No. 10- 101331 APR 26 2011

IN THE

Supreme Court of the United States

BDO SEIDMAN, LLP AND MICHAEL COLLINS,

Petitioners,

v.

SHAHID R. KHAN, ANN C. KHAN, SRK WILSHIRE INVESTMENTS, LLC, SRK WILSHIRE PARTNERS, SRK WILSHIRE INVESTORS, INC., THEMOSPHERE FX PARTNERS, LLC, KPASA, LLC, UVIADO LLC, JONCTION, LLC, AND LEMAN, LLC,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTH DISTRICT OF ILLINOIS

PETITION FOR A WRIT OF CERTIORARI

ELLIS L. REEMER
Counsel of Record
CARY B. SAMOWITZ
DLA PIPER LLP (US)
1251 Avenue of the Americas
New York, New York 10020
(212) 335-4500
ellis.reemer@dlapiper.com

MICHAEL S. POULOS
ANDREW R. GIFFORD
RAJA GADDIPATI
DLA PIPER LLP (US)
203 North LaSalle Street,
Suite 1900
Chicago, Illinois 60601
(312) 368-4000

Attorneys for Petitioners

235859

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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QUESTIONS PRESENTED FOR REVIEW

(1) Whether, on a motion to compel arbitration, the *Prima Paint* doctrine of "separability" should be extended to gateway challenges to arbitrability on the basis of the scope, as opposed to the validity, of an arbitration clause?

(2) Whether, on a motion to compel arbitration, a court, in classifying the general scope of an arbitration clause, is restricted to the two categories of broad and narrow, as articulated by the majority of the United States Courts of Appeal?

PARTIES TO THE PROCEEDINGS BELOW

The following individuals and entities were parties to the proceedings in the Illinois Appellate Court, Fourth District:

(1) Plaintiffs-Appellants, Respondents on Review. Shahid R. Khan, Ann C. Khan, SRK Wilshire Investments, LLC, SRK Wilshire Partners, SRK Wilshire Investors, Inc., Themosphere FX Partners, LLC, KPASA, LLC, Uviado LLC, Jonction, LLC, and Leman, LLC.

(2) Defendants-Appellees, Petitioners on Review. BDO Seidman, LLP, Michael Collins, and Paul Shanbrom are Defendants-Appellees in the proceedings below; BDO Seidman, LLP and Michael Collins are the Petitioners on Review before this Court.

CORPORATE DISCLOSURE STATEMENT

Petitioners are a limited liability partnership and an individual, not corporations. Accordingly, no parent or publicly held company owns 10% or more of Petitioners.

TABLE OF CONTENTS

Table of Contents

Table of Contents

TABLE OF APPENDICES

TABLE OF CITED AUTHORITIES

Cited Authorities

Cited Authorities

Page

STATUTES

PETITION FOR A WRIT OF CERTIORARI

Petitioners BDO Seidman, LLP and Michael Collins ("Petitioners" or "BDO") respectfully petition for a writ of certiorari to review a judgment of the Illinois Appellate Court, Fourth District in this case.

OPINIONS BELOW

The December 3, 2009 opinion and order of the Circuit Court of Champaign County, Illinois ("Illinois Circuit Court") granting BDO's motions to compel arbitration is unpublished, but a transcript of the proceedings that includes the court's ruling is reprinted at Pet. App. 54-84. The September 16, 2010 divided opinion of the Appellate Court of Illinois, Fourth District ("Illinois Appellate Court") affirming in part and reversing in part the Illinois Circuit Court's order is available at 404 Ill. App. 3d 892, 935 N.E.2d 1174 and is reprinted at Pet. App. 1-53. The October 29, 2010 order denying BDO's petition for rehearing in the Illinois Appellate Court is reflected at 404 Ill. App. 3d 892, 935 N.E.2d 1174 and is reprinted at Pet. App. 85-86. The January 26, 2011 order of the Illinois Supreme Court denying BDO's petition for leave to appeal is available at 239 Ill. 2d 555, 943 N.E.2d 1101 and is reprinted at Pet. App. 87.

JURISDICTION

As noted, the Illinois Supreme Court denied BDO's petition for leave to appeal the Illinois Appellate Court's decision on January 26, 2011. Accordingly, BDO has timely invoked the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

This case concerns the Federal Arbitration Act ("FAA"). The following provisions of the FAA are implicated:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 3.

