No. 24 - 135

In the Supreme Court of the United States

JAMES G. ROBINSON, ET AL.,
Petitioners,

v.

ARMIN AZOD, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit properly affirmed the confirmation of a binding arbitration award where the district court found the award did not exceed the arbitrator's powers and was not completely irrational or in manifest disregard of the law, and where the district court confirmed the award on alternative grounds (in holding that Robinson Parties were time-barred).

2. Whether the Ninth Circuit properly affirmed the denial of the motion to dismiss based on judicial estoppel grounds where the Robinson Parties had filed a prior petition in the same forum, and where the district court denied the motion on two alternative grounds (in holding that the motion was an inappropriate vehicle for responding to a motion to confirm an arbitration award and in holding that the Robinson Parties had waived the right to enforce the forum selection clause).

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INTRODUCTION

Petitioners are requesting "this Court's exercise of its supervisory power to vacate the [arbitration] award." Pet. 3. However, the Federal Arbitration Act ("FAA") has established a very high standard for vacating an arbitration award, which Petitioners do not and cannot meet.

As this Court has ruled, "[u]nder the FAA, courts may vacate an arbitrator's decision only in very unusual circumstances."[1] "A party seeking relief under that provision bears a heavy burden."[2] To vacate an arbitration award, "[i]t is not enough to show that the arbitrator committed an error or even a serious error."[3] "[A]n arbitral decision even arguably construing or applying the contract, must stand, regardless of a court's view of its (de)merits."[4] "[T]he sole question for [a court] is whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong."[5]

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[1] *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 568 (2013) (internal citations an quotations omitted).

[2] *Id.* at 569.

[3] *Id.*

[4] *Id.* (internal quotations and citations omitted).

[5] *Id.*

Petitioners fail to show any compelling reason for this Court to exercise its discretion to grant review of the detailed and comprehensive 180-page arbitration award issued by the arbitrator, the Honorable Judge Benson Everett Legg (ret.), a former Chief Judge of the United States District Court for the District of Maryland. There is a lack of any public or national "importance" that would merit this Court's review. The underlying case involves a commercial dispute between private parties, pursuant to a private arbitration agreement. The only "importance" here is limited to the private parties in this particular case.

Similarly, Petitioners fail to show any compelling reason for this Court to exercise its discretion to grant review on the denial of the Robinson Parties' motion to dismiss. The issues Petitioners raise regarding the forum selection clause lack any public or national "importance" that would merit this Court's review. As affirmed by the Ninth Circuit, "the district court did not abuse its discretion by holding the Robinson Parties judicially estopped from moving to dismiss on *forum non conveniens* grounds.... The Robinson Parties suddenly want to prevent [Respondents] from litigating this petition in the Central District after they made the exact choice in the 2019 action.... The Robinson Parties' reversal of po-

sition suggests the very gamesmanship that judicial estoppel seeks to avoid."[6] Furthermore, deciding this case in a different forum would not change the outcome. This case has been fully and fairly heard by competent courts with proper jurisdiction; there is nothing for this Court to correct. Reviewing this issue would only frustrate the objective of the FAA to unburden the federal courts.

The FAA expresses Congress' clear intent to unburden the courts. "If parties could take full-bore legal and evidentiary appeals, arbitration would become merely a prelude to a more cumbersome and time-consuming judicial review process. A review by this Court of a private arbitration award would encourage all losers of private arbitration proceedings to bring their cases through the federal courts, thus defeating the intent of the [FAA]."[7] The present petition is a perfect example of what the FAA seeks to prevent. This is a case where Petitioners simply refuse to accept the findings and rulings from the arbitration, which have been affirmed by the district court and the Ninth Circuit Court of Appeals. Petitioners agreed to arbitration and they must be bound by the arbitrator's rulings. Granting

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[6] App. to Pet. 5a.

[7] *Oxford Health Plans*, 569 U.S. at 568-69.

certiorari here could cause a flood of appeals of private arbitration disputes to the federal courts.

Petitioners argue that the arbitration award exceeded the arbitrator's powers. To the contrary, the agreement at the center of the dispute explicitly grants the arbitrator the power to resolve "any and all disputes or claims arising out of or related to the validity, enforceability, interpretation, performance or breach of this Agreement," and provides that "[t]he arbitrator's decision shall be final, binding, and conclusive."[8] In holding the Petitioners liable for attorneys' fees and costs, the arbitrator found that Petitioners sought benefits under the agreement while at the same time disavowing any liability under the same, which made them subject to equitable estoppel under Maryland law. Indeed, Petitioners have *admitted* on the record that they are bound by Section 21 of the agreement, which grants the arbitrator the power to award attorneys' fees and costs.[9]

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[8] 2-ER-213

[9] 2-ER-286 ("Mr. Robinson and Morgan Creek admitted they are bound by Section 21 as if they were signatories..."); *see also* 2-ER-209, 287.

Petitioners' arguments rely on a mischaracterization of the specific facts in the record. For example, Petitioners, *inter alia*, falsely claim to be a prevailing party when in fact they were not. "In this arbitration, [Respondents] clearly prevailed."[10] "[Respondents], not [the Robinson Parties] were the 'prevailing party.'"[11] "[Respondents] are the 'prevailing Party' under Section 21 of the [agreement] *against each [of the Robinson Parties].*").[12] Petitioners also disregard the arbitrator's finding that their own "uncompromising approach to litigation" is what drove up the fees and costs.

There is no conflict between this Court's holding in *Atlantic Marine* and the Ninth Circuit's holding affirming denial of Petitioners' motion to dismiss based on judicial estoppel, due to Petitioners' express conduct of filing their own petition in the Central District of California in 2019 and litigating in the district court until the arbitration award issued in 2022. There is also no conflict with the First or Sixth Circuit's holdings because of the same reason.

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[10] 2-ER-299.

[11] App. to Pet. 64a.

[12] 2-ER-211 (emphasis in original).

Even if certiorari were to be granted here, the outcome of the case would not change because the district court has also confirmed the arbitration award on an alternative grounds, which is not being challenged – Petitioners are time-barred from challenging the arbitration award under the FAA (9 U.S.C. § 12) and under Maryland law.[13] The district court has also denied Petitioners' motion to dismiss on two alternative grounds – the motion to dismiss was an inappropriate vehicle for responding to the motion to confirm the arbitration award, and waiver of their right to enforce the forum selection clause.

