No. 11-

IN THE

Supreme Court of the United States

KPMG LLP,

Petitioner,

v.

ROBERT COCCHI, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the Fourth District Court of Appeal of the State of Florida

PETITION FOR A WRIT OF CERTIORARI

JOHN K. VILLA
DAVID A. FORKNER
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, NW
Washington, DC 20005
(202) 434-5117

EDWARD A. MAROD
EDWARD A. MAROD, P.A.
400 S. Australian Avenue
Suite 750
W. Palm Beach, FL 33401-5044
(561) 832-0050

CARTER G. PHILLIPS*
PAUL J. ZIDLICKY
ERIC D. MCARTHUR
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000
cphillips@sidley.com

GARY F. BENDINGER
GREGORY G. BALLARD
SIDLEY AUSTIN LLP
787 Seventh Avenue
New York, NY 10019
(212) 839-5300

Counsel for Petitioner

* Counsel of Record

June 15, 2011

QUESTION PRESENTED

Whether the Florida court of appeal's refusal to compel arbitration conflicts with this Court's decisions holding that, under the Federal Arbitration Act, written agreements to arbitrate must be enforced under generally applicable state-law principles even if the result is piecemeal litigation.

PARTIES TO THE PROCEEDINGS

The parties to the proceeding are KPMG LLP, Robert Cocchi, Penny Ellen Fromm, PEF Associates, Inc., Brian Gaines, John Johnson, Dr. David Schwartzwald, Rand Schwartzwald, Dr. Herbert Silverberg, John Silverberg, Dr. Jerry Weiss, Donna Weiss, The Norman Shulevitz Foundation, Inc., RM Management, LLC, Sande Wische, Carol Wische, Paula Zitrin, Dr. Jaron Zitrin, Rachel Zitrin, Dr. Roger Zitrin, Tremont Group Holdings, Inc., Tremont Partners, Inc., Rye Select Broad Market Fund, LP, Rye Select Broad Market Prime Fund, LP, and Rye Select Broad Market XL Fund, LP.

RULE 29.6 STATEMENT

Petitioner KPMG LLP has no parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

TABLE OF CONTENTS

TABLE OF CONTENTS—continued

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

CONSTITUTION AND STATUTES

TABLE OF AUTHORITIES—continued

SCHOLARLY AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Petitioner KPMG LLP ("KPMG") respectfully petitions for a writ of certiorari to review the judgment of the Fourth District Court of Appeal of the State of Florida in this case.

OPINIONS BELOW

The opinion of the Fourth District Court of Appeal of the State of Florida is reported at 51 So. 3d 1165 and is reproduced in the Appendix to this Petition ("Pet. App.") at 23a–29a. The court of appeal's order denying rehearing and rehearing en banc is unpublished and is reproduced at Pet. App. 61a. The unreported orders of the Circuit Court of the Fifteenth Judicial Circuit, Palm Beach County, Florida, are reproduced at Pet. App. 1a–22a, 37a–58a, and 59a–60a.

JURISDICTION

The Florida court of appeal entered its final judgment on December 22, 2010. KPMG's timely petition for rehearing and rehearing en banc was denied on February 15, 2011. Pet. App. 61a. Review by the Florida Supreme Court was unavailable because it lacked jurisdiction over the court of appeal's decision. See Fla. Const. art. 5, § 3(b); *Nash* v. *Fla. Indus. Comm'n*, 389 U.S. 235, 237 n.1 (1967). On April 21, 2011, Justice Thomas granted KPMG's application to extend the time to file its petition until June 15, 2011. This Court has jurisdiction over the court of appeal's order affirming the denial of KPMG's motion to compel arbitration under 28 U.S.C. § 1257(a). See, *e.g.*, *Southland Corp.* v. *Keating*, 465 U.S. 1, 6–8 (1984).

RELEVANT STATUTORY PROVISIONS

The Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1–16, mandates enforcement of the terms of arbitration agreements contained in contracts evidencing transactions in interstate commerce. Section 2 of the FAA provides, in pertinent part, that written arbitration agreements "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.

STATEMENT OF THE CASE

The decision of the Florida court of appeal in this case conflicts with this Court's cases and federal circuit cases holding that the Federal Arbitration Act mandates that courts rigorously enforce arbitration agreements under generally applicable state-law principles even if the result is "piecemeal" litigation.

This case arises from the widely reported fraud perpetrated by Bernard Madoff on investors around the country. Plaintiffs in this case are individuals and entities who bought limited partnership interests in one or more of three entities, referred to collectively as the Rye Funds, which invested with Madoff's company, Bernard L. Madoff Investment Securities LLC, and lost substantially all of their value after Madoff's Ponzi scheme was disclosed. This case is one of numerous cases filed in state and federal courts across the country.

