No. 10-1331

IN THE
Supreme Court of the United States

BDO SEIDMAN, LLP AND MICHAEL COLLINS,
Petitioners,

v.

SHAHID R. KHAN, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals for the Fourth District of Illinois

BRIEF IN OPPOSITION FOR RESPONDENTS

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July 29, 2011

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QUESTIONS PRESENTED

1. Whether, in applying an arbitration clause covering claims arising "in connection with the performance or breach of" an agreement (Pet. App. 10a), the Appellate Court of Illinois correctly considered other provisions of the agreement to determine what "performance" the parties promised to render under it.

2. Whether the Appellate Court of Illinois correctly observed that the arbitration clause at issue here, which applies to disputes arising "in connection with the performance or breach of" an agreement (*id.*), is "more narrow than" (*id.* at 38a) the arbitration clause that this Court considered in *Prima Paint*, which applied to "[a]ny controversy or claim arising out of or relating to this Agreement, or the breach thereof" (*Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 398 (1967) (internal quotation marks omitted)).

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 29.6 of the Rules of this Court, respondents SRK Wilshire Investments, LLC, SRK Wilshire Partners, SRK Wilshire Investors, Inc., Themosphere FX Partners, LLC, KPASA LLC, UVIADO LLC, JONCTION LLC, and LEMAN LLC state the following:

None of the respondent corporate entities has a parent company, and no publicly held company owns 10% or more of the stock of any of the respondent corporate entities.

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INTRODUCTION

From 1999 to 2003, petitioner BDO Seidman, LLP ("BDO") persuaded respondents to enter into a series of extraordinarily complex investment transactions. BDO charged respondents substantial fees for services rendered in connection with those transactions. Unbeknownst to respondents, the investment transactions in which they were induced to invest were in fact abusive tax shelters. BDO was engaged in a conspiracy to market those transactions to its clients, in return for substantial fees. Ultimately, the Internal Revenue Service ("IRS") determined that, as a result of those transactions, respondents' federal income tax liability had been substantially understated during the years at issue, and it ordered respondents to pay significant back taxes, interest, and penalties. In addition, several participants in BDO's conspiracy, including former high-level partners at the firm, have pleaded guilty and been convicted of federal criminal charges arising from their promotion of abusive tax shelters.

In 2009, respondents filed actions against BDO and others in Illinois state court, seeking to recover their substantial out-of-pocket losses resulting from respondents' fraudulent scheme. BDO moved to compel arbitration, relying on several consulting agreements that it had induced respondents to sign. Those agreements contained materially identical arbitration clauses, which provided in pertinent part as follows: "If any dispute, controversy or claim arises in connection with the performance or breach of this agreement . . . such dispute, controversy or claim shall be settled by arbitration." Pet. App. 10a.

The Appellate Court of Illinois held that respondents' tort claims were not subject to arbitration

under the arbitration clauses, but that respondents must arbitrate their claims for breach of contract. The court noted that, unlike an arbitration clause that broadly covers any claim "relating to" an agreement, the arbitration clauses in this case apply only to claims arising in connection with "the performance or breach" of the consulting agreements. *Id.* at 38a. The consulting agreements not only intentionally do not mention the tax shelters but also expressly exclude "investment advice" from the "performance" that BDO promised to render under them. The court accordingly concluded that respondents' tort claims – which arose from BDO's provision of fraudulent investment advice – did not arise in connection with "the performance or breach" of the consulting agreements.

After the Supreme Court of Illinois declined discretionary review, BDO filed a petition for a writ of certiorari, presenting two questions for this Court's review. BDO first asserts that the Court should grant certiorari to decide whether "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." Pet. i. Second, BDO seeks this Court's review to determine whether "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[s]." *Id.* Neither of those questions warrants further review.

First, the doctrine of "separability" to which BDO refers provides that, for the purposes of *enforceability*, an arbitration clause is separable from the agreement in which it is contained. Under that prin-

ciple, a court can enforce an arbitration clause without resolving a party's challenge to the validity of the entire agreement, unless the party contends that the arbitration clause itself is invalid. BDO argues by analogy that, when a court *interprets* the scope of an arbitration clause, it should treat the clause as separable from the agreement and look only at the clause, ignoring the rest of the contract. As an initial matter, however, BDO did not make that argument below, and it therefore is not properly presented in this Court.

Moreover, BDO's analogy lacks merit. As BDO concedes, this Court has never adopted BDO's new approach to the interpretation of an arbitration agreement. And, contrary to BDO's contention, the lower court cases it cites also have not held that a court interpreting an arbitration clause must ignore the remainder of the contract. BDO's claim is not only unprecedented but also illogical: when, as here, an arbitration clause covers issues arising from the "performance or breach" of a contract, a court cannot apply the clause without looking at the rest of the contract to determine the services that the parties promised to "perform[]" under the agreement.

BDO's second question presented rests on a mischaracterization of the decision below. BDO argues that there are only two recognized "classification[s]" of an arbitration clause and that the Illinois appellate court impermissibly "invented an intermediate classification." Pet. 17. But the Illinois court did no such thing. Instead, it observed that the arbitration clause at issue here, which applies to disputes arising "in connection with the performance or breach of" the consulting agreements (Pet. App. 10a), is "more narrow than" (*id.* at 38a) the arbitration

clause that this Court considered in *Prima Paint*, which applied to "[a]ny controversy or claim arising out of or relating to this Agreement, or the breach thereof" (*Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 398 (1967) (internal quotation marks omitted)). By simply making that observation – an observation that was unquestionably accurate – the court below did not "invent[]" a new "classification" of an arbitration clause.