This Court has long held that "a court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error."[14] As set forth below, Petitioners do not and cannot overcome this high burden for review because the record shows no obvious or exceptional errors by the arbitrator, the district court, or the court of appeals.

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[13] App. to Pet. 42a-43a, 57a-58a.

[14] *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949).

STATEMENT OF THE CASE

The present petition for certiorari arises from an arbitration that involved four respondents: Cecilia LLC ("Cecilia"), Good Stuff LLC ("Good Stuff"), Morgan Creek Productions, Inc. ("Morgan Creek"), and Mr. Robinson ("Robinson") (collectively, "Robinson Parties"). Robinson is the sole owner, officer, member, and decision maker for all Robinson Parties. App. to Pet. 44a.

On October 15, 2014, Cecilia entered into an Asset Purchase Agreement ("APA") to purchase Novoform Technologies LLC and its assets from Respondents Dr. Ramez Elgammal, Dr. Dong Zhang, Dr. Shantanu Sharma, Mr. Peter John, and Armin Azod. *Id*. at 45a. Cecilia failed to pay $905,636 on the APA. 2-ER-205 n.9.

On January 20, 2016, Respondents[15] filed a case against Cecilia, Robinson, and Morgan Creek in the Central District of California, for money owed on the APA and attorneys' fees and costs. 2-ER-203. On April 7, 2016, the Robinson Parties (including Petitioners) filed a

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[15] Respondent Dr. Ramez Elgammal was not part of the original case. He joined as a party during the arbitration.

motion to compel arbitration based on Section 21 of the APA. *Id.* Section 21 provides, "the Parties agree to confidentially arbitrate ... any and all disputes and claims" and that the "arbitrator of any such dispute may, in the arbitrator's discretion, award money damages to the prevailing Party, including the costs of the arbitration, and attorney's fees...." 2-ER-213. The motion to compel arbitration was granted. 2-ER-203.

On September 16, 2016, Respondents submitted a demand for arbitration with JAMS. 2-ER-203. Robinson, Cecilia, and Good Stuff filed counterclaims. 2-ER-204. The arbitration proceeded before the Honorable Judge Benson Everett Legg (ret.), the former Chief Judge for the United States District Court for the District of Maryland. The arbitration process involved lengthy discovery and extensive motion practice. *See* 2-ER-202-263 ("History of the Arbitration – Factual and Procedural").

From November 6 to November 10, 2018, a five-day merits hearing took place in Los Angeles, California. *Id.* The merits hearing addressed the counterclaims. *Id.*

On February 7, 2019, the arbitrator issued a Partial Final Award ("PFA") ruling the APA is a valid contract unbreached by Respondents,

and ruling that Respondents are the prevailing party. 2-ER-263-273. The arbitrator awarded Respondents contract damages against Cecilia in the amount of $905,636 and the costs of arbitration. 2-ER-273.

On March 1, 2019, the arbitrator held a telephonic conference with the parties to address the remaining issues, including attorneys' fees and costs and joint and several liability, and to set a briefing schedule. 2-ER-206. The Robinson Parties challenged the arbitrator's jurisdiction to make an award against the non-signatory parties (Robinson, Morgan Creek, and Good Stuff). "The Parties filed over 20 briefs, including a round of briefing on whether Mr. Robinson and Morgan Creek were entitled to their attorneys' fees and costs as 'prevailing Parties' under Section 21 of the APA. [The arbitrator] issued 10 scheduling orders and held four hearings. The Parties engaged in another round of discovery." 2-ER-274.

On September 17, 2019, the arbitrator "issued Scheduling Order 27, in which [he] ruled definitively that the [PFA] was not, and was manifestly never intended to be, final with respect to the potential liability of Respondents Mr. Robinson, Good Stuff, and Morgan Creek." 2-ER-206.

On November 6, 2019, the Robinson Parties filed a petition to confirm the PFA in the Central District of California, before the Honorable Judge Otis D. Wright. 2-ER-274. The case was docketed as *Cecilia, LLC v. Azod*, case 2:19-cv-09552-ODW-AS (C.D. Cal.).

On January 17, 2020, Respondents filed a motion to stay the proceeding until completion of the arbitration. Both parties submitted briefs. Hon. Judge Wright issued a ruling granting the motion to stay and ordered the parties to file joint status reports every 90 days until completion of the arbitration. App. to Pet. 17a, 47a, 79a. Thereafter, the parties filed nine joint status reports. *Id.*

The arbitration continued on the issues of attorneys' fees and costs and joint and several liability. 2-ER-206-212.

On April 15, 2019, Petitioners filed a motion for attorneys' fees seeking an award of $631,160.50 in attorneys' fees and $32,700.50 in JAMS costs. 2-ER-281. "In support of their motion, Mr. Robinson and Morgan Creek invoked Section 21 of the APA." 2-ER-282.

On May 15, 2020, the arbitrator issued an Interim Award, ruling that Petitioners were not entitled to attorneys' fees and costs be-

cause they were not the prevailing party, as defined by the APA. 2-ER-275. The arbitrator reiterated that Respondents were the prevailing party and ruled that Petitioners were liable for attorneys' fees and costs under the theory of equitable estoppel because they sought to enforce Section 21 of the APA to their benefit while disclaiming any liability under it. 2-ER-276.

Substantial litigation activity followed. 2-ER-208. The arbitrator directed Respondents to file their fee petition. 2-ER-209.

On October 26, 2020, Respondents filed a motion for attorneys' fees and costs against all Robinson Parties. 2-ER-210.

On July 15, 2021, a hearing was held on attorneys' fees and costs. *Id.*

On May 18, 2022, a 180-page Final Award ("Final Award") was issued. 2-ER-200-382. In the Final Award, which adopted and integrated the PFA and the Interim Award, the arbitrator reaffirmed that Respondents are the prevailing party against each of the Robinson Parties and awarded Respondents attorneys' fees, costs, and expenses jointly and severally against the Robinson Parties. *Id.* The arbitrator ruled, "In the Interim Award, I decided Mr.

Robinson and Morgan Creek were claiming a benefit under Section 21 while disclaiming any liability under it. This is inequitable; they cannot use Section 21 as both sword and shield. I found that Mr. Robinson and Morgan Creek are bound by Section 21 as if they were signatories to Section 21. Hence, under the doctrine of equitable estoppel, I decided Mr. Robinson and Morgan Creek are liable for [Respondents'] reasonable attorneys' fees and the costs of the arbitration. In this Final Award, I reiterate that decision." 2-ER-282. The arbitrator ruled, "In the instant arbitration, it is unfair for [Robinson Parties] to rely on Section 21 of the APA to seek fees and costs against [Petitioners] while simultaneously arguing that the APA cannot be enforced against them." 2-ER-278.