As discussed in detail below, KPMG provided audit services to the Rye Funds pursuant to written engagement agreements subject to the FAA. The agreements contain a broadly worded arbitration clause that encompasses the claims that respondents seek to litigate in court. Respondents, who are not

parties to the engagement agreement, nonetheless are bound by the arbitration agreement applicable to the Rye Funds under traditional principles of Delaware state law if, as here, they are suing "derivatively" on behalf of the Rye Funds in which they are limited partners.

Before the Florida court of appeal, KPMG showed that each of respondents' four claims against KPMG was "derivative" under Delaware law and therefore, under the FAA, arbitration should be ordered to resolve each of those claims. Although respondents expressly conceded that they would be bound to arbitrate any claims that were "derivative" of those of the Rye Funds, the Florida court of appeal was equally "candid" that it was "not very sympathetic to binding people who never signed an arbitration agreement to arbitrate." Pet. App. 31a (Oral Arg. Tr. 17). In the ruling under challenge, the court of appeal concluded that two of the four claims against KPMG were "direct," and, on that basis, denied KPMG's right to arbitrate any of the four claims against KPMG "because the arbitral agreement upon which KPMG relied would not apply to the direct claims made by the individual plaintiffs." *Id*. at 24a–25a.

The court of appeal's decision directly conflicts with this Court's precedents. *First*, under the FAA, a court must compel arbitration of any claim subject to arbitration even if it concludes that one or more other claims are not subject to arbitration. See *Dean Witter Reynolds Inc.* v. *Byrd*, 470 U.S. 213, 218–21 (1985) (FAA requires arbitration even if "such a course would result in bifurcated proceedings"). The Florida court of appeal cannot refuse to compel arbitration of one claim because it concludes that another claim is not subject to arbitration. The court of appeal's refusal to compel arbitration conflicts with numerous

decisions by the federal courts of appeals applying this Court's decision in *Dean Witter*.

Second, under the FAA, arbitration agreements are enforceable against "nonparties to the contract" where, as here, "'traditional principles' of state law allow a contract to be enforced by or against nonparties to the contract." *Arthur Andersen LLP* v. *Carlisle*, 129 S. Ct. 1896, 1902 (2009); *id.* at 1902 n.5 (court may not "disregard . . . state law *permitting* arbitration by or against nonparties to the written arbitration agreement"). The decision below thus cannot be defended based on a reluctance to compel arbitration against "people who never signed an agreement" because "state law *permit[s]* arbitration . . . against nonparties to the written arbitration agreement." *Id.* at 1902 n.5. The court of appeal's refusal to compel arbitration against nonparties to the agreement conflicts with decisions by the federal courts of appeals holding that nonparties can be compelled to arbitrate under generally applicable principles of state law.

Because the court of appeal's decision is irreconcilable with this Court's decisions in *Dean Witter* and *Arthur Andersen*, KPMG respectfully requests that the Court grant the petition for certiorari, summarily reverse the decision below, and remand for further proceedings not inconsistent with these precedents. See, *e.g.*, *Citizens Bank* v. *Alafabco, Inc.*, 539 U.S. 52 (2003) (per curiam) (summarily reversing misapplication of the Court's precedent interpreting the FAA). Alternatively, the Court should grant plenary review.

A. Statutory Framework.

"The FAA was enacted in 1925 in response to widespread judicial hostility to arbitration agree-

ments." *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1745 (2011); see also *Volt Info. Scis., Inc.* v. *Bd. of Trs.*, 489 U.S. 468, 478 (1989). The Act's "central purpose" is "to ensure 'that private agreements to arbitrate are enforced according to their terms.'" *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53–54 (1995) (quoting *Volt*, 489 U.S. at 479). Accordingly, courts must "rigorously enforce agreements to arbitrate, even if the result is 'piecemeal' litigation." *Dean Witter*, 470 U.S. at 221; see also *Perry* v. *Thomas*, 482 U.S. 483, 490 (1987).

The Act's centerpiece is § 2, which provides that arbitration agreements "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. This provision "creates substantive federal law regarding the enforceability of arbitration agreements, requiring courts to 'place such agreements upon the same footing as other contracts.'" *Arthur Andersen*, 129 S. Ct. at 1901 (quoting *Volt*. 489 U.S. at 478); see also *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). Because judicial hostility to arbitration existed in both federal and state courts, this Court has held repeatedly that § 2 of the FAA applies in both state and federal courts. *Southland*, 465 U.S. at 12–15; *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 272 (1995). "In enacting § 2 of the federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Southland*, 465 U.S. at 10.

Although the FAA creates substantive federal law mandating enforcement of arbitration agreements, it does not "alter background principles of state

contract law regarding the scope of agreements." *Arthur Andersen*, 129 S. Ct. at 1902. To the contrary, the FAA "retains an external body of [state] law" that "determine[s] which contracts are binding under § 2." *Id.*; see also *Perry*, 482 U.S. at 492 n.9; *First Options of Chi., Inc.* v. *Kaplan*, 514 U.S. 938, 944 (1995). Under the FAA, state law may not, however, discriminate against arbitration agreements; it applies only "*if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." *Perry*, 482 U.S. at 493 n.9; see also *Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681, 687 (1996) (§ 2 "preclude[s] States from singling out arbitration provisions for suspect status").

