

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 ARTHUR ANDERSEN LLP, ET :

4 AL. :

5 Petitioners :

6 v. : No. 08-146

7 WAYNE CARLISLE, ET AL. :

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9 Washington, D.C.

10 Tuesday, March 3, 2009

11

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

15 APPEARANCES:

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

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

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P R O C E E D I N G S

(11:19 a.m.)

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

Mr. Baker.

ORAL ARGUMENT OF M. MILLER BAKER

ON BEHALF OF THE PETITIONERS

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

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

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

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

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

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

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

17 MR. BAKER: Your Honor, it's -- it's clear
18 from the -- from the context it's referring to parties
19 to the action. Likewise, in section 4 there's a
20 reference to parties, and it's parties to the
21 controversy. So section 3 refers to parties to the
22 action in which the section 3 stay is sought. Section
23 4, likewise, the companion enforcement provision, refers
24 to parties to the controversy.

25 CHIEF JUSTICE ROBERTS: And what -- what is

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

13 MR. BAKER: Section 2, Your Honor, sets the
14 policy of the FAA, and section 2 establishes that State
15 law determines the rights and obligations of nonparties
16 to an arbitration agreement. If nonparties have rights
17 --

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

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

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

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

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

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

16 JUSTICE SCALIA: Why do you say that section
17 2 -- it isn't at all clear to me that section 2 says
18 State law determines whether somebody not a party to the
19 arbitration agreement can -- can enforce it.

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

1 those questions.

2 JUSTICE SCALIA: Including enforceability by
3 whom?

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

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

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

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

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

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

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

15 MR. BAKER: Well, the Respondents might --
16 might contend so, and they -- they are free to argue on
17 remand the question of whether or not that bankruptcy in
18 any way affects our rights, whether we can prevail under
19 equitable estoppel in this case. But for purposes of
20 this Court, the question that we -- that the Court has
21 to decide is whether or not as a matter of law a
22 nonparty is foreclosed from seeking relief under section
23 3, and section 3 does not foreclose such relief because
24 section 2 establishes the principle that this -- that a
25 court is to look to State law to determine the question

1 of who can enforce an arbitration agreement.

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

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

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

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

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

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

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

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

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

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

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

18 MR. BAKER: It absolutely does.

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

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

1 sections -- it is a Federal question as to what sections
2 3 and 4 require.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

19 JUSTICE GINSBURG: But if you read section
20 3, if you interpret, as you do, the word "parties" to
21 mean parties to the litigation, then for purposes of
22 jurisdiction the only thing is, is this person a party
23 to the litigation? Yes. End of case; they can move for
24 a stay. Then whether they're entitled to one because of
25 this equitable estoppel theory which is determined by

1 the State law is a merits question.

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

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

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

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

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

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

25 MR. BAKER: Your Honor, I turned to the

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

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

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

10 JUSTICE GINSBURG: Good.

11 (Laughter.)

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

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

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

1 --

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

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

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

15 JUSTICE GINSBURG: And that's your
16 jurisdictional argument.

17 MR. BAKER: That's our jurisdictional
18 argument, that the mere request for relief under section
19 3 and the denial of that request triggers appellate
20 jurisdiction.

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

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

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

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

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

21 MR. BAKER: Well, absolutely, Your Honor.

22 JUSTICE BREYER: What?

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

25 JUSTICE BREYER: Okay.

1 MR. BAKER: There's a whole --

2 JUSTICE BREYER: I mean, which one applies
3 here?

4 MR. BAKER: Well, estoppel, and there are --

5 JUSTICE BREYER: Estoppel? I don't
6 understand estoppel.

7 MR. BAKER: Well, Your Honor, it's a theory
8 that was --

9 JUSTICE BREYER: I know what estoppel is in
10 the law.

11 (Laughter.)

12 MR. BAKER: More precisely, it's equitable
13 estoppel, but the -- the practice treatises have entire
14 chapters devoted to --

15 JUSTICE BREYER: I know, but I haven't
16 unfortunately had a chance to read all the practice
17 treatises. So, could you explain to me quite simply
18 what is the theory of equitable estoppel that allows
19 someone who is not a signatory to an arbitration
20 contract to have it enforced?

21 MR. BAKER: Yes, Your Honor. The theory
22 here is that the Respondents asserted claims of -- of
23 concerted misconduct, of conspiracy against the
24 Petitioners, some of whom were -- one of -- well, none
25 of whom were signatories to the arbitration agreement

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

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

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

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

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

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

11 MR. BAKER: The theory of equitable
12 estoppel.

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

16 MR. BAKER: Your Honor --

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

20 (Laughter.)