The arbitrator also found that, "[d]uring oral argument, [Robinson Parties'] counsel stated that when the federal court remanded the case for arbitration, 'we became bound by Section 21; and therefore, we are bound not only by its obligations and potential liabilities, but we were inured with the benefits and rights under that provision, to the extent we qualified for them.' This assertion is a party admission, binding Mr. Robinson and Morgan Creek to the fee-shifting agreement of Section 21 of the APA." 2-ER-209. "Mr. Robinson and

Morgan Creek admitted they are bound by Section 21 as if they were signatories...." 2-ER-286.

Among many other findings, the arbitrator also found that, "[h]aving engaged in an uncompromising approach to litigation...[the Robinson Parties] cannot complain that the Azod Parties' fees and costs reflect their vigorous opposition." 2-ER-350.

On May 31, 2022, Respondents requested a meet and confer for the filing of their upcoming motion to confirm the arbitration award in the still pending 2019 case in the Central District Court of California before the Hon. Judge Wright, which the Robinson Parties had filed. App. to Pet. 19a, 48a, 80a.

On June 1, 2022, without meeting and conferring with Respondents, the Robinson Parties filed a petition to vacate or modify the arbitration award in Maryland state court. *Id*.

On June 6, 2022, the Robinson Parties, again without first meeting and conferring with Respondents, filed a notice of voluntary dismissal of the case before the Central District of California, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i). *Id*.

On June 7, 2022, the action was dismissed without prejudice. *Id.* at 20a, 49a, 80a.

On July 19, 2022, Respondents filed a motion to vacate the dismissal based on the Robinson Parties' improper filing of the unilateral notice of voluntary dismissal. *Id.* Respondents also filed a motion to lift the stay and confirm the Final Award. *Id.* Both of Respondents' motions were stricken because that case was closed. *Id.* at 20a, 49a, 80a.

On July 27, 2022, Respondents filed a motion to confirm the Final Award in the Central District of California, before the Honorable Judge Christina A. Snyder. *Id.* at 44a.

On September 26, 2022, the Robinson Parties filed an opposition asking the district court to vacate the arbitration award, arguing, *inter alia*, that the arbitrator exceeded his authority. *Id.* at 44a, 58a-59a.

On November 9, 2022, the district court granted Respondents' motion to confirm. *Id.* at 77a. The district court ruled that "the request to vacate raised in [Robinson Parties'] opposition to [Respondents'] motion to confirm was untimely under both the FAA and Maryland law, which require filing within ninety days and thirty days of the issuance of the fi-

nal award, respectively." *Id.* at 58a. The district court ruled that the "timing requirements for moving to vacate an arbitration award apply both to motions to vacate and to requests to vacate in opposition to motions to confirm." *Id.* at 57a.

The district court found no grounds to vacate the binding arbitration award holding that it did not exceed the arbitrator's powers and was neither completely irrational nor was it in manifest disregard of the law. *Id.* at 67a. The district court ruled that "the arbitrator's interpretation of Section 21 of the APA to contemplate one prevailing party was not a manifest disregard of governing law or completely irrational." *Id.* The district court also ruled that "the arbitrator cited Maryland law for the findings that the prevailing party is the one that succeeds on the core claims that formed the basis of the dispute between the parties…. The arbitrator additionally explained that the merits hearing was dominated by [Robinson Parties'] counterclaims, on which the [Respondents] prevailed against [Robinson Parties]." *Id.* at 68a (internal citations and quotations omitted).

The district court further ruled that "the Final Award conducted a close analysis of the text of Section 21, concluding that the lan-

guage specifies that attorneys' fees and costs will be awarded to the prevailing Party of any such dispute. The unit of consideration for allocation of fees and costs is the entire dispute, not individual claims in it." *Id.* (internal citations and quotations omitted).

On August 29, 2022, the Robinson Parties filed a motion to dismiss Respondents' motion to confirm the arbitration award arguing, *inter alia,* the forum selection clause in the APA required Maryland state court to be the forum. *Id.* at 78a.

On November 9, 2022, the district court denied the Robinson Parties' motion to dismiss. *Id.* at 96a. The district court ruled that, "[Robinson Parties'] motion to dismiss is an inappropriate vehicle for responding to the motion to confirm the arbitration award and should be denied on that basis." *Id.* at 82a. The court also ruled that in filing their own 2019 petition in the same forum, "[Robinson Parties] *waived* their venue objection and should be estopped from enforcing the forum selection clause here." *Id.* at 87a (emphasis added). The court also ruled that "[t]he doctrine of judicial estoppel can be applied to preclude a party from arguing that venue is improper when they previously asserted that venue was proper in filing an action in federal

court." *Id.* at 87a. "The three judicial estoppel factors ... favor application of the doctrine here." *Id.* at 88a.

On November 15, 2022, the district court issued a final judgment confirming the arbitration Final Award in all respects. 1-ER-2-5.

On December 12, 2022, the Robinson Parties filed a motion to alter or amend the final judgment. *Id.* at 14a.

On January 30, 2023, the district court denied the Robinson Parties' motion. Regarding the confirmation of the arbitration award, the district court ruled that the "the arbitrator's determination that the APA only contemplated one prevailing party to whom fees could be awarded was based on his rational interpretation of Section 21." *Id.* at 36a. "[T]here was only one arbitration, in which all of the parties took part, and in which the arbitrator interpreted to constitute one 'dispute' for the purposes of awarding fees. As previously concluded, this determination was not 'completely irrational'...." *Id.* at 37a. "[T]he Court conclude[ed] that its determination that the arbitrator's interpretation of Section 21 survives the limited review under the FAA does not warrant reconsideration." *Id.* at 39a.

The district court additionally ruled that "contrary to [Robinson Parties'] contention, the Court did conclude that [Robinson Parties'] request to vacate the Final Award was time-barred.... Here, the Final Award was issued and served on the parties on May 18, 2022, and, to comply with the three-month rule in the FAA, [Robinson Parties] were required to serve [Respondents] with a notice to vacate, modify, or correct no later than August 18, 2022. [Robinson Parties'] request to vacate in their opposition was filed on September 26, 2022, over one month after the August 18. 2022 deadline. Thus, [Robinson Parties'] request to vacate was untimely under both the FAA and Maryland law. [Robinson Parties'] failure to file a timely request for vacatur in this Court serves as another ground for confirmation of the Final Award." App. to Pet. 42a-43a (internal citations and quotations omitted).