Background rules of state law govern "the question of who is bound" by an arbitration agreement. *Arthur Andersen*, 129 S. Ct. at 1902. "'[T]raditional principles' of state law allow a contract to be enforced by or against nonparties to the contract" in a variety of circumstances, including through "'assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel.'" *Id.* (quoting 21 R. Lord, *Williston on Contracts*, § 57:19, at 183 (4th ed. 2001)). Thus, if an arbitration agreement is enforceable against a nonparty under traditional state-law principles, the FAA requires state and federal courts to enforce the agreement and compel the nonparty to arbitrate. Put another way, the FAA prohibits a court from "disregard[ing] . . . state law permitting arbitration by or against nonparties to the written arbitration agreement." *Id.* at 1902 n.5 (emphasis omitted).

In making that determination, the FAA "manifest[s] a 'liberal federal policy favoring arbitration.'" *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 (1991) (quoting *Moses H. Cone*, 460 U.S. at 24).

Congress recognized that arbitration "'is usually cheaper and faster than litigation,'" *Allied-Bruce*, 513 U.S. at 280 (quoting H.R. Rep. No 97-542, at 13 (1982)), and concluded that parties should be free to "trad[e] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration," *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). This Court accordingly has instructed that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration," and that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone*, 460 U.S. at 24–25.

B. Factual Background.

As noted above, KPMG served as an outside auditor for the Rye Funds. Compl. ¶ 76. It audited their financial statements pursuant to engagement agreements that contain a broad arbitration clause. The arbitration clause provides, in pertinent part, that arbitration and mediation are the "sole methodologies" for resolving "[a]ny dispute or claim arising out of or relating to the engagement letter" or "the services provided thereunder, or any other services provided by or on behalf of KPMG." Pet. App. 63a, 64a, 68a, 69a. The agreements further provide that "[a]ny issue concerning the extent to which any dispute is subject to arbitration, or any dispute concerning the applicability, interpretation, or enforceability of these procedures . . . shall be governed by the Federal Arbitration Act." *Id.* at 65a–66a, 70a–71a.

Plaintiffs allege that KPMG did not use proper auditing standards when it audited the Rye Funds and as a result failed to uncover Madoff's fraud. Compl. ¶¶ 76–90. Other investors across the country,

including other investors in the Rye Funds, have brought similar claims against KPMG. *E.g.*, *In re Tremont Grp. Holdings, Inc., Sec. Litig.*, MDL No. 2052 (S.D.N.Y. established June 11, 2009). In several of those cases, the plaintiffs either have conceded that their claims must be arbitrated under the engage-ment agreements or have been compelled to arbitrate under the FAA. See, *e.g.*, *In re Tremont Sec. Law, State Law & Ins. Litig.*, No. 08-11183 (S.D.N.Y. Mar. 30, 2010) (Doc. No. 172); *Zutty* v. *Rye Select Broad Mkt. Prime Fund,* No. 09-113209 (N.Y. Sup. Ct. filed Sept. 17, 2009); *Wexler* v. *Tremont Partners, Inc.*, No. 09-101615 (N.Y. Sup. Ct. filed Feb. 5, 2009); *2005 Tomchin Family Charitable Trust* v. *Tremont Partners, Inc.*, No. 09-600332 (N.Y. Sup. Ct. filed Feb. 4, 2009).

C. Proceedings Below.

Plaintiffs filed this suit in May 2009, alleging multiple claims against the Rye Funds and their general partner, as well as four claims against KPMG: (1) negligent misrepresentation, Compl. ¶¶ 128–134; (2) violation of the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"), *id.* ¶¶ 149–157; (3) professional malpractice, *id.* ¶¶ 158–163; and (4) aiding and abetting a breach of fiduciary duty, *id.* ¶¶ 181–188. Plaintiffs sought recovery against KPMG "for damages as a result of losses of their investment in several partnerships." Pet. App. 24a. All of plaintiffs' claims against KPMG depend on the same basic allegation that KPMG failed to follow appropriate standards in conducting its audits of the Rye Funds' financial statements.[1]

---

[1] Compl. ¶ 131 (negligent misrepresentation) (alleging that KPMG did not follow GAAS and GAAP with respect to "the audited financial statements for the Rye Funds"); *id.* ¶ 153

On June 30, 2009, KPMG moved to compel arbitration and stay the action against KPMG or, in the alternative, to dismiss the claims against KPMG on the merits. As to arbitration, KPMG showed that the arbitration agreement was governed by the Federal Arbitration Act. See KPMG LLP's Mem. in Support of Its Mot. to Compel Arbitration and to Stay the Action Against It ("KPMG Mot. to Compel") at 2–4 (Oct. 26, 2009). KPMG further explained that, under the FAA, if there is a valid and binding agreement to which the parties' claims are subject, then "'the Act leaves no place for the exercise of discretion by a . . . court'—the claims must be sent to arbitration." *Id.* at 2 (omission in original). KPMG showed that there were valid arbitration agreements, that the agreements encompassed plaintiffs' claims, and that plaintiffs were bound by the KPMG arbitration agreements with the Rye Funds because plaintiffs were asserting claims that were derivative of claims of the Rye Funds. *Id.* at 2–4.[2]