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the

> return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

9 U.S.C. § 4.

STATEMENT OF THE CASE

Statement of Facts

Petitioner BDO Seidman, LLP, now known as BDO USA, LLP, is a professional services firm that provides assurance, tax, financial advisory, and consulting services to a wide range of publicly traded and privately held companies. Pet. App. at 2. Petitioner Michael Collins is a tax professional at BDO Seidman, LLP. Pet. App. at 3. Respondents are Shahid R. Khan, the owner of the $2 billion auto manufacturing company Flex-N-Gate, his wife Ann C. Khan, and a number of entities under their control. Pet. App. at 2.

In each of the five consecutive years from 1999 through 2003, Respondents entered into certain option and distressed debt transactions. Pet. App. at

5-29. Respondents claimed deductions based on losses generated by these transactions on their 1999-2003 tax returns. *Id.* The IRS audited Respondents' tax returns, disallowed the deductions claimed by Respondents, and imposed back-taxes, interest, and penalties. *Id.*

Respondents then filed a pair of lawsuits against BDO. *Id.* In the two actions, which were consolidated by the Illinois Appellate Court, Respondents allege that BDO knew or should have known that the IRS would disallow the claimed deductions, but nonetheless marketed the transactions to Respondents, improperly advised Respondents as to the transactions, and prepared Respondents' tax returns which incorporate deductions based upon the transactions. *Id.* Respondents asserted claims for breach of fiduciary duty, malpractice, negligent misrepresentation, disgorgement, rescission, declaratory judgment, fraud, violation of the Illinois Consumer Fraud Act, breach of contract, and civil conspiracy. *Id.*

BDO moved to compel arbitration of all the claims asserted by Respondents on the basis of the five consulting agreements entered into by the parties in each of the years 1999-2003 (the "Consulting Agreements"). Pet. App. at 3. The Consulting Agreements, which are materially identical for purposes of this petition, each contain the following arbitration provision:

> If any dispute, controversy or claim arises in connection with the performance or breach of this agreement ... then such dispute, controversy or claim shall be settled by arbitration ... .

Pet. App. at 7.

Proceedings Below

On December 3, 2009, the Illinois Circuit Court granted BDO's motions to compel arbitration and held that the Respondents' claims fell within the scope of the arbitration clause. Pet. App. at 54-84. Consistent with the positions taken by BDO in its motions, the Illinois Circuit Court classified the arbitration clause at issue as broad, focused its analysis on the arbitration clause itself (even citing the Seventh Circuit's decision in *Trimas* discussed in detail below), and ultimately held that all of Respondent's claims are within the scope of the arbitration clause:

> [Respondents'] claim[s] against BDO[,] [which] arose in connection with the latter's performance of the consulting agreements[,] ... were clearly within the scope of the broad arbitration clause.

Pet. App. at 70, 75.

On September 16, 2010, the Illinois Appellate Court, in a 2-1 decision, reversed the Illinois Circuit Court's orders granting BDO's motions to compel arbitration. Pet. App. at 1-53. The Illinois Appellate Court correctly held that the FAA and substantive federal arbitration law governs this case and rejected Respondents' challenges to the validity of the arbitration clause, but erroneously determined that Respondents' claims, with the exception of their contract claims, are outside the scope of the arbitration clause. Pet. App. at 31-32 In considering its scope, the Illinois Appellate Court classified the arbitration clause as "more narrow than the typical arbitration clause," a novel intermediate classification. Pet. App. at 38-39.

Thus, avoiding the interpretive presumptions in favor of arbitrability that accompany a broad classification, the Illinois Appellate Court relied upon a number of general contract provisions outside of the arbitration clause to restrict its scope. Pet. App. at 39-49.

Specifically, the Illinois Appellate Court characterized Respondents' claims "reduce[d] ... to their essence" as follows: (1) BDO gave "[Respondents] dishonest investment advice;" (2) BDO "prepar[ed] defective income-tax returns for [Respondents];" and (3) BDO "conspire[d] with law firms to issue bogus opinion letters attesting to the legality of losses claimed in the tax returns." Pet. App. at 4. The Illinois Appellate Court then broadly interpreted certain investment advice and legal opinion disclaimers in the Consulting Agreements such that, when viewed against the Appellate Court's characterization of the complaint allegations, each of these "essential" claims were held to fall outside of the scope of the parties' contracts. Pet. App. at 39-49. With respect to the first of Respondents' "essential" claims, the Appellate Court held, pursuant to the investment advice disclaimer, that BDO did not provide investment advice to Respondents under the Consulting Agreements, and therefore, such claims are not subject to the arbitration provision in the Consulting Agreements. Pet. App. 39-47. With respect to the second and third of Respondents' "essential" claims, which "fold into" one another, the Appellate Court held, pursuant to the legal opinion disclaimer, that BDO did not provide legal opinions under the Consulting Agreements, and therefore, such claims are not subject to the arbitration provision of the Consulting Agreements. Pet. App. at 47-49. In sum, rather than limiting its analysis to the arbitration clause itself, the Illinois Appellate Court utilized general provisions in