Regarding the motion to dismiss, the district court ruled that "[r]egardless of whether petitioners have successfully established that judicial estoppel is appropriate here, the Court concludes that respondents have waived their right to enforce the forum selection clause." *Id.* at 31a. Regarding judicial estoppel, the district court ruled, "[Robinson Parties'] new argument misses the point. While it is correct

that proper venue, which is determined by federal venue laws, and forum are distinct concepts, [Robinson Parties] did more than simply assert venue was legally proper in the Central District of California. In filing their petition to confirm the PFA in the Central District of California in the 2019 case, [Robinson Parties] unequivocally asserted their position that the parties could adjudicate the arbitration award in this district, notwithstanding the forum selection clause in the APA.... This position is clearly inconsistent with their current position.... [Robinson Parties] have not raised any reason why this action would be governed by the forum selection clause while the 2019 action would not. And any such argument would be unpersuasive, as both actions involve the same parties, arise out of the same arbitration, and seek to confirm arbitration awards...." *Id*. at 26a.

On January 16, 2024, the Ninth Circuit affirmed. App. to Pet. 6a. Regarding the confirmation of the arbitration award, the Ninth Circuit ruled:

> Because Robinson and Morgan Creek sought a benefit by asserting their entitlement to attorneys' fees and costs under Section 21 of the APA, *it was not completely ir-*

> *rational* for the arbitrator to apply equitable estoppel to hold these non-signatories jointly and severally liable for attorneys' fees and costs under that same provision. See *Griggs v. Evans*, 43 A.3d 1081, 1092 (Md. Ct. Spec. App. 2012) ("The doctrine of equitable estoppel is rooted in the equitable principle that it would be unfair for a party to rely on a contract when it works to its advantage, and repudiate it when it works to its disadvantage.") (internal quotation marks omitted). *Nor did the arbitrator manifestly disregard Maryland law* by finding that reliance was not required to hold Robinson and Morgan Creek liable under an equitable estoppel theory. See *Bessette v. Weitz*, 811 A.2d 812, 827 (Md. Ct. Spec. App. 2002) (explaining that '[t]here may be instances' where equitable estoppel does not require reliance).

Id. at 6a (emphasis added).

Regarding the motion to dismiss, the Ninth Circuit ruled:

The Robinson Parties argue that their 2019 representations about judicially determined 'venue' have no relation to their current representations about contractually determined 'forum', citing to *Atl. Marine Const. Co. v. U.S. Dist. Ct. for W. Dist. Of Texas*, 571 U.S. 49 (2013). But the record belies this post hoc distinction. The Robinson Parties had not differentiated between venue and forum in their 2019 action, and in fact justified their choice to file the 2019 petition in the Central District by stating that the [Respondents] waived any objections to venue by filing there first in 2016.... The district court properly concluded that the Robinson Parties are attempting to secure an unfair advantage by dismissing this petition under *forum non conveniens*.... [T]he Robinson Parties suddenly want to prevent [Respondents] from litigating this petition in the Central District after they made the exact choice in the 2019 action.... The Robinson Parties' reversal of position suggests the very games-

> manship that judicial estoppel seeks to avoid.[16]

Id. at 3a-4a.

On January 30, 2024, Petitioners and Good Stuff filed a petition for panel rehearing and rehearing en banc. On April 4, 2024, the Ninth Circuit denied the petition, stating "[t]he full court has been advised of the petition and no judge has requested a vote on whether to rehear the matter en banc." *Id.* at 97a.

On August 2, 2024, two of the four Robinson Parties – Robinson and Morgan Creek ("Petitioners") – filed the present petition for certiorari seeking review of the: (1) confirmation of the arbitration award, and (2) denial of the motion to dismiss. The other two Robinson Parties – Cecilia and Good Stuff – are not challenging those rulings and currently remain under the jurisdiction of the Central District Court of California for judgement enforcement.

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[16] App. to Pet. 5a.

REASONS FOR DENYING THE PETITION

I. There is No Basis to Grant Certiorari on the Confirmation of the Binding Arbitration Award

The FAA expresses Congress' clear public policy intent to unburden the courts and "to move the parties to an arbitrable dispute out of court … as quickly and easily as possible." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 480 U.S. 1, 22 (1983). Consistent with that public policy, this Court may exercise its discretion to deny review of the confirmation of the arbitration award for several reasons.[17]

A. There is No Conflict With This Court's Precedent

In its ruling, the Ninth Circuit cited to this Court's precedent, holding that "both the [FAA] and Maryland law permit 'courts [to] vacate an arbitrator's decision only in very unusual circumstances,' *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 568 (2013)." App. to Pet. 6a. *Oxford Health Plans* establishes

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[17] Two of the Robinson Parties, Cecilia and Good Stuff, are not challenging the lower court's confirmation of the arbitration award.

that to vacate an arbitration award, "[i]t is not enough to show that the arbitrator committed an error or even a serious error." *Oxford Health Plans*, 569 at 569. "[A]n arbitral decision even arguably construing or applying the contract, must stand, regardless of a court's view of its (de)merits." *Id.* (internal quotations and citations omitted). "[T]he sole question for [a court] is whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong." *Id.*; *see also Eastern Associated Coal Corp. v. United Mine Workers of America, District 17, et al.,* 531 U.S. 57, 62 (2000) (citing *Paperworkers v. Misco, Inc.,* 484 U.S. 29, 38 (1987)) ("as long as [an honest] arbitrator is even arguably construing or applying the contract and acting within the scope of his authority," the fact that "a court is convinced he committed serious error does not suffice to overturn his decision.").

Here, the arbitrator, Honorable Judge Benson Everett Legg (ret.), former Chief Judge for the United States District Court for the District of Maryland, conducted the arbitration over the span of six years (2016-2022). Judge Legg allowed for extensive discovery and motion practice; held a five-day merits hearing that included seven witnesses and four expert reports; and, issued a PFA, Interim Award,

and 44 scheduling orders. *See* 2-ER-200-382. Ultimately, Judge Legg issued a lengthy Final Award with meticulous analysis weighing the facts of this case and applying Maryland law. *See* App. to Pet. 69a.

There is no conflict with this Court's precedent. Petitioners do not dispute this Court's well-established law, and the facts in this case reflect an award that is consistent with it.