In response, plaintiffs did not dispute that a valid and binding arbitration agreement existed between KPMG and the Rye Funds. Plaintiffs' Opposition to KPMG's Mot. to Compel Arbitration and to Stay the Action Against KPMG LLP at 3 (Oct. 26, 2009). They did not dispute that the arbitration agreement

---

(FDUTPA) (same); *id* ¶ 160 (malpractice) (same); *id.* ¶ 186 (aiding and abetting the breach of fiduciary duty) (alleging that KPMG "knowingly perform[ed] an inadequate audit").

[2] Because the Rye Funds were limited partnerships organized in Delaware, under general principles of Delaware state law, plaintiffs were attempting to step into the Rye Funds' shoes and were subject to the same defenses that KPMG could advance against the Rye Funds. KPMG Mot. to Compel at 3–4 ("Derivative plaintiffs enjoy rights no greater than those of the entity on whose behalf they sue and are bound to any arbitration agreements entered into by that entity.").

encompassed plaintiffs' claims because they arose from audit services performed by KPMG under the engagement agreements. *Id.* at 4–11. Nor did they dispute that they were bound by the arbitration agreement to the extent they were asserting claims derivatively on behalf of the Rye Funds. *Id.* at 6–7. Plaintiffs instead argued that they were not bound by the arbitration agreement because they were not parties to the agreements, and their claims were direct, not derivative. *Id.* at 6–8.

On November 2, 2009, the trial court denied KPMG's motion to compel arbitration without explanation in a one-sentence order. Pet. App. 59a–60a. KPMG immediately appealed under Florida Rule of Appellate Procedure 9.130(a)(3)(C)(iv), authorizing interlocutory appeals of orders determining a party's entitlement to arbitration. See also 9 U.S.C. § 16(a)(1).

On appeal, KPMG argued that the decision whether to compel arbitration was governed by the FAA, under which "'any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.'" Initial Brief of KPMG at 10 (Jan. 15, 2010). KPMG argued that plaintiffs were obligated to arbitrate because (1) there is a valid arbitration agreement, (2) that agreement is binding on plaintiffs, and (3) plaintiffs' claims fall within the scope of that agreement. *Id.* at 8. Where these criteria are satisfied, KPMG further explained that, under the FAA, "the Court's role is severely limited" because "[t]he FAA 'leaves no place for the exercise of discretion by a [court].'" *Id.* at 11 (second alteration in original) (quoting *Dean Witter*, 470 U.S. at 218).

KPMG showed that plaintiffs were bound by the arbitration agreements because their claims depended on injuries suffered by the Rye Funds. *Id.*

at 13. Therefore, "Plaintiffs stand in the shoes of the partnerships" and "are subject to any defenses KPMG LLP could assert against the limited partnerships, including contractual rights to arbitration." *Id.*[3] At oral argument, plaintiffs conceded that "the direct/ derivative test of Delaware law applies to determine whether this case is arbitrable under federal law." Pet. App. 34a (Tr. Oral Arg. 31) ("We would concede that yes, Your Honor, that the direct/derivative issue is central to this court's decision.").

On December 22, 2010, the Florida court of appeal affirmed the trial court's order denying KPMG's motion to compel arbitration. Pet. App. 23a–29a. Although KPMG contended that each of plaintiffs' four claims was derivative, and although plaintiffs conceded that any derivative claims were subject to the arbitration agreement, the court of appeal addressed only two of plaintiffs' claims. It ruled that plaintiffs' negligent-misrepresentation and FDUTPA claims were direct claims because plaintiffs alleged "torts directed at the individual limited partners" and that "the limited partners suffered individual harm." *Id.* at 26a. The court of appeal did not address whether plaintiffs' claims for malpractice and aiding

---

[3] On February 5, 2010, while KPMG's appeal was pending, the trial court granted KPMG's motion to dismiss in part and denied it in part. Pet. App. 37a–58a. It held that plaintiffs' claims for negligent misrepresentation, malpractice, and aiding and abetting a breach of fiduciary duty were derivative, and dismissed those claims without prejudice and with leave to amend. *Id.* at 43a–44a. Only plaintiffs' FDUTPA claim was ruled to be direct. *Id.* at 45a. The court of appeal granted KPMG's motion to supplement the record on appeal to include the trial court's decision, and, in its reply brief, KPMG alerted the court of appeal that the trial court had ruled that "three of Plaintiffs' four claims are derivative." Reply Br. of KPMG at 1 (Apr. 20, 2010).

and abetting the breach of a fiduciary duty were derivative or direct. Instead, the court of appeal affirmed the order denying the motion to compel arbitration as to all four claims "because the arbitral agreement upon which KPMG relied would not apply to the direct claims made by the individual plaintiffs." *Id*. at 24a–25a.

