No. 24-64

In the Supreme Court of the United States

NICHOLAS PIAZZA, *et al.*,

Petitioners,

v.

GRAMERCY DISTRESSED OPPORTUNITY FUND II L.P., *et al.*,

Respondents.

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

BRIEF OF AMICUS CURIAE CIVIL JUSTICE ASSOCIATION OF CALIFORNIA IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether, under 9 U.S.C. § 16, a circuit court has appellate jurisdiction over an interlocutory order denying a motion for a stay pending arbitration or for an order compelling arbitration where those requests for relief are included within a motion to dismiss.

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INTEREST OF AMICUS CURIAE

Founded in 1979, the Civil Justice Association of California (CJAC) is a non-profit organization representing businesses, professional associations and financial institutions. The association's principal purpose is to educate the public and governing bodies about ways to make the judicial process and our civil liability laws more fair, certain, economical and efficient. Toward this end, CJAC regularly appears as amicus curiae in numerous cases of interest to its members, including those that concern the scope and application of the Federal Arbitration Act ("FAA"); in this case, invoking the statutory right granted by Congress to directly appeal from interlocutory orders denying a party's request to arbitrate disputes and to stay litigation until the claims that are subject to arbitration are fully resolved.

CJAC and its constituent members are substantially interested in the development of clear and consistent procedural rules governing the exercise of parties' statutory rights to take an interlocutory appeal from the orders of the federal courts denying a motion to dismiss claims in litigation that are subject to contractual arbitration, and the remedy of "staying" arbitral claims that are asserted in court proceedings until final resolution of those disputes.[1]

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made any monetary or other contribution to its preparation or submission. The parties' counsel of record received timely notice of the intent to file the amicus brief.

BACKGROUND AND SUMMARY OF ARGUMENT

In December 2021, plaintiffs and respondents (collectively, "Gramercy" or respondents) brought a civil complaint in the District of Wyoming against the five petitioner-defendants (collectively "Piazza Defendants" or petitioners), and others asserting a variety of RICO and common law tort claims. App. 3a.

According to the district court's recitation: "In a nutshell, Gramercy alleges that [Ukranian oligarch, Oleg] Bakhmatyuk and the [Piazza] Defendants together engaged in a multi-year pattern of racketeering activity to defraud Gramercy of the value of notes it [acquired and] holds from non-parties UkrLandFarming PLC ("ULF") and its subsidiary Avangardco IPL ("AVG," together with ULF, the "Company"), which are Ukrainian agricultural companies that Bakhmatyuk controls. Gramercy brings three claims for civil liability under the federal Racketeer Influenced and Corrupt Organizations ("RICO") laws, 18 U.S.C. § 1961 et al. The RICO claims are the basis of the Court's subject-matter jurisdiction. Gramercy also brings state law claims for fraud, tortious interference with contract (i.e., the ULF and AVG notes), civil conspiracy and aiding and abetting." App. 11a (brackets added, abbreviations in original).

It alleged: "Since October 2015, Gramercy has held more than 25% of AVG's notes (hereafter, the "AVG Notes"). The AVG Notes are governed by the

AVG Trust Deed. ECF No. 1 ¶¶ 46, 47; ECF No. 44-19 (Def. Ex. 5, excerpts), ECF Nos. 44-20 through 44-23 (Def. Ex. 5A, complete copy)." App. 12a.

Gramercy further claimed: "The AVG Trust Deed gives certain rights to Noteholders above 25%. Since 2017, Gramercy has held roughly 41% of the AVG Notes. Meanwhile, between 2013 and 2017, Gramercy purchased over 28% of ULF's notes (hereafter, the "ULF Notes"). ECF No. 1 ¶ 48. The ULF Notes are governed by the ULF Trust Deed. *Id*. ¶ 49; ECF No. 44-24 (Def. Ex. 6, excerpts), ECF Nos. 44-25 and 44-26 (Def. Ex. 6A, complete copy). The ULF Trust Deed gives certain rights to Noteholders above 25%. Gramercy has held more than 25% of the ULF Notes since July 21, 2016." App. 12a.