B. The Arbitration Award Did Not Exceed the Arbitrator's Powers

Petitioners assert, "The Award of Attorneys' Fees Against Respondents Exceeded the Powers Of The Arbitrator." (Pet. 19). Petitioners also assert, "[t]he arbitrator's award of fees was not grounded in the Agreement, and was instead simply his own 'brand of industrial justice'...." (Pet. 22-23). Petitioners are incorrect.

Petitioners rely on *Stolt-Nielsen S.A. v. AnimalFeeds Int'l.,* 559 U.S. 662 (2010). Pet. 20. However, the facts in *Stolt-Nielsen* are distinguishable from the present case. "In *Stolt-Nielsen,* the arbitrators did not construe the parties' contract.... So in setting aside the arbitrator's decision, [this Court] found not that [the arbitrators] had misinterpreted the con-

tract, but that they had abandoned their interpretive role." *Oxford Health Plans*, 569 U.S. at 571.

In contrast, here the record shows that the arbitrator did construe the contract. *See* App. to Pet. 68a-69a ("[T]he Final Award conducted a close analysis of the text of Section 21.... [Robinson Parties] have not shown that, in so interpreting Section 21, the arbitrator understood and correctly stated the law, but proceeded to disregard the same. Nor have [Robinson Parties] shown that the interpretation fails to draw its essence from the agreement as to be completely irrational. Rather, the arbitrator drew from the APA's text.... While [Robinson Parties] have set forth an alternative interpretation of Section 21, they have failed to show that the arbitrator's interpretation was not plausible.") (internal citations and quotations omitted).

Petitioners also rely on their assertion that, "there is no language in the Agreement supporting a conclusion that the parties' intended for non-signatory participants in the arbitration to be subject to an attorneys' fees award against them...." Pet. 20. Their argument fails because, as set forth below, Petitioners admitted to being bound to the attorneys' fees

provision (Section 21), and Petitioners invoked the attorneys' fees provision (Section 21).

1. Petitioners Admitted They Were Bound by Section 21

"During oral argument, [Robinson Parties'] counsel stated that when the federal court remanded the case for arbitration, 'we became bound by Section 21; and therefore, we are bound not only by its obligations and potential liabilities, but we were inured with the benefits and rights under that provision, to the extent we qualified for them.' This assertion is a party *admission*, binding Mr. Robinson and Morgan Creek to the fee-shifting agreement of Section 21 of the APA." 2-ER-209 (emphasis added); *see also* 2-ER-286 ("Mr. Robinson and Morgan Creek admitted they are bound by Section 21 as if they were signatories...").

The arbitrator further ruled, "Mr. Robinson and Morgan Creek theorize that they are bound by Section 21, and can enforce Section 21, because they were ordered to participate in the arbitration as parties. This theory and equitable estoppel reach the same place by separate routes. Both bind [Respondents] and [the Robinson Parties]. Each side can enforce Section 21 and Section 21 can be enforced against them." 2-ER-287.

2. Petitioners Inequitably Invoked Section 21 to Claim a Benefit While Disavowing Any Liability Under It

The arbitrator ruled unambiguously that "[i]n the Interim Award, I decided Mr. Robinson and Morgan Creek were claiming a benefit under Section 21 while disclaiming any liability under it. This is inequitable; they cannot use Section 21 as both sword and shield. I found that Mr. Robinson and Morgan Creek are bound by Section 21…. Hence, under the doctrine of equitable estoppel, I decided Mr. Robinson and Morgan Creek are liable for [Respondents'] reasonable attorneys' fees and costs of the arbitration. In this Final Award, I reiterate that decision." 4-ER-698.

The district court found that "...the arbitrator concluded, Robinson and Morgan Creek should be bound by Section 21 as if they were signatories. This conclusion is neither a manifest disregard for governing law, nor completely irrational." App. to Pet. 73a. "[T]he arbitrator concluded that because [Petitioners] had attempted to exercise a right under Section 21, it would be inequitable to allow them to hide behind their not being signatories to avoid liability under it. [Robinson Parties] have failed to show that this conclusion was so unsound

that it was completely irrational or a manifest disregard under § 10(a)(4)." *Id.* at 75a.

The district court also ruled, "[t]he arbitrator's finding that [Robinson Parties] could be held jointly and severally liable for attorneys' fees ... is consistent with the arbitrator's interpretation of Section 21 as contemplating one side of the dispute bearing the other side's fees and costs and that the non-Cecilia parties should be included as part of the non-prevailing side, pursuant to equitable estoppel.... [N]either of these determinations runs afoul of § 10(a)(4).... The allocation of responsibility among [Robinson Parties] is an issue that they may take up with one another, if they so wish, but [Robinson Parties] have not shown that finding Robinson and Morgan Creek jointly and severally liable ... constitutes a manifest disregard of the law." *Id.* at 76-77.

The district court further ruled, "[i]n short, [Robinson Parties] have not demonstrated that the arbitrator's decision was contrary to the facts or to the relevant case law or would warrant a finding that 'the award is completely irrational, or exhibits manifest disregard of law. Thus, regardless of whether a court could reach a different conclusion, vacatur would be improper." App. to Pet. 76a-77a n.2 (internal citations omitted).

The Ninth Circuit affirmed:

> Because Robinson and Morgan Creek sought a benefit by asserting their entitlement to attorneys' fees and costs under Section 21 of the APA, *it was not completely irrational* for the arbitrator to apply equitable estoppel to hold these non-signatories jointly and severally liable for attorneys' fees and costs under that same provision. See *Griggs v. Evans*, 43 A.3d 1081, 1092 (Md. Ct. Spec. App. 2012) ("The doctrine of equitable estoppel is rooted in the equitable principle that it would be unfair for a party to rely on a contract when it works to its advantage, and repudiate it when it works to its disadvantage.") (internal quotation marks omitted). *Nor did the arbitrator manifestly disregard Maryland law* by finding that reliance was not required to hold Robinson and Morgan Creek liable under an equitable estoppel theory. See *Bessette v. Weitz*, 811 A.2d 812, 827 (Md. Ct. Spec. App. 2002) (explaining that '[t]here may be instances' where

> equitable estoppel does not require reliance).

App. to Pet. 6a. (emphasis added).

Accordingly, based on the specific facts in the record, the award did not exceed the arbitrator's powers.