KPMG petitioned for rehearing and rehearing en banc, contending that the court of appeal had erred by denying arbitration as to all claims. KPMG acknowledged that the Court had concluded that two of the four claims brought by plaintiffs were direct, but argued that plaintiffs should be compelled to arbitrate the remaining two claims that the Court had not ruled to be direct. KPMG's Mot. for Clarification, Rehearing, Rehearing En Banc or Certification at 3–4 (Jan. 6, 2011). KPMG made clear that under the FAA, "'an arbitration agreement must be enforced notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement.'" *Id.* at 6 (quoting *Moses H. Cone*, 460 U.S. at 20).

Specifically, KPMG explained that if *any* claim is derivative, then that claim is subject to binding arbitration, and the remaining claims must be stayed pending arbitration because all of plaintiffs' claims involve the same issues. *Id.* at 7–8; see 9 U.S.C. § 3; Fla. Stat. § 682.03(3); *Okeelanta Corp.* v. *U.S. Sugar Corp.*, 712 So. 2d 814, 815 (Fla. Dist. Ct. App. 1998) (per curiam); *425 Fla., Inc.* v. *George V. Behan Constr., Inc.*, 497 So. 2d 1340, 1341 (Fla. Dist. Ct. App. 1986). In their response, plaintiffs acknowledged that the court of appeal denied arbitration of all claims even though its ruling "was silent" about whether two of plaintiffs' claims "are derivative." Plaintiffs' Response at 3 (Jan. 21, 2011). On February

15, 2011, the court of appeal denied KPMG's petition for rehearing and rehearing en banc without comment. Pet. App. 61a.

Meanwhile, in the trial court, on February 25, 2010, plaintiffs filed an amended complaint, reasserting each of their four previous claims against KPMG—including those ruled by the trial court to be derivative—as well as an additional claim for aiding and abetting fraud. Amended Compl. ¶¶ 135–149, 181–206, 222–239. KPMG again moved to compel arbitration or, in the alternative, to dismiss because plaintiffs were bound by the arbitration agreement as they were asserting derivative claims.

On January 25, 2011, the trial court denied KPMG's motion to compel arbitration, citing its earlier order denying arbitration and the court of appeal's decision affirming that order. Pet. App. 2a (denying motion to compel arbitration because the trial court's previous "order was affirmed by the Fourth District Court of Appeal" and "[t]he arguments presented in the instant motion are nearly identical to the arguments regarding the Engagement Agreement that were presented in KPMG's prior motion"). The court denied KPMG's motion to dismiss the negligent-misrepresentation and professional-malpractice claims, *id*. at 3a–5a, and then dismissed the other three claims without prejudice to amend, *id*. at 5a–10a, 22a.

Plaintiffs have sought leave to amend their complaint to reassert each of their previous claims against KPMG—including those deemed to be derivative by the trial court—as well as an additional claim for fraud in the inducement. See Second Amended Compl. ¶¶ 167–181, 190–204, 236–261, 284–292, 302–310.

REASONS FOR GRANTING THE PETITION

Review should be granted because the decision of the Florida court of appeal conflicts with the decisions of this Court and federal circuit courts mandating that agreements to arbitrate under the FAA must be rigorously enforced even if the result is "'piecemeal'" litigation. See *Dean Witter*, 470 U.S. at 218–21; *Moses H. Cone*, 460 U.S. at 24; *Arthur Andersen*, 129 S. Ct. at 1902.

First, the Florida court of appeal affirmed the denial of KPMG's motion to compel arbitration without ever assessing whether two of the four claims advanced against KPMG were subject to binding arbitration. The court of appeal denied arbitration as to all four claims "because the arbitral agreement upon which KPMG relied would not apply to the direct claims made by the individual plaintiffs." Pet. App. 24a–25a. That analysis conflicts directly with this Court's ruling that § 2 of the FAA "leaves no place for the exercise of discretion by a district court" and requires that a court "rigorously enforce agreements to arbitrate, even if the result is 'piecemeal' litigation." *Dean Witter*, 470 U.S. at 218, 221; see *Moses H. Cone*, 460 U.S. at 20. Federal courts of appeals throughout the country uniformly have concluded, following *Dean Witter*, that the FAA prevents a court from declining to compel arbitration of claims subject to an arbitration agreement because it deems other claims nonarbitrable. The decision below conflicts directly with these settled principles.

