whether a Singapore judgment should be given preclusive effect.

Where, as is true here, an arbitration poses no threat to a federal judgment or an ongoing federal proceeding, it is inappropriate to use the All Writs Act to enjoin the arbitration. The FAA illustrates this point by detailing the procedure to be followed when there are questions about whether a dispute is properly arbitrable. In particular, the Act provides, in relevant part, that when a court finds that a dispute is subject to arbitration, the court "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." 9 U.S.C. § 3. Moreover, the Act provides, in relevant part, that "[a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement . . . may petition any United States district court [having jurisdiction] . . . for an order directing that such arbitration proceed in the manner provided for in such agreement." *Id.* § 4. Additionally, once the arbitration is completed, an appropriate U.S. District Court may, in accordance with the Act, review the arbitral award, and confirm or vacate the award as appropriate. *Id.* §§ 9-13. Only after the district court enters judgment does the arbitration award have binding effect. *See id.* § 13 ("The judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered."). Put differently, "[b]ecause '[a]rbitration awards are not self-enforcing,' they must be given force and effect by being converted to judicial orders by courts; these orders can confirm and/or vacate the award, either in whole or in part." *D.H. Blair & Co. v. Gottdiener*, 462 F.3d 95, 104 (2d Cir. 2006) (quoting *Hoeft v. MVL Grp., Inc.*, 343 F.3d 57, 63 (2d Cir. 2003)) (alteration in original).

Against this statutory backdrop, it will be a rare case in which an anti-arbitration injunction can be justified under the All Writs Act. Because any disputes about arbitrability can be resolved: (i) during the arbitration; or (ii) failing that, upon judicial review of the arbitration award, the All Writs Act will rarely

permit a court to enjoin an ongoing arbitration. And All Writs Act relief certainly will not lie where, as here, such an injunction has no connection to the enforcement or preservation of any United States federal court judgment or proceeding.

B. Even if the Power to Enjoin an Arbitration Comes from a Source Other than the All Writs Act, the Second Circuit's Decision Conflicts with This Court's Precedents

As described above, the power to enjoin an arbitration is found in the All Writs Act. But even if this Court concluded that the power resides elsewhere, the Second Circuit's decision upholding the district court's permanent injunction is irreconcilable with this Court's precedents. "According to well-established principles of equity," a plaintiff may obtain a permanent injunction only if: (1) it has suffered an irreparable injury; (2) remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) the public interest would not be disserved by a permanent injunction. *eBay*, 547 U.S. at 391. This Court recognized that even though the Patent Act provides that patentees have the right to exclude others from practicing their patented inventions, it does not necessarily follow that patentees are automatically entitled to permanent injunctions upon establishing a violation of that right. *Id.* at 391-94. Instead, patentees are required to satisfy the traditional four-factor test for injunctive relief. *Id.* In

reaching this conclusion, this Court explained that "'a major departure from the long tradition of equity practice should not be lightly implied.'" *Id.* at 391 (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 320 (1982)).

Given this precedent, the Second Circuit erred in adopting the district court's conclusions that: (i) "it does not have to satisfy the traditional factors courts consider in granting injunctive relief in order to enjoin an arbitration[;]" and (ii) "[a] court's finding that there is no agreement to arbitrate is all that is required to enable it to enjoin an arbitration[.]" App. 31-32 n.15. Rather, even assuming *arguendo* that a court's power to enjoin an arbitration is based on its authority to afford a litigant a remedy under federal law—as opposed to a court's authority to aid its jurisdiction under the All Writs Act—the Second Circuit erred in concluding that an injunction can be granted without consideration of traditional equitable principles. The district court and the Second Circuit found that an injunction was warranted without considering, for example, BPS's argument that CSCL failed to demonstrate irreparable harm. This Court's precedents do not support granting injunctive relief where the plaintiff fails to make such a showing. For example, this Court found that it was impermissible for the Federal Circuit to adopt "a general rule, unique to patent disputes, that a permanent injunction will issue once infringement and validity have been adjudged." *eBay*, 547 U.S. at 393-94 (internal quotation marks omitted). Here, the Second Circuit was in error to adopt a rule—unique to arbitration disputes—that an

injunction shall issue whenever a district court concludes that the parties did not agree to arbitrate.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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