More fundamentally, any issue regarding the proper "classification" of the arbitration clause in this case is purely academic. Courts have said that, when an arbitration clause is "broad," a presumption in favor of arbitration should be applied in interpreting the clause. Here, the court below in fact applied that presumption, stating that it would "resolve any doubts in favor of arbitrability." Pet. App. 37a. Thus, even if the classification issue warranted review by this Court, which it does not, this Court's resolution of that issue will not affect the outcome of this case.

The petition should therefore be denied.

STATEMENT OF THE CASE

1. In 1993, BDO began performing auditing services for respondents. *See* Pet. App. 2a, 5a. Having become one of respondents' trusted advisors, BDO persuaded respondents to enter into a series of investment transactions between 1999 and 2003. *See id.* at 2a, 5a-6a, 12a-14a, 19a-20a, 22a-23a, 25a, 27a-29a. Respondents' goal was to earn a return on their investments, and BDO represented to them that the investment transactions it recommended were "legitimate ways to make a profit and at the same time to minimize income taxes." *Id.* at 2a; *see id.* at 6a, 18a-19a, 26a.

Those representations were false. Although respondents "did not know . . . that they were doing anything illegal," the transactions in which BDO convinced them to participate were in fact abusive tax shelters – schemes to "shuffl[e] assets around and generat[e] artificial tax losses." *Id.* at 2a.

On advice from BDO, respondents claimed investment losses resulting from the tax shelters on their tax returns in each year from 1999 through 2003. *See id.* at 16a, 21a-22a, 25a, 28a-29a. BDO not only prepared those returns but also arranged for respondents to obtain opinion letters supporting the claimed deductions from particular law firms, including Jenkens & Gilchrist, P.C. *See id.* at 2a-3a, 14a-16a, 20a-21a, 24a-25a, 26a-27a, 29a. Although those law firms were "supposedly independent," they in fact participated with BDO in the conspiracy to defraud respondents, and the legal opinions they provided "were merely 'fill in the blank' boilerplate opinions." *Id.* at 2a, 16a (internal quotation marks omitted).

BDO required respondents to enter into multiple "consulting agreements." Those agreements covered BDO's provision of certain "consulting services" in connection with certain "Transactions." *Id.* at 7a-8a. The consulting agreements, however, intentionally did not mention the tax shelters, and they expressly excluded "investment advice" from the services to be furnished by BDO: "*BDO is not in the business of providing investment advice or services, thus, none of the services to be rendered are to be considered as investment advice, and it is understood that the Client is not relying upon BDO for investment advice or services.*" *Id.* at 9a (emphasis in agreement). The agreements also provided that "BDO's Services here-

under do not include, and BDO assumes no responsibility whatsoever for, any legal and/or tax opinions regarding any strategies that may be implemented, and has advised the Client to retain a law firm for legal and/or tax opinions on any strategies or transactions they enter into." *Id.*

BDO intentionally employed vague language in the consulting agreements to obscure the true nature of the services being provided and to conceal from the IRS the fact that it was promoting abusive tax shelters. *See* No. 09-L139 Compl. ¶ 28; No. 09-L140 Compl. ¶ 31. As an internal BDO memorandum explained, "[o]ur engagement letters have been structured not to make clear exactly what services we were providing in return for our fee." SA48.[1] In addition, BDO partners have admitted that BDO's consulting agreements deliberately omitted any mention of the tax shelters. *See, e.g.*, SA139, 151, 165.

Each consulting agreement between BDO and respondents contains an arbitration clause. *See* Pet. App. 4a. Those clauses provide in pertinent part as follows: "If any dispute, controversy or claim arises in connection with the performance or breach of this agreement . . . such dispute, controversy or claim shall be settled by arbitration." *Id.* at 10a.[2]

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[1] "SA" refers to the supplemental appendix accompanying respondents' answer to the petition for leave to appeal in the Supreme Court of Illinois. "A" refers to the appendix accompanying BDO's petition for leave to appeal.

[2] There are five consulting agreements in all. They contain materially identical language, except with respect to choice of law. Each of the five agreements contains a "[g]overning law" clause providing that it "shall be governed and construed in accordance with the laws of the State of New York." A173, 178, 314, 319, 325. In addition, the arbitration clauses in the

Respondents suffered monetary harm as a consequence of investing in the BDO tax shelters. In 2008, the IRS disallowed respondents' tax losses relating to the shelters, and it ordered them to pay substantial sums in back taxes, interest, and penalties. *See id.* at 3a, 18a, 22a, 25a, 28a-29a. Respondents also paid significant fees to BDO and other co-conspirators for services in connection with the tax shelters. *See id.*

Respondents were only a few of the many clients that BDO induced to participate in tax-shelter transactions. Several participants in BDO's conspiracy to market tax shelters have been charged with federal offenses. *See* SA17-38, 51-135, 139-64, 169-203. Four former BDO partners have pleaded guilty to those charges. *See* SA39-43, 136-38, 165-68, 204-06. In May 2011, following a jury trial in the United States District Court for the Southern District of New York, BDO's former CEO and two former Jenkens & Gilchrist partners were convicted of charges arising from BDO's marketing of tax shelters.[3]

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agreements entered into in 1999, 2000, and 2001 provided that applicable disputes "shall be settled by arbitration in accordance with the laws of the State of New York." A313, 319, 325. The arbitration clauses in the agreements entered into in 2002 and 2003, however, provided for "arbitration in accordance with the laws of the State of Illinois." A172, 177.