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

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

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

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

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

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

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

16 MR. BAKER: Your Honor --

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

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

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

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

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

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

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

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

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.
15 Mr. De Marco.

16 ORAL ARGUMENT OF PAUL M. De MARCO

17 ON BEHALF OF THE RESPONDENTS

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

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

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

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

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

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

10 MR. De MARCO: Yes, sir.

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

17 MR. De MARCO: Because the stay that he
18 requested was distinctly outside section 3, not as a
19 merits question, but so far outside question -- section
20 3 that we can say he should not -- that the stay was not
21 requested under section 3; it was not denied under
22 section --

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

1 is really what you're saying --

2 MR. De MARCO: Right.

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

5 MR. De MARCO: Yes. There are --

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

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

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

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

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

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

7 MR. De MARCO: Right.

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

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

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

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

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

5 Here, by -- by claiming equitable estoppel
6 not only aren't the Petitioners asserting rights that
7 flow to them from the contract, because they have no
8 contract; they are actually saying -- this is the gist,
9 it gets back to your question, what's the gist of their
10 equitable estoppel theory? It's as we quote in footnote
11 13: The gist of it is that equitable principles prevent
12 Respondents from claiming that they have no obligation
13 to arbitrate with the Petitioners despite the lack of an
14 agreement.

15 Their very theory assumes that what section
16 3 says must exist is absent. Their very theory says we
17 don't have an agreement of our own to assert, and
18 therefore, we need equitable principles to fill the
19 void. Now, where do these equitable principles come
20 from?

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

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

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

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

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

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

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

4 MR. De MARCO: Yes.

5 JUSTICE SOUTER: And what is your reason for
6 saying that?

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

9 JUSTICE SOUTER: Yes.

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

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

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

25 The examples they use -- assignment, they

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

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

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

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

24 MR. De MARCO: Right.

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

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

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

11 MR. De MARCO: Right.

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

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

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

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

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

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

18 MR. De MARCO: Right.

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

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

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

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

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

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

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

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

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

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

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

20 MR. De MARCO: It does.

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

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

1 ground rules for asking for this stay?

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

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

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

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

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

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

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

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

25 JUSTICE STEVENS: Yes.

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

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

14 MR. De MARCO: Yes.

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

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

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

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

6 MR. De MARCO: Right.

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

9 MR. De MARCO: Right.

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

16 MR. De MARCO: Right.

17 JUSTICE BREYER: So is that -- is that
18 right, or is it wrong? What's your instinct or guess on
19 that?

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

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

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

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

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

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

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

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

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

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

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

20 MR. De MARCO: Pardon me?

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

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

1 though, that -- I -- I think we have to be careful in --
2 in judging the -- a stay motion, to focus on the
3 language of section 3 under the "under a written
4 agreement" language, and when -- when that is the focus,
5 I think it's clear that theories such as equitable
6 estoppel, an outlier among all those theories that were
7 listed -- assumption, assignment -- an outlier among
8 them -- uniquely says, despite the lack of a written
9 agreement to arbitrate, equity requires; equity says it
10 should be arbitrated. That -- that I think is
11 incompatible with the language of section 3. After all
12 --

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

21 MR. DE MARCO: Right.

22 JUSTICE GINSBURG: That would be all right?

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

1 attempts, perhaps labels its motion a section 3 stay,
2 but misses the mark by not truly grounding it in
3 section 3. When it misses the mark, their outlet,
4 their pathway to interlocutory appeal ought to be
5 1292(b), particularly because section 16(b) indicates
6 Congress felt that was a compatible accommodation in the
7 stay -- in the arbitration context.

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

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

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

1 section 3.

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

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

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

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

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

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

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

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

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

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

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

13 MR. De MARCO: Yes.

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

17 MR. De MARCO: Right.

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

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

1 them there from here.

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

4 Mr. Baker, you have four minutes remaining.

5 REBUTTAL ARGUMENT OF M. MILLER BAKER

6 ON BEHALF OF THE PETITIONERS

7 MR. BAKER: Thank you, Your Honor.

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

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

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

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

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

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

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

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

5 1292(b) -- the right to appellate
6 jurisdiction is illusory because if that is denied, a
7 nonparty with arbitration rights would be forced to
8 litigate and lose the very things that arbitration is
9 designed to avoid -- that is, the cost and time of being
10 in litigation in a district court. Not only that, the
11 district court will suffer the loss of judicial
12 efficiency by having to litigate -- litigate a case
13 before it or adjudicate a case that should be in
14 arbitration.

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

17 CHIEF JUSTICE ROBERTS: Thank you, counsel.

18 The case is submitted.

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

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