This was the thrust of Gramercy's claims: "Since at least 2016, Ukrainian oligarch Oleg Bakhmatyuk has perpetrated a complex, multi-faceted scheme in order to maintain control over his agricultural business, (ULF and AVG), so that he could exploit the Company's assets as his own personal war chest and *frustrate Gramercy's right to recover on the Notes*." App. 12a-13a (italics added.) The Piazza Defendants allegedly participated in the scheme, or otherwise aided and abetted Bakhmatyuk's activities in that regard. *Ibid*. App. 13a; *see also id*. at App. 14a-16a.

"Gramercy alleges that through the [Defendants'] pattern of racketeering activity, Bakhmatyuk carried out a scheme of misinformation and deception [including formation of 'dummy'

Wyoming entities all of which] culminated in the siphoning of nearly a billion dollars of assets for the purposes of *preventing a Gramercy-led creditor takeover and obliterating the value of Gramercy's Notes*." App. 18a (italics added).

In response to Gramercy's action, the Piazza Defendants moved to dismiss, raising a variety of alternative arguments. (E.g., Petition at 16-17.) The motion argued that the trial court should stay or dismiss the lawsuit because the dispute is subject to binding arbitration under the FAA. App. 3a–4a. The motion expressly invoked the FAA, explicitly asking the district court to "stay" or "stay or dismiss" the litigation, and stated that it was "a request to refer an international dispute to arbitration" and that the court should "refer this dispute to arbitration in London." App. 20a–21a, 68a, 149a, 150a, 289a. The motion's conclusion said, "*For the foregoing reasons, the Complaint should be stayed or dismissed pending arbitration*, pursuant to Rules 12(b)(1), (2), (6), (7), 19(a), and 19(b)." App. 200a (italics added), 311a. The motion made other arguments as well, asserting in the alternative that Gramercy's complaint should be dismissed for lack of personal jurisdiction, forum non conveniens, and failure to state a claim. App. 179a–200a, 297a–311a.

Gramercy's opposition to the motion to dismiss argued that the parties' dispute was not subject to arbitration because, among other reasons, neither Gramercy nor the Piazza Defendants were actually "signatories" to the Notes and Deeds of Trust acquired by Gramercy. App. 22a-23a.

The district court took notice of the contents of the "broad" arbitration provisions governing disputes "arising out of" the notes and trust deeds. *See* App. 11a-12a, n. 3; *see also* 21a-22a. The arbitration clauses provided for binding arbitration of disputes arising from those contracts under English law, and that the question of "arbitrability" of claims was also the subject of the arbitration – i.e., the question of the arbitrator's "jurisdiction" would be determined by the arbitrator. App. 23a; *see also* 159a-160a. The district court ultimately agreed with Gramercy that the arbitration provisions could not be enforced against non-signatories. App. 23a-30a, 69a-70a.

Petitioners appealed to the Tenth Circuit under 9 U.S.C. § 16. Section 16 confers appellate jurisdiction over any interlocutory order that "refuse[s] a stay of any action under section 3 of [the FAA]," "den[ies] a petition under section 4 of [the FAA]," or "den[ies] an application under section 206 of [the FAA]." 9 U.S.C. § 16(a)(1).

The Tenth Circuit summarily dismissed the appeal. The court held that it lacked appellate jurisdiction because the form of petitioners' "motion to dismiss" raised challenges to issues of jurisdiction and the legal viability of certain claims alleged by Gramercy. According to the Tenth Circuit, by raising certain arguments concerning the merits of Gramercy's alleged claims in a motion to dismiss, petitioners waived the right to appeal under the FAA, applying the "bright-line" test articulated by that court in *Conrad v. Phone Directories Co.*, 585 F.3d 1376 (10th Cir. 2009). App. 1a–2a.