[3] *See* Press Release, United States Attorney for the Southern District of New York, *Jenkens & Gilchrist Attorneys, Former BDO Seidman CEO, and Deutsche Bank Broker Found Guilty in Manhattan Federal Court of Multi-Billion Dollar Criminal Tax Fraud Scheme* (May 24, 2011), *available at* http://www.justice.gov/usao/nys/pressreleases/May11/daugerdasetalverdictpr.pdf; Mark Hamblett, *Conviction of Lawyers in Tax Shelter Case Seen as Deterrent*, N.Y. L.J., May 26, 2011.

2. In July 2009, respondents filed two actions in Illinois court against BDO and other defendants. They pleaded several claims under Illinois law, including, among others, fraud, conspiracy to commit fraud, breach of fiduciary duty, negligence, negligent misrepresentation, and breach of contract.

BDO filed a motion to compel arbitration in each of the actions. Respondents opposed those motions. They argued that the disputes did not arise "in connection with the performance or breach of" (Pet. App. 10a) the consulting agreements because those agreements deliberately omitted any mention of the tax shelters and excluded the investment advice at issue. Respondents also contended that, in any event, the agreements to arbitrate were invalid under applicable state law.

On December 3, 2009, the Illinois circuit court granted BDO's motions to compel arbitration. *See id.* at 65a-75a. Ruling from the bench, the court initially described the question of arbitrability in these cases as "complicated" and stated that it was "unclear whether the subject matter of the dispute falls within the scope of the arbitration agreement." *Id.* at 68a-69a. After citing several authorities for the proposition that doubts about arbitrability should be resolved in favor of arbitration, however, the court opined without significant analysis that respondents' claims against BDO "arose 'in connection with the latter's performance of the consulting agreements'" and were "clearly within the scope of the broad arbitration clauses." *Id.* at 70a; *see id.* at 75a ("plaintiffs' claims were within the broad terms of the arbitration agreements").

The circuit court also rejected respondents' challenges to the validity of the arbitration agreements,

stating that respondents had "fail[ed] to show that the arbitration clause itself, as opposed to the entire consulting agreement, arose out of . . . fraud." *Id.* at 67a; *see id.* at 73a ("Here, while the plaintiffs allege that BDO's fraud and conspiracy to commit fraud were part of the grand . . . scheme that permeated the entire consulting agreements, they failed to show that the fraud induced the making of the arbitration clause itself.").

3. The Illinois appellate court consolidated the cases and, on September 16, 2010, affirmed in part and reversed in part the circuit court's orders, and remanded the cases for further proceedings. *See* Pet. App. 1a-53a. The appellate court reversed the circuit court's orders insofar as they compelled arbitration of respondents' tort claims against BDO, but affirmed the circuit court's orders compelling arbitration of respondents' claims for breach of contract. *See id.* at 4a, 49a.[4]

The appellate court began its analysis by recognizing that, under the Federal Arbitration Act ("FAA"), the question of "arbitrability" – i.e., whether the parties agreed to arbitrate a particular dispute – is to be decided by the court, unless the contract clearly and unmistakably provides otherwise. *See id.* at 31a-32a (citing, *inter alia*, *AT&T Techs., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 649 (1986)). Finding "no evidence that the parties in this case clearly and unmistakably agreed that the arbitrator would decide the question of the arbitrability of a given claim," the court concluded that the issue was for it to determine in the first instance. *Id.* at 32a.

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[4] Justice Turner specially concurred in part and dissented in part. *See* Pet. App. 49a-53a.

The appellate court proceeded to construe the agreement, explaining that, because "'a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit,'" "the first thing to do is look at the contract and see if the parties agreed to arbitrate the claims in question." *Id.* at 36a-37a (quoting *AT&T Techs.*, 475 U.S. at 648). The court expressly acknowledged that, in interpreting the agreement, it "should resolve any doubts in favor of arbitrability." *Id.* at 37a; *see also id.* ("'[A]s with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability.'") (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985)).