the Consulting Agreements, including its preamble, the investment advice and legal opinion disclaimers, and the merger and integration clause, to restrict the scope of the arbitration clause.

On October 29, 2010, the Illinois Appellate Court denied BDO's motion for rehearing, and, on January 26, 2011, the Illinois Supreme Court denied BDO's petition for leave to appeal, both of which incorporated BDO's arguments set forth below. Pet. App. at 85-87.

REASONS FOR GRANTING THE PETITION

In enacting the Federal Arbitration Act, Congress declared "a national policy favoring arbitration." *Preston v. Ferrer*, 552 U.S. 346, 353 (2008); *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984). The FAA created a "body of federal substantive law" that, through Congress's plenary authority under the commerce clause, is applicable in both federal and state courts. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *Preston*, 552 U.S. at 353; *Southland Corp.*, 465 U.S. at 12. Accordingly, this Court has consistently used its review authority to enforce the will of Congress by overruling decisions of state courts that are inconsistent with the policy underlying the FAA. *See, e.g.*, *Preston*, 552 U.S. at 353-54 (overturning California Appellate Court decision even though California Supreme Court denied petition for review); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 448-49 (2006) (overturning Florida Supreme Court decision for failure to apply *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402 (1967)); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 688-89 (1996) (overturning Montana Supreme Court decision

because the state statute at issue is "inconsonant with, and is therefore preempted by, the federal law"); *Southland Corp.*, 465 U.S. at 7 (overturning California Supreme Court decision because it "might seriously erode federal policy").

Motions to compel arbitration are the battleground for the enforcement of the FAA. In resolving a motion to compel arbitration, a court determines the twin "gateway" issues of the validity and scope of an arbitration clause. *Rent-A-Center West Inc. v. Jackson*, 130 S.Ct. 2772, 2782 (2010); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83-84 (2002). This Court's recent arbitration jurisprudence has focused primarily on the validity of an arbitration clause as opposed to its scope, leaving the contours of federal arbitration law on the scope of an arbitration clause thinly defined. Taking advantage of this judicial void, the Illinois Appellate Court has attempted, and the Illinois Supreme Court has sanctioned, an end-run around the important national policy in favor of arbitration. The Supreme Court should grant BDO's petition for writ of certiorari in order to articulate principles of interpretation for the scope of an arbitration clause.

I. THE SUPREME COURT SHOULD GRANT CERTIORARI TO EXTEND THE DOCTRINE OF "SEPARABILITY" TO GATEWAY CHALLENGES TO ARBITRABILITY ON THE BASIS OF THE SCOPE OF THE ARBITRATION CLAUSE.

This Court established the doctrine of "separability," which holds that an arbitration clause is severable from the general terms of the contract in which it is contained, in *Prima Paint* as a mechanism to give full force and

effect to the presumption of arbitrability that undergirds the FAA's strong national policy in favor of arbitration. The Illinois Appellate Court has attempted to reverse this presumption in favor of arbitrability by erecting an asymmetrical interpretive barrier to the enforcement of arbitration provisions in Illinois. Under its decision, a party opposing a motion to compel arbitration on the basis of scope can rely upon general contract provisions that are neither located within nor even reference the arbitration clause, but a party moving to compel arbitration can only rely upon the arbitration clause itself. *Compare Khan v. BDO Seidman, LLP*, 404 Ill. App. 3d 892, 914, 935 N.E.2d 1174, 1192 (Ill. App. Ct. 4th Dist. 2010) ("[T]o determine what claims [Respondents] agreed to arbitrate, we must determine what performances BDO promised to render *in the consulting agreements* ... ."); *with Khan*, 404 Ill. App. 3d at 918, 935 N.E.2d at 1196 ("The arbitration clause, *by its terms*, must cover the dispute.") (emphasis added). Thus, in effect, the Illinois Appellate Court purports to use the doctrine of "separability" as a sword and a shield against the FAA – not only has it declined to apply the doctrine where it is to the benefit of a party seeking to enforce an arbitration provision, but it has also applied the doctrine where it is to such a party's detriment. Such manipulation of federal arbitration law is in derogation of the FAA.