Second, the Florida court of appeal's decision cannot be justified based on the fact that plaintiffs "never signed an agreement to arbitrate." This Court has made clear that the FAA, and its policy favoring arbitration, do not permit a court to "disregard" "state law *permitting* arbitration by or against

nonparties to the written arbitration agreement." *Arthur Andersen*, 129 S. Ct. at 1902 n.5. Here, the Florida court of appeal refused to compel arbitration of any claim advanced against KPMG without ever deciding whether "'traditional principles' of state law allow" KPMG's arbitration agreement to be enforced against plaintiffs as to two of plaintiffs' claims. *Id.* at 1902. By doing so, the court of appeal's decision conflicts with decisions of the federal courts of appeals holding that the FAA requires a determination whether arbitration can be enforced under traditional state-law principles even when a party did not sign the arbitration agreement.

Summary reversal is warranted because the governing principles set forth in this Court's cases are well established, and the decision of the court of appeal contravenes those settled standards as to an important and recurring issue of federal law. Alternatively, the Court should grant plenary review because the decision of the Florida court of appeal conflicts directly with decisions of this Court and multiple federal appellate courts on an issue that has arisen, and will continue to arise, regarding the proper rules governing the resolution of litigants' efforts to compel arbitration under the FAA.

I. THE DECISION BELOW DISREGARDS THIS COURT'S PRECEDENTS MANDATING RIGOROUS ENFORCEMENT OF ARBITRATION AGREEMENTS UNDER THE FAA.

The decision of the Florida court of appeal in this case is contrary to this Court's settled precedents requiring state courts to enforce arbitration agreements under the FAA.

Under the FAA, arbitration must be compelled when (1) there is a written agreement to arbitrate, (2) the agreement is broad enough to encompass the subject matter of the dispute between the parties, and (3) the agreement is binding on the parties. See *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002). Here, plaintiffs did not and could not contend that the KPMG arbitration agreement is invalid, and there was no dispute that, by its terms, the arbitration agreement encompasses the subject matter of the dispute between plaintiffs and KPMG. Further, as to the final question—whether the agreement is binding on plaintiffs—there was no dispute that plaintiffs are bound by the arbitration agreement to the extent they are suing derivatively on behalf of the Rye Funds rather than directly on their own behalf. Against this background, the court of appeal denied arbitration of all four claims against KPMG based on its conclusion that two of the claims were "direct" claims to which the KPMG arbitration agreement "would not apply." Pet. App. 24a–25a. By doing so, the court disregarded this Court's precedents under the FAA.

As plaintiffs have acknowledged, the court of appeal's decision "was silent" about whether plaintiffs' malpractice and aiding and abetting a breach of fiduciary duty claims "are derivative." Plaintiffs' Response at 3. The court's refusal to compel arbitration of any claim against KPMG can be explained in one of two ways. *First*, the court of appeal concluded that it was unnecessary to decide whether plaintiffs' malpractice and aiding-and-abetting claims were derivative because the presence of two claims it deemed not subject to arbitration authorized the denial of arbitration as to *all* claims against KPMG. *Second*, the court of appeal concluded

that plaintiffs' malpractice and aiding-and-abetting claims were derivative, but nonetheless refused to compel arbitration of those claims because plaintiffs never signed an agreement to arbitrate. Either way, the court's decision violates this Court's precedents and should be reversed.

1. Under the FAA, if any claim is subject to binding arbitration, a court must compel arbitration of that claim even if the suit involves other claims or parties not subject to arbitration. The controlling decision is *Dean Witter Reynolds Inc.* v. *Byrd*, 470 U.S. 213 (1985). There, an investor sued his broker-dealer, Dean Witter, alleging violations of both the federal securities laws and various state-law provisions. Pursuant to the parties' arbitration agreement, Dean Witter moved to compel arbitration, but only with respect to the state-law claims, because it was assumed the federal securities claims were nonarbitrable under *Wilko* v. *Swan*, 346 U.S. 427 (1953). The district court refused to compel arbitration, concluding that "[w]hen arbitrable and non-arbitrable claims arise out of the same transaction, and are sufficiently intertwined factually and legally, the district court . . . may in its discretion deny arbitration as to the arbitrable claims and try all the claims together." *Dean Witter*, 470 U.S. at 216.

This Court unanimously rejected that view, holding that the FAA "requires district courts to compel arbitration of pendent arbitrable claims when one of the parties files a motion to compel, even where the result would be the possibly inefficient maintenance of separate proceedings in different forums." *Id.* at 217. Emphasizing the FAA's mandatory and unequivocal language, and Congress's purpose "to ensure judicial enforcement of privately made agreements to arbitrate," this Court concluded that "a

court must compel arbitration of otherwise arbitrable claims, when a motion to compel arbitration is made," "even if the result is 'piecemeal' litigation." *Id*. at 218–21.

Dean Witter thus squarely forecloses any contention that the presence of nonarbitrable direct claims permitted the court to refuse to enforce the arbitration agreement with respect to arbitrable derivative claims. Even accepting the court of appeal's decision as to plaintiffs' negligent-misrepresentation and FDUTPA claims,[4] the court's refusal to compel arbitration of the remaining claims against KPMG conflicts with this Court's governing precedent. Under *Dean Witter*, a court may not refuse to compel arbitration of claims subject to a binding arbitration agreement on the ground that other claims before the court are nonarbitrable.