Turning to the language of the arbitration clause, the appellate court observed that the parties had "agreed to arbitrate only those claims that are related to the performance or breach of the consulting agreement." *Id.* at 38a; *see supra* p. 6 (quoting clause). In that regard, the court noted that the clause's language "is more narrow than the typical arbitration clause, such as the one in *Prima Paint*, which referred to 'any controversy or claim arising out of or relating to this Agreement.'" Pet. App. 38a (quoting *Prima Paint*, 388 U.S. at 398); *see id.* at 39a ("The arbitration clause before us . . . contemplates the arbitration of a narrower class of claims – those relating to the performance of the agreement – not claims relating to the agreement."). Because, by its terms, the arbitration clause applies only to disputes arising "in connection with the performance or breach of" the agreements, the court explained that, "to determine what claims plaintiffs agreed to arbitrate," it would have to examine the consulting

agreements to "determine what performances BDO promised to render in [those] agreements." *Id.* The court accordingly reviewed the operative provisions of the consulting agreements, noting, among other things, the agreements' exclusion of "investment advice." *See id.* at 39a-42a. The court concluded that BDO's performance under the consulting agreements did not include "the act of advising the client as to the value of [particular investment transactions] and as to the advisability of investing in, purchasing, or selling such [investments]." *Id.* at 42a. The court noted that the preamble to the agreement – which referred to "the Transactions" and thus "presuppose[s] that the client already knows which investments it wishes to make" – reinforced that conclusion. *Id.* at 42a-43a.

The appellate court then turned to respondents' claims, explaining that respondents "seek to recover from BDO for 'advising [them] to engage in the Investment Strategies' and for falsely representing to them that they could make a profit from the investment strategies – in other words, for giving them fraudulent or negligent 'investment advice.'" *Id.* at 43a (alteration in original). The court held that, "[b]ecause the consulting agreement expressly and specifically excludes 'investment advice' from BDO's promised performance, plaintiffs' claims premised on investment advice are not 'claim[s] aris[ing] in connection with the performance or breach of [the consulting] agreement.'" *Id.* at 43a-44a (second and third alterations in original). It further concluded that "[t]he arbitration clause is not susceptible to a plausible interpretation that covers disputes over investment advice, because such an interpretation would collide with the plain language of the written

contract." *Id.* at 44a (citing *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960)).

The appellate court also held that, "insomuch as plaintiffs bring claims against BDO for conspiring with Jenkens [and other law firms] to issue sham legal opinions, their claims do not 'arise[] in connection with the performance or breach of [the consulting agreement].'" *Id.* at 48a (second and third alterations in original). It explained that the consulting agreement "plainly states that 'BDO's Services hereunder do not include . . . any legal and/or tax opinion'" and thus "expressly contemplates that a law firm, not BDO, will be responsible for formulating legal or tax opinions." *Id.* at 48a-49a (alteration in original); *see id.* at 49a ("By interfering with, or compromising the integrity of, this process of legal review by a third party, BDO went outside its field of activity as contemplated by the consulting agreement and, therefore, outside the scope of the arbitration clause.").

4. On October 29, 2010, the Illinois appellate court denied BDO's petition for rehearing. *See* Pet. App. 85a-86a.

On January 26, 2011, the Supreme Court of Illinois declined BDO's petition for leave to appeal the appellate court's decision. *See id.* at 87a.

REASONS FOR DENYING THE PETITION

BDO does not dispute the following propositions: First, "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *AT&T Techs., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 648 (1986) (internal quotation marks omitted). Second, although the parties can agree to have an arbitrator resolve the predicate question whether a dispute is subject to arbitration under their agreement, *see, e.g.*, *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772, 2777 (2010), the default rule is that "the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator," *AT&T Techs.*, 475 U.S. at 649. Third, the issue of arbitrability will be referred to the arbitrator only when the agreement "clearly and unmistakably" so provides. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995); *AT&T Techs.*, 475 U.S. at 649.[5] BDO does not contest that the Illinois appellate court correctly stated and followed those principles in determining that the question of arbitrability in this case was for the court to resolve. *See* Pet. App. 31a-32a.

BDO asserts, however, that the Illinois appellate court's analysis of the arbitrability issue conflicts with decisions of federal courts of appeals in two ways: (i) the court below improperly looked to other

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[5] *See Granite Rock Co. v. International Bhd. of Teamsters*, 130 S. Ct. 2847, 2856 (2010) ("To satisfy itself that [an] agreement [to arbitrate] exists, the court must resolve any issue that calls into question the formation or applicability of the specific arbitration clause that a party seeks to have the court enforce. Where there is no provision validly committing them to an arbitrator, these issues typically concern the scope of the arbitration clause and its enforceability.") (citations omitted).

provisions of the contract in deciding whether the arbitration clause covers respondents' claims; and (ii) the court below "invented" a new "classification" of arbitration clause. Neither issue merits further review.

I. WHETHER A COURT CAN LOOK TO OTHER PROVISIONS OF THE CONTRACT IN APPLYING AN ARBITRATION CLAUSE IS NOT PROPERLY PRESENTED AND DOES NOT WARRANT THIS COURT'S REVIEW

BDO's first question presented does not merit this Court's review for four reasons. First, BDO did not present the argument in the court below, and it therefore is not properly presented here. Second, the decision below does not conflict with any decision of this Court. Third, there is no conflict between the Illinois appellate court's decision and the federal court of appeals decisions on which BDO relies. Fourth, BDO's argument is in any event illogical and unpersuasive on its merits.

A. The Question Is Not Properly Presented

BDO did not raise in the Illinois appellate court its current claim that the doctrine of "separability" should be applied to the interpretation of arbitration clauses. *See* BDO No. 4-10-0002 C.A. Br. 26-34; BDO No. 4-10-0003 C.A. Br. 7-19. That claim therefore is not properly presented, and review should be denied for that reason alone. *See United States v. United Foods, Inc.*, 533 U.S. 405, 416-17 (2001).