The petition cogently digests the conflict that presently exists among the circuit courts over the proper application of a party's section 16 right to pursue an appeal from interlocutory orders within the purview of the FAA. The Tenth Circuit's "bright-line" test is inconsistent with the statute's plain meaning and purpose. This court should grant certiorari to assure uniformity of decision under the FAA by settling this important question of federal law.

ARGUMENT

I. History and purpose of the right to appeal interlocutory orders under Section 16 of the FAA

The FAA "is a congressional declaration of a liberal federal policy favoring arbitration agreements …." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (*Moses H. Cone*). To further that policy, "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Ibid.* This policy reflects the "FAA's commitment to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts." *Morgan v. Sundance, Inc.*, 596 U.S. 411, 418 (2022).

The general rule that prevented interim appeals of orders involving arbitration was substantially altered in 1988 when Congress amended the FAA by adopting 9 U.S.C. § 16 to govern appeals from district court orders in cases involving arbitration.

See Judicial Improvements and Access to Justice Act, Pub.L. No. 100-702, Title X, § 1019(a), 102 Stat. 4642, 4671 (1988). *Stedor Enterprises, Ltd. v. Armtex, Inc.*, 947 F.2d 727, 730 (4th Cir. 1991) (*Stedor Enterprises*) "The broad purpose of section 16 was to implement Congress' 'deliberate determination that appeal rules should reflect a strong policy favoring arbitration.' [Citation omitted.]" *Ibid*.

By enacting section 16, Congress sought to effectuate this policy in providing that "an order that favors litigation over arbitration — whether it refuses to stay the litigation in deference to arbitration; [or] refuses to compel arbitration … is immediately appealable, even if interlocutory in nature. *See* 9 U.S.C. § 16(a)(1) and (2)." *Stedor Enterprises*, 947 F.2d at 730. The right to take an interim appeal facilitates the strong federal policy of upholding agreements to arbitrate – "a party who believes that arbitration is required by an agreement between the parties need not suffer the expense and inconvenience of litigation before receiving appellate review of a district court judgment that arbitration was inappropriate." *Ibid*; *Wheeling Hospital, Inc. v. Health Plan of the Upper Ohio Valley, Inc.*, 683 F.3d 577, 584 (4th Cir. 2012) (*Wheeling Hospital*).

An immediate appeal from the denial of the right to arbitrate also reflects the policy often stated by this court that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an

allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone*, 460 U.S. at 24-25.

This duty to enforce arbitration agreements "is not diminished when a party bound by an agreement raises a claim founded on statutory rights" or alleges theories in a lawsuit that do not involve traditional contract breach. *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 226 (1987). As in this case, when provisions to arbitrate are broadly phrased – applying to *any* disputes "arising under" "arising out of" or "connected with" the agreement – "they are normally given broad construction, and are generally construed to encompass claims going the formation of the underlying agreements" and the parties' performance of them. *Battaglia v. McKendry*, 233 F.3d 720, 727 (3d Cir. 2000); *cf.* App. 11a-12a, 21a-22a.[2]

The district court's order denying arbitration of Gramercy's claims and related requests to stay the action was based principally on its conclusion that the

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[2] Such broad construction follows this court's FAA jurisprudence that agreements to arbitrate a particular dispute "should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *See Battaglia v. McKendry*, 233 F.3d at 727 (fraudulent misrepresentation; fraud in the inducement); *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. at 222 (ordering arbitration of RICO claims); *Abrams v. Chesapeake Energy Corp.,* Nos. 4:16–cv–1343, 1345-1347, 2017 WL 6541511, at *6 -7 (M.D. Pa. Dec. 21, 2017) ("Plaintiffs' standing to bring Sherman Act, RICO, conversion, civil conspiracy, and unjust enrichment claims arises only based on their status as leaseholders" under agreements compelling arbitration of any disputes – citing *Battaglia* and *Shearson/Am. Express*).