A. This Court has yet to Decide Whether the Doctrine Of Separability Applies to a Challenge to Arbitrability on the Basis of Scope.

In making a gateway determination as to the scope of an arbitration clause, the policy underlying the FAA demands that courts apply "a presumption of arbitrability

in the sense that an order to arbitrate the particular grievance 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." *AT&T Techs., Inc. v. Communications Workers of America*, 475 U.S. 643, 649 (1986) (emphasis added). This Court's focus on "the arbitration clause," as opposed to the contract as a whole, in making a determination of scope follows from the principle that "in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims." *AT&T Techs., Inc.*, 475 U.S. at 649.

Indeed, this Court has repeatedly held, albeit in the context of arbitrability challenges to the validity of the arbitration agreement, that "as a matter of substantive federal arbitration law" an arbitration clause is "separable" or "severable" from the contract in which it is embedded. *Prima Paint Corp.*, 388 U.S. at 402 (rejecting fraud in the inducement defense to arbitrability because the defense challenged the contract as a whole as opposed to the arbitration provision itself); *Buckeye Check Cashing, Inc.*, 546 U.S. at 445-46 (rejecting illegality defense to arbitrability because the defense challenged the contract as a whole as opposed to the arbitration provision itself); *Rent-A-Center West Inc.*, 130 S.Ct. at 2778, 2781 n. 4 (rejecting unconscionability defense to arbitrability because the defense challenged the validity of the contract as a whole as opposed to the arbitration provision at issue). Under *Prima Paint* and its progeny, the arbitration clause itself is the focus of a court's inquiry in making a gateway determination of arbitrability. *Id.* at 2777-78. "A party's challenge to *another provision* of a contract, or to the contract *as a whole*, does not prevent a court from

enforcing a specific agreement to arbitrate." *Id.* at 2778 (emphasis added).

In *Moses H. Cone*, this Court recognized the relationship between gateway challenges to the validity of an arbitration agreement and the scope of an arbitration agreement but did not expressly extend the *Prima Paint* doctrine of "separability" to challenges based on scope:

> Although our holding in *Prima Paint* extended only to the specific issues presented, the courts of appeals have since consistently concluded that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration. We agree. The Arbitration Act establishes that, as a matter of federal law, 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 Mem'l Hosp., 460 U.S. at 24-25 (emphasis added). Accordingly, while the doctrine of "separability" is firmly entrenched in this Court's jurisprudence on gateway challenges to the validity of an arbitration agreement, this Court has yet to address whether, in furtherance of the presumption of arbitrability, the doctrine likewise extends to gateway challenges to the scope of an arbitration agreement.

B. There is a Circuit Split as to Whether the Doctrine of "Separability" Applies to a Challenge to Arbitrability on the Basis of Scope.

The United States Court of Appeals for the Seventh Circuit recognized that, in order to give effect to *AT&T*'s presumption of arbitrability, *Prima Paint*'s doctrine of "separability" must be extended to gateway challenges to the scope of an arbitration clause:

> [O]ur role in deciding arbitrability is essentially that of a gatekeeper. ... If the parties have in fact agreed to arbitrate their dispute, then they have bargained for *the arbitrator's interpretation of their contract – not our's*. If we were to weigh in on the merits of their case, we would be denying them the benefit of that bargain.
>
> The question we must answer, then, is narrow. We must determine whether the Union is making a claim that is, *on its face*, governed by the TriMas Agreement.
>
> * * *
>
> Although TriMas complains that the district court ignored critical evidence, we think the district court was correct to do so. The evidence TriMas offered was *irrelevant* to the question of arbitrability because it did not concern the interpretation of *the arbitration clause itself.* The scope of the arbitration clause is established by *the text of the arbitration clause itself.*

* * *

> The evidence offered by TriMas is inadequate as a matter of law because it does not purport to show that *the arbitration clause itself* means something other than what it appears to mean *on its face. As a matter of federal law, arbitration clauses are 'separable' from the contracts in which they are embedded,* at least when there is no indication that the parties have intended otherwise. ... If the rule were otherwise, it would be relatively easy to manufacture a dispute over arbitrability by raising extrinsic attacks on the contract in which the arbitration clause is embedded. We would then be required to interpret the substantive provisions of the agreement and become entangled in the merits of the dispute – a result we try to avoid.
>
> Application of the 'separability' rule is dispositive in this case. TriMas has presented no evidence that the parties agreed ... to limit the scope of the *arbitration clause itself.*