B. There Is No Conflict With This Court's Precedent

1. BDO principally relies (at 9-12) on a series of this Court's cases beginning with *Prima Paint Corp.*

v. Flood & Conklin Manufacturing Co., 388 U.S. 395 (1967). But those cases did not address the interpretation or application of an arbitration clause to determine if it covers the asserted claims; rather, as BDO admits, they considered "arbitrability challenges to the *validity* of the arbitration agreement." Pet. 11 (emphasis added); *see* Pet. 12 ("[T]his Court has yet to address whether . . . the doctrine [of separability] likewise extends to gateway challenges to the scope of an arbitration agreement.").

In *Prima Paint*, this Court held that, when a litigant opposes a request to enforce an arbitration agreement based on "a claim of fraud in the inducement," the fraud claim should be decided by the arbitrator in the first instance, unless "the claim is fraud in the inducement of the arbitration clause itself." 388 U.S. at 402-03. Thus, a "claim[] of fraud in the inducement of the contract generally" is "to be referred to the arbitrators." *Id.* at 402, 404. As the Court subsequently explained, that approach rests on the reasoning that "a party's challenge to another provision of the contract, or to the contract as a whole, does not prevent a court from enforcing a specific agreement to arbitrate." *Rent-A-Center*, 130 S. Ct. at 2778.

In *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006), the Court held that *Prima Paint* applies not only to fraudulent-inducement claims but also to claims of illegality. *See id.* at 446-48. And, in *Rent-A-Center*, the Court held that, under the principle of *Prima Paint*, a provision delegating to the arbitrator authority to decide the enforceability of the arbitration agreement must be enforced unless the plaintiff challenges "the delegation provision specifically." 130 S. Ct. at 2779.

Here, the Illinois appellate court did not address respondents' challenges to the validity of the arbitration agreement. *See* Pet. App. 37a ("[T]he first thing to do is look at the contract and see if the parties agreed to arbitrate the claims in question."); *see also id.* at 3a-4a. Instead, it decided only that the arbitration agreement, even if valid, "does not" – as a matter of interpretation – "cover the claims that plaintiffs assert in their complaints." *Id.* at 4a. This Court has never indicated that the principle of separability that applies to challenges to the *validity* of an arbitration agreement has any bearing on the proper *interpretation* of an arbitration agreement to determine if it covers the asserted claims, as BDO appears to recognize. *See* Pet. 9 ("The Supreme Court Should Grant Certiorari *To Extend* the Doctrine of 'Separability'") (emphasis added; capitalization altered).

Moreover, this Court has explained that the rule of *Prima Paint* derives from the language of the FAA. *See, e.g., Rent-A-Center*, 130 S. Ct. at 2778. Section 2 of the Act provides that a "written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . 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. Because § 2 "states that a 'written provision' 'to settle by arbitration a controversy' is 'valid, irrevocable, and enforceable' *without mention* of the validity of the contract in which it is contained," a challenge to the validity of "the contract as a whole[] does not prevent a court from enforcing a specific agreement to arbitrate." *Rent-A-Center*, 130 S. Ct. at 2778. Nothing in the Act's language

suggests that the principle of separability that this Court has applied to *validity* challenges requires a court to ignore other provisions of a contract in *interpreting* or *applying* an arbitration clause to determine if it covers the asserted claims. Nor does BDO attempt to ground its proposed rule in the Act's text.

2. BDO also cites (at 11) *AT&T Technologies*. But that case addressed only *who* should determine arbitrability – the court or the arbitrator. *See* 475 U.S. at 644 ("The issue presented in this case is whether a court asked to order arbitration . . . must first determine that the parties intended to arbitrate the dispute, or whether that determination is properly left to the arbitrator."). *AT&T Technologies* held that "the question of arbitrability . . . is undeniably an issue for judicial determination." *Id.* at 649. The Court observed that, in determining arbitrability, the court "is not to rule on the potential merits of the underlying claims," and it should apply "a presumption of arbitrability." *Id.* at 649-50. But those observations have nothing to do with whether, in interpreting the arbitration clause to determine whether it "covers the asserted dispute," the court can consider other provisions of the contract. *Id.* at 650 (internal quotation marks omitted). Notably, BDO makes no claim that, in determining that respondents' tort claims are not subject to arbitration under the consulting agreements, the Illinois appellate court impermissibly passed on the merits of any of respondents' underlying claims.

Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1 (1983), which BDO also cites (at 12), is even farther afield. The question there was whether a federal district court appropriately decided to stay a case "out of deference to [a]

parallel litigation brought in state court." 460 U.S. at 13. One factor relevant to that determination was whether "federal law provide[d] the rule of decision on the merits." *Id.* at 23. The court determined that federal law did provide the rule of decision because "[t]he basic issue presented in [the] federal suit was the arbitrability of the dispute" and "[f]ederal law in the terms of the [Federal] Arbitration Act governs that issue." *Id.* at 24. The court went on to opine that, under 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." *Id.* at 24-25. Nothing in *Moses H. Cone* supports the rule for which BDO advocates – namely, that a court applying an arbitration clause cannot look to other provisions of the agreement.