arbitration provisions in the Notes and Deeds of Trust that Gramercy had assumed could not be enforced against these plaintiffs as "non-signatories." App.23a-30a, 69a-70a. On the contrary, federal law "provides guidance for determining the circumstances under which a non-signatory may be bound by such agreements." *Griswold v. Coventry First LLC*, 762 F.3d 264, 271 (3d Cir. 2014) (*Griswold*). Under traditional principles of contract and agency law recognized by the FAA, the party bringing suit may be deemed "akin to a signatory of the underlying agreement." *Id*. at 271-72.

As argued by petitioners' motion to dismiss, "[e]stoppel can bind a non-signatory to an arbitration clause when that non-signatory has reaped the benefits of a contract containing an arbitration clause. *See Thomson-CSF, S.A. v. American Arbitration Assoc.*, 64 F.3d 773, 778 (2d Cir. 1995). This prevents a non-signatory [in the position of Gramercy] from 'cherry-picking' the provisions of a contract that it will benefit from and ignoring other provisions that don't benefit it or that it would prefer not to be governed by (such as an arbitration clause)." *Invista S.A.R.L. v. Rhodia, S.A*, 625 F.3d 75, 84-85 (3d Cir. 2010) (bracketed text added).

Here, Gramercy claimed that the Piazza Defendants allegedly participated in a scheme which, among other things, resulted in "obliterating the value" of the Notes plaintiffs had acquired and thereby frustrated their assumption of other interests. *See, e.g.*, App. 14a-18a.

Moreover, by the terms of the arbitration provisions at-issue, questions concerning the "arbitrability" of those claims were to be decided *by the arbitrator*. *See* App. 23a; 159a-160a.

Henry Schein Inc. v. Archer and White Sales Inc., 586 U.S. 63 (2019) (*Henry Schein*), holds that under the FAA district courts may not decide whether an arbitration agreement applies to the particular dispute where the parties "clearly and unmistakably" delegated that question *to an arbitrator*, even if the court believes that the argument for arbitrability is "wholly groundless." *Id*. at 65-67. When a contract so provides, those are "gateway questions" for the arbitrator alone to decide:

> That conclusion follows not only from the text of the Act but also from precedent. We have held that a court may not "rule on the potential merits of the underlying" claim that is assigned by contract to an arbitrator, "even if it appears to the court to be frivolous."

Henry Schein, 586 U.S. at 68-69.

At a minimum, petitioners raised colorable legal arguments in their motion to dismiss that directly invoked sections 3 and 4 of the FAA. The denial of those requests for relief by virtue the district court's rulings denying this relief were subject to their right to pursue an interim appeal under section 16. That right should not have been short-circuited by the application of the Tenth Circuit's "bright line" rule.

II. The present conflict among the Circuits about whether a motion to dismiss may properly include requests for relief under the FAA to compel arbitration and stay judicial proceedings requires resolution by this court

The source of the conflict among the circuit courts about the ostensible "waiver" of the right to appeal under section 16 arises where defendant in seeking remedies under the FAA either combines that request, or precedes it, with a motion that also addresses the "merits" of the lawsuit – such as, the validity of the plaintiffs' claims, personal jurisdiction, etc. The Piazza Defendants made alternative arguments along those lines in their moving papers styled as a "motion to dismiss."

The three prevailing views, described as "broad," "narrow" and "functional," are not particularly helpful in their articulation or application as the instant case illustrates. *See* Petition at 6-10; *see, e.g.*, *Devon Robotics, LLC v. DeViedma*, 798 F.3d 136, 145 (3d Cir. 2015) (discussing the split of authority).