United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union v. Trimas Corp., 531 F.3d 531, 536 (7th Cir. 2008) (emphasis added). *See also Karl Schmidt Unisia, Inc. v. International Union, United Automotive, Aerospace, and Agricultural Implement Workers of America, UAW Local 2357*, 628 F.3d 909, 913 (7th Cir. 2010) ("Finally, we must take care not to address the merits of the underlying claim. The *language of the CBA's arbitration clause* forms the basis of our analysis.")

(emphasis added). The United States Court of Appeals for the Ninth Circuit is in accord. *Haig Berberian, Inc. v. Cannery Warehousemen*, 535 F.2d 496, 499 (9th Cir. 1976) ("It is the arbitration clause, not the substantive contract clause in controversy, which governs whether a dispute must be submitted to arbitration."); *Republic of Nicaragua v. Standard Fruit Co.*, 937 F.2d 469, 479 (9th Cir. 1991) ("[T]he district court's analysis incorporated several evidentiary factors which are irrelevant as a matter of law to the question of arbitrability. These included the language of the Memorandum *generally*, which is as we have seen irrelevant under *Prima Paint* ... .") (emphasis added).

By contrast, the United States Courts of Appeal for the Third, Sixth, and Eighth Circuits have declined to apply the doctrine of "separability" to challenges to the scope of an arbitration clause, instead utilizing general contract provisions to restrict the scope of the arbitration clause. *Rite Aide of Pennsylvania, Inc. v. United Food & Commercial Workers Union, Local 1776*, 595 F.3d 128, 137 (3d Cir. 2009) ("[W]e must determine whether the parties agreed to arbitrate this dispute, and we cannot avoid that duty because it requires us to interpret a provision of a bargaining agreement, even if we trench to some extent upon the merits.")[1]; *United Steelworkers of America, Local No. 1617 v. General Fireproofing Co.*, 464 F.2d 726,

1. Illustrating the Third Circuit's divergence with the Seventh Circuit, the dissent in *Rite Aid* cited favorably to the Seventh Circuit's decision in *Trimas. Rite Aid of Pennsylvania, Inc.*, 595 F.3d at 146 (Ambro, J. dissenting) ("[W]e are ill equipped to decide whose interpretation of the Recognition provision is correct. Rather, that function is properly fulfilled by an arbitrator, as the parties have agreed.").

729 (6th Cir. 1972) ("In order to determine then whether the parties have agreed to arbitrate [the matter at issue], we must examine the collective bargaining agreement ... to see if, under any reasonable interpretation, agreement to arbitrate can be found."); *International Brotherhood of Electrical Workers, AFL-CIO, Local 1 v. GKN Aerospace North America, Inc.*, 431 F.3d 624, 629 (8th Cir. 2005) (interpreting various provisions of a collective bargaining agreement in order to determine whether the claims were within the scope of the arbitration provision contained therein).

C. The Doctrine of "Separability" Must be Applied to Challenges to the Scope of an Arbitration Clause in Order to Give Full Effect to the Presumption of Arbitrability and to Enforce the National Policy in Favor of Arbitration.

By extending the doctrine of "separability" to challenges to the scope of an arbitration clause, this Court would establish a bright-line interpretive rule ensuring that state courts accord "due regard ... to the federal policy favoring arbitration." *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995). This Court has recognized the inevitability of mischief when a state court is permitted to evaluate the merits of a contract in order to resolve a gateway challenge to the scope of its arbitration provision: it "*could only* have a *crippling effect* on grievance arbitration." *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564, 566-67 (1960) (emphasis added). In the absence of dispositive guidance from this Court, in certain Circuits and states, "it [is] relatively easy to manufacture a dispute over arbitrability by raising extrinsic attacks on the contract in which the

arbitration clause is embedded." *Trimas Corp.*, 531 F.3d at 536 (emphasis added). Such challenges to the scope of an arbitration clause "significantly undercut the force of the presumption of arbitrability." *Rite Aide of Pennsylvania, Inc.*, 595 F.3d at 151 (Ambro, J. dissenting); *International Brotherhood of Electrical Workers, AFL-CIO, Local 1*, 431 F.3d at 629 (Heaney, J. dissenting) ("If the majority's view is sustained, the courts in this circuit will feel free to examine the merits of every labor dispute."). By granting certiorari in this action, the Supreme Court can clarify the fractured and uncertain legal framework governing the interpretation of the scope of an arbitration clause, and thereby give full force and effect to the presumption of arbitrability and the important national policy in favor of arbitration.