C. There Is No Division Of Authority In The Lower Courts

BDO's effort (at 13-16) to show a conflict among the lower courts has no merit.

1. BDO argues that the decision below conflicts with the law in the Seventh Circuit. *See* Pet. 13-14 (citing *United Steel Workers Int'l Union v. TriMas Corp.*, 531 F.3d 531, 536 (7th Cir. 2008); *Karl Schmidt Unisia, Inc. v. International Union*, 628 F.3d 909, 913 (7th Cir. 2010)). But, on the relevant point, the decision below reached the same result as in those cases. Each of the plaintiffs in *TriMas* and *Karl Schmidt* alleged a violation of an agreement containing an arbitration clause. *See TriMas*, 531 F.3d at 537 ("The Union alleges a 'violation' of the TriMas Agreement[.]"); *Karl Schmidt*, 628 F.3d at 914 ("[T]he Union . . . claims that the Company has

violated the terms of the [collective-bargaining agreement ("CBA").]"). Because the arbitration clauses in those cases applied to any alleged "violation" of the agreements in which they were contained, *see TriMas*, 531 F.3d at 536; *Karl Schmidt*, 628 F.3d at 913, the Seventh Circuit concluded that the claims of violations of the agreements were subject to arbitration. Here, too, the Illinois appellate court held that respondents must arbitrate their claims that BDO breached the consulting agreements. *See* Pet. App. 4a, 49a. Although the court below also held that respondents were not required to arbitrate tort claims involving conduct beyond the scope of the consulting agreements, neither *TriMas* nor *Karl Schmidt* addressed such a contention.

Nor does *TriMas* or *Karl Schmidt* support BDO's assertion that a court construing an arbitration clause cannot consider other provisions of the agreement. On the contrary, those cases followed the same interpretive approach that BDO criticizes here. In *TriMas*, the arbitration clause was contained in a CBA, and it applied to any "violation or dispute involving the terms of" the agreement. 531 F.3d at 536. The plaintiff union argued that the defendant had violated the agreement by failing to remain neutral during the union's effort to organize a particular plant. *See id.* at 535. The court, looking to other provisions of the agreement, pointed to the CBA's definition of "a 'covered workplace'" in concluding that the union's claim concerning that plant facially presented a "dispute involving the terms of" the agreement. *See id.* at 537 & n.2. Similarly, in *Karl Schmidt*, the court looked to other provisions of the agreement in determining that the union had alleged a violation of the agreement and, thus, a claim

covered by the arbitration clause. *See* 628 F.3d at 913-14. Other Seventh Circuit decisions confirm that the law in that circuit requires courts to consider other provisions of the agreement when necessary to determine whether a claim is within the scope of an arbitration clause. *See Stone v. Doerge*, 328 F.3d 343, 346 (7th Cir. 2003) (Easterbrook, J.) (looking to "the rest of the agreement between" the parties in interpreting the scope of the arbitration clause); *Independent Lift Truck Builders Union v. Hyster Co.*, 2 F.3d 233, 236-37 (7th Cir. 1993) (vacating order compelling arbitration and directing district court to "determine whether the collective bargaining agreement applies to retired employees").

The *TriMas* court also declined to address the defendant's argument that "extrinsic evidence" established the existence of an "oral side agreement" excluding the plant in question from the CBA's neutrality obligation. *See* 531 F.3d at 533, 535, 537-38. Such a side agreement could not change the fact that the parties disagreed over whether the CBA's neutrality obligation applied to the plant or that such a dispute was subject to arbitration under the arbitration clause's plain terms. *See id.* That holding does not create a conflict with the decision below, which relied not on extrinsic evidence but on the agreements' language. Indeed, the court below rejected *BDO's* attempt to rely on extrinsic evidence supposedly showing that the parties had acted as if the consulting agreements covered BDO's provision of investment advice to respondents, despite the agreements' language excluding such services. *See* Pet. App. 44a-46a.[6]

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[6] In any event, the extrinsic evidence in this case demonstrates that BDO intentionally omitted any mention of the tax

2. Nor is there any conflict between the decision below and Ninth Circuit cases, as BDO asserts. *See* Pet. 15 (citing *Haig Berberian, Inc. v. Cannery Warehousemen*, 535 F.2d 496, 499 (9th Cir. 1976) (per curiam); *Republic of Nicaragua v. Standard Fruit Co.*, 937 F.2d 469, 479 (9th Cir. 1991)). As in *TriMas* and *Karl Schmidt*, in both *Haig Berberian* and *Republic of Nicaragua*, the plaintiffs alleged violations of the agreements in question. *See Haig Berberian*, 535 F.2d at 498; *Republic of Nicaragua*, 937 F.2d at 471, 474, 477, 479 & n.15. In *Haig Berberian*, moreover, the court looked to other provisions of the contract in determining that the plaintiff had raised a claim subject to arbitration under it. *See Haig Berberian*, 535 F.2d at 498-99 & n.2. In *Republic of Nicaragua*, the Ninth Circuit criticized the district court for considering "the language of the [contract] generally" in determining the *enforceability* of the arbitration clause, not its scope. 937 F.2d at 479; *see id.* at 471 ("We hold that although it was the court's responsibility to determine the threshold question of arbitrability, the district court improperly looked to the *validity* of the contract as a whole[.]") (emphasis added).