As with other contractual rights, the right to arbitrate may be waived. *United States ex rel. Dorsa v. Miraca Life Sciences, Inc.*, 33 F.4th 352, 357 (6th Cir. 2022) (*Dorsa*) (citing *Am. Locomotive Co. v. Gyro Process Co.*, 185 F.2d 316, 318 (6th Cir. 1950)). However, an interpretation that a party has "waived" its rights accruing under the FAA, including the right to appeal interlocutory arbitration orders under

section 16, is disfavored and will not be lightly inferred. *Moses H. Cone*, 460 U.S. at 24-25.

The "functional" approach, which was ostensibly adopted by the Tenth Circuit in *Conrad,* 585 F.3d 1376, purports to chart a middle course. *Conrad* devised a two-step test: First, the court looks at the caption of the motion to see if movant is seeking relief under the FAA; second, if the form of that motion does not answer the question, "the court must look beyond the caption … to determine whether it is plainly apparent from the four corners of the motion that the movant *seeks only the relief provided for in the FAA*." *Id*. at 1385, italics added.

Other courts applying this functional test, have declined to take the Tenth Circuit's second element (requiring a motion seeking *exclusive* relief under the FAA) to that extreme.

For example, the Sixth Circuit has held that the filing of a motion to dismiss challenging the merits of the plaintiffs' claims *may* under some circumstances be plainly inconsistent with a defendant's reliance on an arbitration agreement. However, that Circuit acknowledges that "'[n]ot every motion to dismiss is inconsistent with the right to arbitration.'" *Solo v. United Parcel Serv. Co.*, 947 F.3d 968, 975 (6th Cir. 2020) (*Solo*). The *Solo* court also recognized that "the Eighth Circuit has held that a motion to dismiss raising 'jurisdictional and quasi-jurisdictional grounds' but seeking 'no action with respect to the merits of the case' is not inconsistent with later seeking arbitration." *Ibid.* (quoting *Dumont v. Sask.*

Gov't Ins., 258 F.3d 880, 886-87 (8th Cir. 2001)). The outcome depends on *the context* of the relief requested.

"Similarly, where a complaint asserts a mix of arbitrable and nonarbitrable claims, 'the portions of the motion [to dismiss] addressed to nonarbitrable claims do not constitute a waiver.'" *Solo*, 947 F.3d at 975. This more flexible view is consistent with the moving party's right under the Federal Rules of Civil Procedure to make arguments and plead defenses *in the alternative* – recognizing that the relief requested by a motion to dismiss may not always amount to an "all-or-nothing" proposition. *See* Petition at 9-10, 13.

Cases using this more pragmatic iteration of the "functional test" ordinarily will find a "waiver" of the right to arbitrate only in circumstances where the defendant's "motion to dismiss … seeks 'a decision on the merits' and 'an immediate and total victory in the parties' dispute' [that] is entirely inconsistent *with later requesting* that those same merits questions be resolved in arbitration." *Solo*, 947 F.3d at 975 (italics and brackets added). Common sense supports that rationale: "A party may not use a motion to dismiss 'to see how the case [is] going in federal district court,' while holding arbitration in reserve for 'a second chance in another forum.'" *Id.* at 975.

As the Sixth Circuit aptly explained: "Only after we reversed that favorable ruling [on the motion to dismiss under Rule 12(b)(6)] did UPS change course, filing an answer invoking arbitration and seeking to rely on the arbitration agreement to limit discovery to arbitration-related issues. Had that been

UPS's course of conduct from the outset of the litigation, it likely would not have waived its right to arbitrate." *Solo*, 947 F.3d at 975-76; *accord*, *Western Security Bank v. Schneider, Ltd.*, 816 F.3d 587, 589-90 (9th Cir. 2016).

This court's more recent 2022 decision in *Morgan v. Sundance, Inc.*, 596 U.S. 411, involved a related issue under the FAA that arose from an appeal in the context of a defendant's tactics of filing a motion to dismiss the plaintiff's lawsuit. That initial motion focused only on the merits not the forum choice, and defendant's demand for arbitration was not presented until months later. *Morgan*, 596 U.S. at 414-15.