C. Petitioners Rely on a Mischaracterization of the Specific Facts in the Record

This Court has long held that, "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925); *see also Texas v. Mead*, 465 U.S. 1041 (1984) (Stevens, J., respecting denial of certiorari); *NLRB v. Hendricks Cty. Rural Elec. Membership Corp*., 454 U.S. 170, 176 n.8 (1981) (improvident grant of cross-petition that presented "primarily questions of fact," "which does not merit Court review"); *Rudolph v. United States*, 370 U.S. 269 (1962); *Southern Power Co. v. North Carolina Pub. Serv. Co*., 263 U.S. 508 (1924); *Houston Oil Co. of Tex. V. Goodrich*, 245 U.S. 440 (1918); *see also* S. Ct. R. 10 (certiorari is "rarely granted" when the petition asserts "erroneous factual findings"); Stephen M. Shapiro, et

al., *Supreme Court Practice* § 4.14, at 4-43 (11th ed. 2019).

The Court has held that "a court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error." *Graver Tank & Mfg. Co.*, 336 U.S. at 275; *see also Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 840-41 (1996); *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987); *NCAA v. Board of Regents*, 468 U.S. 85, 98 n.15 (1984); *United States v. Doe*, 465 U.S. 605 (1984); *Rogers v. Lodge*, 458 U.S. 613, 623 (1982); *Branti v. Finkel*, 445 U.S. 507, 512 n.6 (1980); *Berenyi v. District Director, INS*, 385 U.S. 630, 635 (1967); Shapiro, *supra*, at 4-44.

Here, Petitioners assert that "[t]he decision to find Petitioners liable for roughly $4 million in attorneys' fees where *they prevailed on every claim asserted against them* based *solely* on the Petitioners request for an award of attorneys' fees was a 'rough brand of industrial justice' which cannot stand, and which calls for this Court's exercise of its supervisory power to vacate the award." Pet. 3 (emphasis added). Petitioners also assert, "[Respondents] did not prevail in any respect as to any claim against

Petitioners." Pet. 21. These assertions rely on a mischaracterization of the facts that is directly contradicted by the record.

1. Petitioners Falsely Assert They Prevailed

The record is very clear – Respondents are the prevailing party in the arbitration, which includes prevailing on all the Robinson Parties' counterclaims. App. to Pet. 16a ("Robinson, Cecilia, and Good Stuff counterclaimed against [Respondents] for recission based on fraud, recission based on breach of contract, breach of contract, breach of implied covenant of good faith and fair dealing, fraud, and breach of fiduciary duty."); *see also* 2-ER-273 ("I also expressly state what was self-evident when the Partial Final Award issued: [Respondents] are the 'prevailing Party' of the Merits Hearing."); *id.* at 2-ER-303-04 ("Thus, [Respondents] prevailed against Mr. Robinson on his counterclaims, and Mr. Robinson failed against the [Respondents]."); *id.* at 2-ER-299 ("In this arbitration, the [Respondents] clearly prevailed.").

The arbitrator specifically found that "[Robinson Parties'] continual assertion that Mr. Robinson and Morgan Creek 'prevailed against each and every cause of action brought against

them' *relies on a misreading of the Interim Award*." 2-ER-301 (emphasis added). The arbitrator expanded on this extensively:

> [Robinson Parties] interpret Scheduling Order 38 as authorizing them to again brief and argue that Mr. Robinson and Morgan Creek are prevailing parties under Section 21, entitled to recover their fees and costs against the [Respondents]. Their argument is based on reading Rulings 3 and 7 out of context.... [Robinson Parties] read [Ruling 3] as language authorizing them to argue in the future that they are the prevailing Party. This is incorrect.... [Robinson Parties] also rely on Ruling 7 to justify their re-argument of 'prevailing Party.' ... [Robinson Parties] misread this ruling as well.... It clarifies that I will decide, in making the final award, the individual liability of each [of the Robinson Parties] for the [Respondents'] attorneys' fees and costs. These rulings are straightforward. The [Respondents] are the prevailing Party entitled to recover their fees and

> costs under Section 21 of the APA against all [of the Robinson Parties]. The rulings at the end of Scheduling Order 38 underscore this outcome by setting a briefing schedule for [Respondents'] Fee Petition. I did not give Mr. Robinson and Morgan Creek permission to re-brief and re-argue their 'prevailing Party' position.

2-ER-299-301.

Altogether, the arbitrator ruled in no uncertain terms that the Robinson Parties were not the prevailing party, and that Respondents prevailed against each of the Robinson Parties, including Petitioners. 2-ER-211 ("[Respondents] are the 'prevailing Party' under Section 21 of the APA *against each [of the Robinson Parties].*") (emphasis in original).

This issue was specifically addressed by the district court. The district court ruled, "the arbitrator issued an Interim Award, which reiterated that [Respondents] were the prevailing party and found that Robinson and Morgan Creek were liable for attorneys' fees and costs…." App. to Pet. 18a; *see also* App. to Pet. 48a ("The Interim Award additionally found that [the Robinson Parties] were not entitled

to attorneys' fees and costs because they were not the prevailing party.").

The district court found that "the arbitrator interpreted Maryland law and the language of Section 21 to conclude ... that there could only be one prevailing party entitled to fees arising out of the dispute. The arbitrator then applied Maryland law to determine that [Respondents], not [Robinson Parties] were the 'prevailing party.'" App. to Pet. 64a; *see also* id. at 67a ("The Court finds that the arbitrator's interpretation of Section 21 of the APA to contemplate one prevailing party was not a manifest disregard of governing law or completely irrational.").

The Ninth Circuit affirmed.

2. Petitioners Disregard the Arbitrator's Finding that the Robinson Parties' "Uncompromising Approach to Litigation" is What Drove up the Fees and Costs

Petitioners assert, "Here there could be no 'conscious wrongdoing' by Petitioners in requesting attorneys' fees, and neither the arbitrator, the District Court nor the Ninth Circuit Court of Appeals *provided any rationale or explanation as to why any inequity existed in Pe-*

titioners' request for fees." Pet. 25 (emphasis added). That mischaracterization disregards material facts and findings in the record.

The arbitrator provided ample rationale and numerous explanations regarding the inequity that existed in Petitioners' fee request. As set forth *supra* (§ I.B), Petitioners admitted that they were bound to Section 21, and Petitioners inequitably used Section 21 as both a sword and a shield seeking a benefit while disavowing any liability under the contract.

Another explanation is the arbitrator's finding that the high cost of litigation is the result of the Robinson Parties' own litigation strategy. "Robinson Parties'] persistence drove up the [Respondents'] fees and costs.... Having engaged in an uncompromising approach to litigation ... [the Robinson Parties] cannot complain that the [Respondents'] fees and costs reflect their vigorous opposition." 2-ER-350.