D. BDO's Claim Rests On An Illogical Premise

This Court's review of BDO's first question presented is unwarranted for the additional reason that it rests on an illogical premise. The apparent premise of the first question is that, in determining whether an arbitration clause applies to a particular claim, a court should "limit[] its analysis to the arbitration clause itself" and not consider "general contract provisions outside of the arbitration clause."

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shelters in the consulting agreements and instead expressly excluded the investment advice at issue here. *See supra* p. 6.

Pet. 7. That position not only is unprecedented (as explained above), but also makes no sense. When, as here, the arbitration clause defines the disputes to which it applies by reference to the agreement of which it is a part, a court cannot determine the scope of the clause without some understanding of what the agreement encompasses. For example, the arbitration clause in this case applies to disputes "aris[ing] in connection with the performance or breach of this agreement." Pet. App. 10a (internal quotation marks omitted). Without knowing what "this agreement" provides, a court could not decide whether a particular dispute "arises in connection with" the agreement's "performance or breach." *Id.*[7] BDO makes no effort to explain how a court could make that determination without looking at "contract provisions outside of the arbitration clause." Pet. 7. Nor does BDO attempt to square the rule for which it advocates with the general principle that contracts are interpreted as a whole. *See, e.g.*, *Restatement (Second) of Contracts* § 202 (1981) ("A writing is interpreted as a whole").

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[7] For that reason, courts that have addressed this issue have determined that there is no bar on looking to other provisions of the contract in applying an arbitration clause to determine if it covers the asserted claims. *See, e.g.*, *Mehler v. Terminix Int'l Co. L.P.*, 205 F.3d 44, 47 (2d Cir. 2000) ("We take no issue with the District Court's decision to determine the relationship between the claims and the scope of the contract containing the arbitration clause.") (citing cases).

II. THE ILLINOIS APPELLATE COURT'S RECOGNITION THAT THE ARBITRATION CLAUSE IN THIS CASE IS NARROWER THAN THE CLAUSE IN *PRIMA PAINT* DOES NOT WARRANT THIS COURT'S REVIEW

A. BDO argues (at 17-18) that the court below "invented an intermediate classification" for arbitration clauses and thereby created a conflict with federal decisions. But that mischaracterizes the Illinois appellate court's decision. The court compared the arbitration clause at issue here, which applies to disputes arising "in connection with the performance or breach of" the agreements (Pet. App. 10a), with the arbitration clause at issue in *Prima Paint*, which applied to "[a]ny controversy or claim arising out of or relating to this Agreement, or the breach thereof" (388 U.S. at 398 (internal quotation marks omitted)).[8] The court observed that the clause in this

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[8] Most of the cases BDO cites (at 18-19) involved an arbitration clause similar to the broader one at issue in *Prima Paint*. *See Newmont U.S.A. Ltd. v. Insurance Co. of N. Am.*, 615 F.3d 1268, 1272 (10th Cir. 2010) ("any dispute arising out of this Agreement"); *Terrebonne v. K-Sea Transp. Corp.*, 477 F.3d 271, 274 (5th Cir. 2007) ("any claims related to" a workplace injury); *Burlington Ins. Co. v. Trygg-Hansa Ins. Co. AB*, 9 F. App'x 196, 201 (4th Cir. 2001) (per curiam) ("any dispute arising out of this Agreement"); *see also Southern California Dist. Council of Laborers v. Berry Constr., Inc.*, 984 F.2d 340, 341-42, 344 (9th Cir. 1993) ("all grievances or disputes . . . over the interpretation or application of the terms of" the agreement, including "[a]ny dispute involving" the section of the agreement at issue in the case); *cf. Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading Inc.*, 252 F.3d 218, 222 (2d Cir. 2001) ("[a]ny dispute arising from the making, performance or termination of" the agreement).

One of the cases on which BDO relies, *United Steelworkers of America v. Duluth Clinic, Ltd.*, 413 F.3d 786 (8th Cir. 2005),

case is "more narrow than" the clause in *Prima Paint* because it applies to claims "relating to the performance of the agreement – not claims relating to the agreement." Pet. App. 38a-39a. BDO does not dispute the accuracy of that observation (nor could it). The Illinois appellate court did not "invent[]" a "novel classification" of arbitration clauses (Pet. 18); it simply recognized a difference between the language of the clause at issue here and the clause at issue in *Prima Paint*.[9]

B. More fundamentally, BDO fails to show how the Illinois appellate court's description of the arbitration clause could have affected the outcome of the appeal. BDO asserts (at 20-21) that "classification of an arbitration clause as broad" triggers "a presumption of arbitrability" and requires the court to resolve "all doubts concerning the scope of arbitrable issues" (internal quotation marks omitted). But BDO ignores the Illinois appellate court's explicit statements that it would resolve "any doubts" "in favor of arbitrability" and that the parties' "'intentions'" would be "'generously construed as to issues of arbitrability.'" Pet. App. 37a (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985)). The Illinois appellate court correctly stated

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described as "narrow" an arbitration clause covering "any claim . . . alleging a violation of a specific contract provision or adherence to the terms and provisions of this Agreement." *Id.* at 789-90.