Morgan settled another conflict among the circuits about whether an *additional* showing of "prejudice" to the plaintiff was required. *Morgan* held that "the usual federal rule of waiver does not include a prejudice requirement," and consequently "prejudice is not a condition of finding that a party, *by litigating too long, waived its right to stay litigation or compel arbitration under the FAA*." *Morgan*, 596 U.S. at 419 (italics added).

That "wait and see" scenario is not remotely presented by this record. The Piazza Defendants' motion to dismiss promptly and explicitly raised questions about whether (and to what extent) the claims alleged by Gramercy were subject to the exclusive jurisdiction of an arbitration tribunal in London with the arbitrator tasked to resolve questions concerning the scope of that jurisdiction.

III. The Tenth Circuit's "bright-line" rule is antithetical to the right conferred by the FAA to pursue an interlocutory appeal

In resolving the conflict over "prejudice," *Morgan* declined to address the remaining disagreements among the Circuits involving "waiver, forfeiture, estoppel, laches, or procedural timeliness" that might result in loss of a contractual right to arbitrate. *Morgan*, 596 U.S. at 416.

This leaves undecided the proper test for determining whether a defendant who has invoked remedies that are explicitly authorized under sections 3 and 4 of the FAA – in the alternative to other requests for relief in a motion to dismiss that are not inherently inconsistent with the right to arbitrate – has ineluctably "waived" the statutory the right to appeal granted by Congress under section 16.

The Tenth Circuit's "bright-line" rule is rigid and unworkable. As applied in this case, that rule is contrary to the plain language of the FAA, and in many cases will impermissibly "short-circuit" potentially viable arguments supporting the prompt arbitration of disputes in a manner that frustrates the meaning and purposes underlying section 16. *See and compare Henry Schein*, 586 U.S. at 68-69.

Conrad's test ignores the context of numerous cases in which a complaint may allege a "mix of arbitrable and nonarbitrable claims," "jurisdictional and quasi-jurisdictional grounds" and dispenses with the right of parties under the Federal Rules to timely

make arguments *in the alternative* regarding how the courts should appropriately address those claims and jurisdictional questions. *Solo*, 947 F.3d at 975.[2]

This is contrary to the policy of the FAA that strongly *disfavors* any claim or "allegation of waiver, delay, or a like defense to arbitrability." *See Moses H. Cone*, 460 U.S. at 24-25. Applying this strong policy, even after consideration of *Conrad*'s rigid two-step analysis, the majority of circuits that have squarely addressed the so-called "functional test" on similar facts conclude that such "a hypertechnical reading of [the defendant's] pleadings would be inconsistent with the liberal federal policy favoring arbitration agreements. [The defendant] made it clear during proceedings in the district court that it was seeking enforcement of the arbitration clause of the Agreement." *Wheeling Hosp.*, 683 F.3d at 584-85. This is exactly what the Piazza Defendants did here.

The notion that the Tenth Circuit was justified in summarily dismissing this appeal because it should not be required to "parse" the district court motions and memoranda to ascertain if FAA remedies were properly sought is unpersuasive. *Cf.* App. 7a. The district court articulated the basis for its orders when denying relief under the FAA in a manner that can be

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[2] *See also Aluminium Bahrain B.S.C. v. Dahdaleh*, 17 F.Supp.3d 461, 469-70 (W.D. Pa. 2014) (RICO claims raised by a "non-signatory" who had assumed the contract were ordered to arbitration on defendant's motion to dismiss or stay); *Abrams,* 2017 WL 6541511, at *6 -7 (some claims were referred to the arbitrator's jurisdiction, other claims deferred).

readily determined without undue administrative burden. Moreover, this is a right to appeal mandated by Congress, even if some "parsing" were necessary.

The question raised by the petition is important to the proper application of section 16. Like *Morgan*, this issue requires resolution of a conflict among the circuits that can only be decided by this court.

CONCLUSION

Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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