II. THE SUPREME COURT SHOULD GRANT CERTIORARI TO REJECT THE INTERMEDIATE CLASSIFICATION OF AN ARBITRATION CLAUSE.

The arbitration clause contained in each of the Consulting Agreements covers "any dispute, controversy or claim aris[ing] in connection with the performance or breach of this agreement." *Khan*, 404 Ill. App. 3d at 897, 935 N.E.2d at 1180. Rather than classify this provision as broad or narrow, the Illinois Appellate Court invented an intermediate classification, describing the clause as "more narrow than the typical arbitration clause." *Khan*, 404 Ill. App. 3d at 913, 935 N.E.2d at 1192. In so doing, the Illinois Appellate Court overlooked authoritative and highly analogous federal precedent, and instead relied upon two cases that are simply inapt. *Khan*, 404 Ill. App. 3d at 913-14, 935 N.E.2d at 1192 (*citing Midwest Window*

Systems, Inc. v. Amcor Industries, Inc., 630 F.2d 535, 537 (7th Cir. 1980) (noting, in *dicta*, that the plaintiff's fraud allegations were outside the scope of a distinguishable arbitration clause "providing for arbitration of a dispute 'concerning the interpretation or application of any of the provisions' of the original agreement," not "performance or breach" as here) and *Prima Paint Corp.*, 388 U.S. at 406 (merely classifying a particular arbitration clause as broad)). These thin reeds undergirding the Illinois Appellate Court's novel classification of the arbitration clause illustrate the extent of the court's departure from federal arbitration law. The continued application of an intermediate classification to arbitration clauses will undermine the strong national policy in favor of arbitration.

A. There Are Only Two Recognized Classifications Of An Arbitration Clause – Broad and Narrow.

This Court has yet to fully articulate a framework for the general classification of the scope of an arbitration clause. Stepping into this legal vacuum, the United States Courts of Appeal have consistently held that an arbitration clause can be classified only as broad or narrow. *See, e.g., Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading Inc.*, 252 F.3d 218, 224 (2d Cir. 2001) ("[A] court should classify the particular [arbitration] clause as either broad or narrow."); *Burlington Ins. Co. v. Trygg-Hansa Ins. Co. AB*, 9 Fed. Appx. 196, 201 n. 6 (4th Cir. 2001) ("There are two types of arbitration clauses – broad and narrow."); *Terrebonne v. K-Sea Transportation Corp.*, 477 F.3d 271, 286 (5th Cir. 2007) ("[T]his court distinguishes between broad and narrow arbitration clauses ... ."); *United Steelworkers of America, AFL-CIO-CLC v.*

Duluth Clinic, Ltd., 413 F.3d 786, 788 (8th Cir. 2005) ("This court first decides whether the arbitration clause is narrow or broad."); *Southern California District Council of Laborers v. Berry Constr., Inc.*, 984 F.2d 340, 344 (9th Cir. 1993) ("These are broad rather than narrow arbitration provisions."); *Newmont U.S.A. Ltd. v. Ins. Co. of North America*, 615 F.3d 1268, 1274 (10th Cir. 2010) ("[I] n deciding if a dispute is arbitrable, a court must initially determine whether the arbitration provision is broad or narrow."). Accordingly, in selecting a third classification option, the Illinois Appellate Court's intermediate classification of the arbitration clause is contrary to federal arbitration law.