In this respect, the decision below also conflicts with a series of decisions by the federal circuit courts that make clear that the FAA requires courts to compel arbitration of arbitrable claims even if they are presented in a lawsuit that raises other claims that are not arbitrable. For example, the Fourth Circuit has held, based on *Dean Witter*, that "the fact that the matters to be arbitrated may be 'intertwined factually and legally' with the matters to be decided by the district court no longer presents an obstacle to arbitration of the arbitrable matters." *Summer Rain* v. *Donning Co./Publishers, Inc.*, 964 F.2d 1455, 1460 (4th Cir. 1992). Similarly, the Fifth Circuit has held that "where a valid arbitration agreement exists, a

---

[4] In reality, *all* of plaintiffs' claims are derivative and hence subject to binding arbitration. The court of appeal erred in reaching a contrary conclusion with respect to plaintiffs' negligent-misrepresentation and FDUTPA claims.

district court must compel arbitration despite intertwining with non-arbitrable claims." *Bhatia* v. *Johnston*, 818 F.2d 418, 420 (5th Cir. 1987). More recently, the Second Circuit has reconfirmed that "the Supreme Court has made clear that the Arbitration Act requires district courts to compel arbitration of arbitrable claims even where doing so produces the inefficiencies associated with litigating similar claims in separate proceedings in different forums." *White* v. *Cantor Fitzgerald, L.P.*, 393 F. App'x 804, 807–08 (2d Cir. 2010); see also *Bowen* v. *Amoco Pipeline Co.*, 254 F.3d 925, 934 (10th Cir. 2001) (stating that "district courts must compel arbitration even if arbitrable and nonarbitrable claims are pleaded in the same complaint despite the potential negative effects on efficient dispute resolution").

The decision of the Florida court of appeal refusing to compel arbitration of any of plaintiffs' four claims against KPMG because it concluded that two of those claims are not arbitrable cannot be reconciled with the decision of this Court in *Dean Witter* or the holdings of federal circuit courts that have followed *Dean Witter*.

2. To the extent the Florida court of appeal concluded that plaintiffs' malpractice and aiding-and-abetting claims were derivative, but refused to compel arbitration because plaintiffs had not signed the KPMG arbitration agreement, the court likewise clearly erred in refusing to compel arbitration of those claims.

This Court's precedents hold that, under the FAA, courts must "rigorously enforce" arbitration agreements according to their terms. *Dean Witter*, 470 U.S. at 221. As noted, this substantive requirement of federal law arises from § 2 of the FAA and "is equally

binding on state and federal courts." *Vaden* v. *Discover Bank*, 129 S. Ct. 1262, 1271 (2009). Further, as this Court has explained, nonparties may be compelled to arbitrate under the FAA where "'traditional principles' of state law allow a contract to be enforced by or against nonparties to the contract." *Arthur Andersen*, 129 S. Ct. at 1902; see generally 1 Larry E. Edmonson, *Domke on Commercial Arbitration* ch. 13 (3d ed. 2010) (same); 1 Thomas H. Oehmke, *Oehmke Commercial Arbitration* ch. 9 (3d ed. 2011) (same).

In *Arthur Andersen*, this Court addressed the Sixth Circuit's determination that "those who are not parties to a written arbitration agreement are categorically ineligible for relief," including enforcement under § 2 of the FAA. 129 S. Ct. at 1901. This Court explained that state law is "applicable to determine whether contracts are binding under § 2" "'*if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally.'" *Id.* at 1902 (alteration omitted) (quoting *Perry*, 482 U.S. at 493 n.9). As a result, this Court rejected the view that "nonparties to a contract are categorically barred from relief" under the FAA because "'traditional principles' of state law allow a contract to be enforced by or against nonparties to the contract." *Id.* (quoting 21 Lord, *supra*, § 57:19, at 183). The Court further explained that the FAA does not permit a court to "disregard . . . state law *permitting* arbitration by or against nonparties to the written arbitration agreement." *Id.* at 1902 n.5.

Here, the relevant rule of state law is the familiar principle that a party suing derivatively on behalf of a third-party stands in the third-party's shoes and is subject to any defense that could be raised against the third-party if it brought the claim itself. See, *e.g.*,

Schleiff v. *Balt. & Ohio R.R.*, 130 A.2d 321, 327 (Del. Ch. 1955).[5] Under Delaware law, a party asserting derivative claims on behalf of an entity is bound by the entity's arbitration agreement. See, *e.g.*, *Ernst & Young Ltd.* v. *Quinn*, No. 09-1164, 2009 U.S. Dist. LEXIS 99835, at *24–28 (D. Conn. Oct. 26, 2009) (applying Delaware law); *In re Salomon Inc. Shareholders' Derivative Litig.*, No. 91-5500, 1994 U.S. Dist. LEXIS 1374, at 12–14 (S.D.N.Y. Sept. 28, 1994) (same).