D. The Arbitration Award was Also Confirmed on Alternative Grounds - Petitioners are Time-Barred

If the Court might be able to decide the case on another ground and not reach the point in conflict, the conflict itself may not be

sufficient reason for granting review. For example, in *South Dakota v. Kansas City Southern Industries, Inc.*, 880 F.2d 40 (8th Cir. 1988), *cert denied*, 493 U.S. 1023 (1990), the Court denied certiorari to resolve a split regarding the standard for the "sham" exception to the *Noerr-Pennington* doctrine (*Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965)) where there was an alternate, exclusively state-law ground for affirming the court of appeals. *See also*, *e.g.*, *Beard v. Knidler*, 558 U.S. 53, 60 (2009) (holding that discretionary state procedural rules can serve as an adequate ground to bar habeas review); *Abdur'Rahman v. Bell*, 537 U.S. 88 (2002) (per dissent of Stevens, J., dismissing certiorari out of concern over possible procedural default); *Sanson Hosiery Mills v. NLRB*, 344 U.S. 863 (1952); *Arlington, Inc., v. Mayer*, 339 U.S. 965 (1950).

Here, the district court ruled that the Robinson Parties were time-barred under the FAA and Maryland law. App. to Pet. 42a ("contrary to [Robinson Parties'] contention, the Court did conclude that [Robinson Parties'] request to vacate the Final Award was time-barred.... The FAA provides that any notice of a motion to vacate, modify, or correct an award must be

served upon the adverse party or his attorney within three months after the award is filed or delivered. 9 U.S.C. § 12.... The timing requirements for moving to vacate an arbitration award apply both to motions to vacate and to requests to vacate in oppositions to motions to confirm. An unsuccessful party at arbitration who did not move to vacate the award within the prescribed time may not subsequently raise, as affirmative defenses in a suit to enforce the award, contentions that it could have raised in a timely petition to vacate the award.") (internal citations and quotations omitted); *id.* at 58a ("Here, the request to vacate raised in respondents' opposition to petitioners' motion to confirm was untimely under both the FAA and Maryland law...."); *id.* at 43a ("Thus, [Robinson Parties'] request to vacate was untimely under both the FAA and Maryland law. [Robinson Parties'] failure to file a timely request for vacatur in this Court serves as another ground for confirmation.").

Those rulings remains undisturbed as the Ninth Circuit did not need to reach the issue. App. to Pet. 7a. ("Because we affirm the district court's grant of the Motion to Confirm on the foregoing grounds, we need not determine whether the Robinson Parties' opposition to the Motion to Confirm is time-barred under either the FAA or Maryland law.").

II. There is no Basis to Grant Certiorari on the Denial of Petitioners' Motion to Dismiss Based on Judicial Estoppel

Petitioners seek certiorari on the Ninth Circuit's holding affirming denial of the Robinson Parties' motion to dismiss,[18] based on an alleged conflict with this Court's precedent in *Atlantic Marine Const. Co., Inc. v. U.S. Dist. Court*, 571 U.S. 49 (2013), and an alleged conflict between the First and Sixth Circuits. However, there is no genuine conflict with *Atlantic Marine*, nor is there a genuine conflict between the First and Sixth Circuits. Moreover, even if the Court were to grant certiorari on the issue, the outcome of the case would not change because the district court also denied the motion to dismiss on two alternative grounds – it was an inappropriate vehicle for responding to the motion to confirm the arbitration award, and waiver.

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[18] Two of the Robinson Parties, Cecilia and Good Stuff, are not challenging the lower court's denial of the motion to dismiss.

A. There is No Conflict with This Court's Holding in *Atlantic Marine*

Petitioners assert, "[t]he Ninth Circuit panel's holding in this case also decided an important question of federal law (whether forum non conveniens required dismissal) in conflict with Supreme Court precedent expressed in *Atlantic Marine Const. Co., Inc. v. U.S. Dist. Court*, 571 U.S. 49, 63 (2013)." Pet. 16. They are incorrect. Petitioners rely on *Atlantic Marine*'s holding that, "statements made in an action about venue 'say nothing about a forum-selection clause.'" Pet. 2-3. However, as the district court ruled, that "argument misses the point." App. to Pet. 26a.

Atlantic Marine involved a party who sought a transfer from one district court to another district court (i.e., from Western District Court of Texas to the Eastern District Court of Virginia), which is factually distinct from the present case wherein Petitioners sought a transfer from a federal court to a state court. *Atlantic Marine*, 571 U.S. at 53.

Even so, in *Atlantic Marine* this Court held that "the appropriate way to enforce a forum-selection clause pointing to a state or foreign forum," as in the present case, "is through the doctrine of *forum non conveniens*." *Id.* at 60.

The case was remanded for the lower courts to consider whether public-interest factor in a *forum non conveniens* analysis support the denial of the motion to transfer. *Id*. at 68.

Here, distinct from *Atlantic Marine*, the district court ruled that Robinson Parties are judicially estopped from moving to dismiss on *forum non conveniens* grounds.

> While it is correct that proper venue, which is determined by federal venue laws, and forum are distinct concepts, [Robinson Parties] did more than simply assert venue was legally proper in the Central District of California. In filing their petition to confirm the PFA in … the 2019 case, [Robinson Parties] unequivocally asserted their position that the parties could adjudicate the arbitration award in this district, notwithstanding the forum selection clause in the APA.... This position is clearly inconsistent with their current position.... [Robinson Parties] have not raised any reason why this action would be governed by the forum selection clause while the 2019 action

> would not. And any such argument would be unpersuasive, as both actions involve the same parties, arise out of the same arbitration, and seek to confirm arbitration awards....

Id. at 26a.

In addition, the district court ruled that the Robinson Parties untimely raised this argument in their motion for reconsideration after having failed to raise it when the motion to dismiss was before the district court. App. to Pet. 25a.