B. Federal Courts Have Uniformly Held That the Arbitration Clause is Broad.

Every federal court to consider BDO's standard-form arbitration clause has classified it as unqualifiedly broad. *Denney v. BDO Seidman, LLP*, 412 F.3d 58, 62, 69 (2d Cir. 2005) ("Each of these three consulting agreements also contained the following mandatory arbitration clause: 'If any dispute, controversy or claim arises *in connection with the performance or breach of this Agreement* ... then such dispute, controversy or claim shall be settled by arbitration ... . We have [] recognized that if an arbitration provision is *broad*, as it is here, a presumption of arbitration attaches such that arbitration of even a collateral matter will be ordered ... .") (emphasis added); *Miron v. BDO Seidman, LLP*, 342 F. Supp. 2d 324, 330 (E.D. Pa. 2004) ("The ... arbitration clause is *broad* on its face, governing 'any dispute, controversy or claim *aris[ing] in connection with the performance or breach of this Agreement*. While Plaintiffs contend that the

inclusion of the limiting phrase 'in connection with the performance or breach of this Agreement' supports a narrower reading of the clause, this position is consistent neither with Third Circuit precedent nor with ... *Denney* ... .") (emphasis added); *King v. Deutsche Bank AG*, No. 04 CV 1029, 2005 WL 611954, at **15-16 (D. Or. Mar. 8, 2005) ("The arbitration provision ... states: 'If any dispute, controversy or claim arises *in connection with the performance or breach of this Agreement* ... then such dispute, controversy or claim shall be settled by arbitration ..... Contractual language such as 'all disputes arising in connection with' an agreement is interpreted *broadly* to reach every dispute between the parties having a significant relationship to the contract and all disputes having their origin or genesis in the contract, including statutory claims.") (emphasis added). Accordingly, in failing to classify the arbitration clause as broad, the Illinois Appellate Court's intermediate classification of the arbitration clause is contrary to federal arbitration law.

C. The Intermediate Classification of an Arbitration Clause Undermines the National Policy in Favor of Arbitration.

The classification of an arbitration clause as broad results in significant interpretive presumptions. *First*, there is a "presumption of arbitrability which is only overcome if it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Bank Julius Baer & Co. v. Waxfield Ltd.*, 424 F.3d 278, 284 (2d Cir. 2005); *Exelon Generation Co. v. Local 15, Int'l Bro. of Elec. Workers*, 540 F.3d 640, 646 (7th Cir. 2008); *AT&T Techs., Inc.*, 475 U.S. at 650. *Second*, rather than apply ordinary principles

of contract interpretation, the court must resolve all doubts concerning the scope of arbitrable issues in favor of arbitration. *Bensadoun v. Jobe-Riat*, 316 F.3d 171, 176 (2d Cir. 2003); *County of McHenry v. Ins. Co. of the West*, 438 F.3d 813, 823 (7th Cir. 2006); *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24–25. *Third*, all claims that are reasonably related to the general subject matter of the Consulting Agreements (as opposed to facially within the scope of the arbitration clause) are subject to arbitration. *Newmont U.S.A. Ltd.*, 615 F.3d at 1274; *Louis Dreyfus Negoce S.A.*, 225 F.3d at 224; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 622 n.9, 624 n.13 (1985).

By classifying an arbitration clause as intermediate in scope, state courts, like the Illinois Appellate Court, can circumvent the foregoing interpretive presumptions that accompany a broad classification, while, at the same time, insulating their decisions from appellate review by virtue of the dearth of authority on intermediate classification. This tactical approach places the policy underlying the FAA in jeopardy. *See Louis Dreyfus Negoce S.A.*, 225 F.3d at 225 ("We think making a distinction between broad and narrow arbitration clauses is necessary and sound ... ."). Accordingly, this Court should grant certiorari to make the two-category classification system that has been widely adopted by the United States Courts of Appeal binding upon state courts.

CONCLUSION

The FAA reflects a strong federal policy in favor of arbitration. The Supreme Court has consistently enforced this policy by vigilantly overturning state court decisions that are hostile to arbitration, with a particular focus on challenges to an arbitration clause's *validity*. The Illinois Appellate Court, taking advantage of the divided and uncertain legal landscape governing the interpretation of an arbitration clause's *scope*, acted in derogation of the FAA. This Court should grant the petition in order to establish a binding framework to guide the lower courts' interpretation of the scope of an arbitration clause such that state courts cannot attempt an end-run around the FAA by limiting arbitration clauses on this basis.

Respectfully submitted,

ELLIS L. REEMER
Counsel of Record
CARY B. SAMOWITZ
DLA PIPER LLP (US)
1251 Avenue of the Americas
New York, New York 10020
(212) 335-4500
ellis.reemer@dlapiper.com

MICHAEL S. POULOS
ANDREW R. GIFFORD
RAJA GADDIPATI
DLA PIPER LLP (US)
203 North LaSalle Street,
Suite 1900
Chicago, Illinois 60601
(312) 368-4000

Attorneys for Petitioners