[9] For that reason, there is no conflict between the decision below and the cases that BDO says have described "BDO's standard-form arbitration clause" as "broad." Pet. 19. In any event, a fact-bound dispute about the characterization of BDO's particular arbitration clause would not warrant this Court's review, particularly where (as here) it does not affect the outcome of the case. *See infra* Part II.B.

the very rule that BDO claims the court failed to follow. And, in applying that rule, the appellate court concluded that respondents' claims for breach of contract were subject to arbitration.

The Illinois appellate court concluded that respondents' tort claims were not subject to arbitration, notwithstanding the presumption of arbitrability, because "[t]he arbitration clause is not susceptible to a plausible interpretation that covers" those claims. *Id.* at 44a. BDO does not directly contest that determination. And any fact-bound dispute over the Illinois appellate court's application of this arbitration clause to the complicated allegations in this case would not warrant this Court's review in any event.

BDO also asserts (at 21) that, with a "broad" arbitration clause, "all claims that are reasonably related to the general subject matter of the [agreement] (as opposed to facially within the scope of the arbitration clause) are subject to arbitration." To the extent BDO means to suggest that courts have forced parties to arbitrate matters beyond the scope of their arbitration clauses – contrary to this Court's precedents, *see supra* p. 13 – it is incorrect. The cases BDO cites (at 21) address situations where there are multiple contracts between parties to a particular transaction, and only one of the agreements contains an arbitration clause. *See Louis Dreyfus*, 252 F.3d at 224, 228-29; *see also Newmont*, 615 F.3d at 1274 (quoting *Cummings v. FedEx Ground Package Sys., Inc.*, 404 F.3d 1258, 1261 (10th Cir. 2005) (quoting in turn *Louis Dreyfus*, 252 F.3d at 224)). Those cases state that, when an arbitration clause broadly covers any issue relating to the agreement in which it is contained, arbitration of issues relating to a "collateral agreement" – that is, "a separate, side agree-

ment, connected with the principal contract which contains the arbitration clause" – will be ordered when the "collateral matter[s]" "implicate[] issues of contract construction or the parties' rights and obligations under" the principal contract. *Louis Dreyfus*, 252 F.3d at 224, 228 (internal quotation marks omitted). Here, there are no "collateral agreements." Accordingly, the judgment below does not conflict with cases such as *Louis Dreyfus*.

III. IN ANY EVENT, THE ARBITRATION CLAUSES ARE UNENFORCEABLE

The result reached by the Illinois appellate court is correct for an additional reason: the arbitration clauses are unenforceable.[10] Respondents explained in their briefs in the Illinois appellate court that those clauses are invalid on multiple grounds under applicable state law. *See* No. 4-10-0002 C.A. Br. 19-34, 39-49; No. 4-10-0003 C.A. Br. 32-44. The existence of those alternative bases for affirming the judgment provides another reason for denying further review by this Court.

In particular, with respect to the consulting agreements for 1999-2001, the arbitration clauses are unenforceable under New York law because BDO's fraud permeated the entire agreements. Although the FAA ordinarily requires a party seeking to invalidate an arbitration clause on the ground of fraudulent inducement to show that the arbitration clause itself was fraudulently induced, the Act also permits "the enforcement of agreements to arbitrate under different rules than those set forth in the Act

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[10] The Illinois appellate court did not address respondents' challenges to the validity of the arbitration clauses. *See* Pet. App. 37a.

itself." *Volt Info. Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 479 (1989). Here, the 1999-2001 consulting agreements provide that applicable disputes "shall be settled by arbitration *in accordance with the laws of the State of New York.*" A313 (emphasis added); *see supra* note 2. Under New York law, "if the alleged fraud was part of a grand scheme that permeated the entire contract, including the arbitration provision, the arbitration provision should fall with the rest of the contract." *Weinrott v. Carp*, 298 N.E.2d 42, 46 (N.Y. 1973); *see Anderson St. Realty Corp. v. New Rochelle Revitalization, LLC*, 78 A.D.3d 972, 974 (N.Y. App. Div. 2010).

The consulting agreements in this case were part of a fraudulent scheme that permeated the entire contracts. BDO made the following representations, among others, to respondents:

- the investment transactions were legitimate investments that would generate above-average returns, while legally minimizing applicable taxes;
- the investment transactions were consistent with applicable tax law;
- "independent" law firms would issue opinion letters confirming the propriety of the investment transactions and precluding the IRS from assessing penalties in the event of an audit; and
- the investment transactions had the required business purpose and economic substance.

See A99, 103-04, 107-10, 122-23, 146-52, 192-94, 205, 207-08, 229-30, 245-46, 281-91. Those representations, and many others, were false when made, and BDO knew them to be false. BDO made those representations to convince respondents to execute the

consulting agreements, and respondents relied on BDO's misrepresentations in entering into those agreements. *See id.* The consulting agreements, and the arbitration clauses contained in them, are accordingly invalid under governing New York law. Additionally, the arbitration clauses are unconscionable under New York law (with respect to the arbitration clauses contained in the 1999-2001 consulting agreements) and Illinois law (with respect to the arbitration clauses contained in the 2002-2003 consulting agreements).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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July 29, 2011