The Ninth Circuit affirmed:

> The Robinson Parties argue that their 2019 representations about judicially determined 'venue' have no relation to their current representations about contractually determined 'forum', citing to *Atl. Marine Const. Co. v. U.S. Dist. Ct. for W. Dist. Of Texas*, 571 U.S. 49 (2013). But the record belies this post hoc distinction. The Robinson Parties had not differentiated between venue and forum in their 2019 action,

> and in fact justified their choice to file the 2019 petition in the Central District by stating that the [Respondents] waived any objections to venue by filing there first in 2016.... The district court properly concluded that the Robinson Parties are attempting to secure an unfair advantage by dismissing this petition under *forum non conveniens.* Both parties have, at various points, chosen to litigate this dispute in the Central District in direct contravention of the APA's clear forum selection clause. Now, the Robinson Parties suddenly want to prevent [Respondents] from litigating this petition in the Central District after they made the exact choice in the 2019 action.... The Robinson Parties' reversal of position suggests the very gamesmanship that judicial estoppel seeks to avoid.[19]

App. to Pet. 2a-5a.

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[19] App. to Pet. 5a.

Altogether, in addition to being untimely, Petitioners fail to establish any genuine conflict between the Ninth Circuit's decision and this Court's precedent in *Atlantic Marine*.

B. There is No Conflict with the First or Sixth Circuit's Holdings

Petitioners assert that the Ninth Circuit's holding in this case conflicts with the Sixth Circuit's holding in *Teledyne Indus., Inc. v. N.L.R.B.*, 911 F.2d 1214, 1218-1219 (6th Cir. 1990), and the First Circuit's holding in *Perry v. Blum*, 629 F.3d 1, 11 (1st Cir. 2010), because "there was never any finding made here by the district court in the 2019 action as to issues of proper venue or forum…." Pet. 13. Based on specific facts and findings in the record in this case, Petitioners are incorrect.

As noted by the district court in 2022,[20] the district court in 2019[21] necessarily determined that venue and forum were proper by choosing to retain jurisdiction over several years. App. to Pet. 88a-89a ("[Robinson Parties] were successful in their representation to the court that

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[20] The 2022 case was filed in district court before the Hon. Judge Christina A. Snyder.

[21] The 2019 case was filed in district court before the Hon. Judge Otis D. Wright.

venue was proper, as demonstrated by the fact that Judge Wright presided over the 2019 case for numerous years and issued an order granting [Respondents'] motion to stay in the 2019 case. Because federal courts are required sua sponte to examine jurisdictional issues … this constitutes judicial acceptance of venue….") (internal citations and quotations omitted).

In addition, as the Ninth Circuit found, the Robinson Parties specifically referred to the forum selection clause in their 2019 petition.

> Because Judge Wright granted the [Respondents'] motion to stay the 2019 action, received numerous joint status reports, and presided over the case for three years, he necessarily accepted – or relied on – the Robinson Parties' representation that the petition was properly filed in the Central District ... By filing the 2019 action, the Robinson Parties effectively misled the district court into believing it would not contest its own choice of venue in the Central District – which it does now. In response, the Robinson Parties suggest that their filing of the 2019 action in the

> Central District was a genuine mistake: new counsel joined the case in 2018, was unaware of the forum selection clause, and incorrectly believed that the 2019 action should be filed in the same place as the [Respondents'] 2016 proceeding. The record does not support that view. The 2019 petition cites directly to the APA's forum selection clause. And this entire dispute arises out of a ten-page agreement. It seems highly unlikely that sophisticated counsel would overlook a pivotal clause in such a short contract.

App. to Pet. 4a-5a (emphasis added).

Thus, there is no genuine conflict here. Even if a conflict were to exist between the Ninth Circuit and the First and Sixth Circuits, it would not need to be resolved at this time by this Court. Such a conflict would likely be resolved in any of the circuits, or all of them, by simply ruling next time on the issue *en banc*. The Sixth Circuit's decision in *Teledyne Indus., Inc. v. N.L.R.B.*, 911 F.2d 1214, 1218-1219 (6th Cir. 1990), was decided by a three-judge panel, as was *Perry v. Blum*, 629 F.3d 1, 11–12 (1st Cir. 2010). The present case was

decided by a three-judge panel and, upon petition for rehearing, none of the Ninth Circuit judges asked for a vote to hear the case *en banc*. App. to Pet. 98a ("The full court has been advised of the petition and no judge has requested a vote on whether to rehear the matter en banc.").

C. Petitioners' Motion to Dismiss was Denied on Two Alternative Grounds – Inappropriate Vehicle for Responding to the Motion to Confirm, and Waiver.

The district court ruled that, "[Robinson Parties'] motion to dismiss is an inappropriate vehicle for responding to the motion to confirm the arbitration award and should be denied on that basis." App. to Pet. 82a.

The district court also ruled that independent from being *judicially estopped* from enforcing the forum selection clause, the Robinson Parties had also *waived* the right to enforce the forum selection clause. App. to Pet. 31a-33a. ("Regardless of whether petitioners have successfully established that judicial estoppel is appropriate here, the Court concludes that respondents have waived their right to enforce the forum selection clause."). The district court found:

> "[Robinson Parties] filed a petition to confirm the PFA in this district, notwithstanding the forum selection clause... Waiver is appropriate in such circumstances because [Robinson Parties] have 'intentional[ly] relinquish[ed] a known right' and 'act[ed] in a manner inconsistent with the intent to enforce a right.... Principles of fairness counsel that such conduct is improper.... Once the arbitrator issued the Final Award and [the Robinson Parties] 'f[ound] out which way the wind is blowing,' they changed course and contended that [Respondents'] motion to confirm is subject to the forum selection clause. Permitting [the Robinson Parties] to enforce the forum selection clause now would encourage this inequitable conduct and would contravene the strong public policy against forum shopping.

App. to Pet. 33a.

III. This Case Does Not Present an Issue of National Importance

The issues in a writ for certiorari must be "beyond the academic or the episodic." *Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 74 (1955). Even "serious legal questions" may not be sufficient. *English v. Cunningham*, 361 U.S. 905, 907 (1959).

The importance of an issue relates "to the public as distinguished from" importance to the particular "parties" involved. *Layne & Bowler Corp. v. Western Wall Works*, 261 U.S. 387, 393 (1923); *Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 79 (1955); Stephen M. Shapiro, et al., *Supreme Court Practice* § 4.11, at 4-33 (11th ed. 2019). "Except where a governmental or public body is a litigant and is able to demonstrate in terms of the public interest it represents, an issue the Court deems of interest and importance only to the immediate parties to the case is not likely to qualify as worthy of further consideration." Stephen M. Shapiro, et al., *Supreme Court Practice* § 4.11, at 4-34 (11th ed. 2019).

Here, Petitioners fail to show that any *important* constitutional issues are implicated. This case involves a commercial dispute between private parties. It does not rise to the

level of importance worthy of this Court's limited time and resources.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari may be denied.

Respectfully submitted,

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