None of these governing principles was disputed by the parties in the proceedings below. Rather, both parties agreed that the dispositive question was whether plaintiffs' claims are derivative or direct under Delaware law. See Pet. App. 34a (Tr. Oral Arg. 31) ("THE COURT: You can see [*sic*] that the direct/derivative test of Delaware law applies to determine whether this case is arbitrable under federal law? [PLAINTIFFS' COUNSEL]: We would concede that, yes . . . ."). For its part, the court of appeal, applying Delaware law, concluded that plaintiffs' negligent-misrepresentation and FDUTPA claims were direct and thus not subject to the arbitration agreement. *Id*. at 26a (applying the test set forth in *Tooley* v. *Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1033 (Del. 2004)). Inexplicably, however, the court of appeal failed to address plaintiffs' claims for malpractice and aiding and abetting a breach of fiduciary duty, even though the court recognized that KPMG sought to compel arbitration of these claims as well. *Id*.

---

[5] Because the Rye Funds are Delaware entities, Compl. ¶¶ 21–23, it was undisputed that Delaware law governs this issue, see *Kamen* v. *Kemper Fin. Servs., Inc.*, 500 U.S. 90, 108–09 (1991).

To the extent the court declined to compel arbitration as to the latter two claims, even though it concluded that they were derivative, the court violated this Court's clear precedent in refusing to compel arbitration of these claims. If plaintiffs' claims are derivative under Delaware law, then the FAA denies the Florida court of appeal any discretion to "disregard" "state law *permitting* arbitration against nonparties to the written arbitration agreement." *Arthur Andersen*, 129 S. Ct. at 1902 n.5.

On this issue as well, the court's refusal to compel arbitration as to plaintiffs' professional-malpractice and aiding-and-abetting claims against KPMG conflicts with decisions of the federal circuit courts holding that arbitration under the FAA must be compelled against "nonparties to the contract" if warranted under "'traditional principles' of state law." *Id.* For example, the Fifth Circuit has held that "nonsignatories to arbitration agreements . . . may sometimes be compelled to arbitrate." *Todd* v. *S.S. Mut. Underwriting Ass'n (Berm.) Ltd.*, 601 F.3d 329, 333 (5th Cir. 2010); see also *Wash. Mut. Fin. Grp., LLC* v. *Bailey*, 364 F.3d 260, 267 (5th Cir. 2004) (holding that a nonparty may be "bound to the terms of the arbitration agreement" "under ordinary principles of contract law"). Likewise, the Ninth Circuit has concluded that "contract and agency principles [may] bind nonsignatories to arbitration agreements." *Comer* v. *Micor, Inc.*, 436 F.3d 1098, 1104 n.10 (9th Cir. 2006). Similarly, the Sixth Circuit has held that "nonsignatories may be bound to an arbitration agreement under ordinary contract and agency principles." *Javitch* v. *First Union Sec., Inc.*, 315 F.3d 619, 629 (6th Cir. 2003) (vacating and remanding district court's decision refusing to compel arbitration); *cf. Zurich Am. Ins. Co.* v. *Watts Indus.,*

Inc., 417 F.3d 682, 687 (7th Cir. 2005) (recognizing a variety of state-law "doctrines through which a non-signatory can be bound by arbitration agreements entered into by others").

The decision below cannot be defended on the ground that plaintiffs were not parties to the KPMG arbitration agreement because this Court's decision in *Arthur Andersen* and federal circuit decisions hold that nonsignatories may be bound to arbitration agreements under generally applicable state-law principles.

II. THE COURT SHOULD SUMMARILY REVERSE THE DECISION BELOW.

In light of the direct conflict between the decision below and this Court's and federal circuit court precedents under the FAA, KPMG respectfully requests that the Court grant the petition for certiorari, summarily reverse the decision below, and remand the case for further proceedings not inconsistent with this Court's precedents. Alternatively, the Court should accept the case for plenary review.

Although summary reversal is strong medicine, it is appropriate where, as here, "'the law is well settled and stable, the facts are not in dispute, and the decision below is clearly in error.'" Eugene Gressman et al., *Supreme Court Practice* 350 (9th ed. 2007) (quoting *Schweiker* v. *Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting)); see *id.* at 352 ("the Court has shown no reluctance to reverse summarily a state court decision found to be clearly erroneous"). Aside from the clear conflict between the decision below and this Court's precedents, a number of additional considerations warrant summary reversal in this case.

First, as this Court has explained, "state courts have a prominent role to play as enforcers of agreements to arbitrate." *Vaden*, 129 S. Ct. at 1272. That is because the FAA "is something of an anomaly in the realm of federal legislation": Although it creates substantive federal law, it "bestows no federal jurisdiction but rather requires for access to a federal forum an independent jurisdictional basis over the parties' dispute." *Id.* at 1271 (internal quotation marks and alterations omitted). As a result, when the underlying dispute does not give rise to federal jurisdiction, a party seeking to enforce an arbitration agreement must rely on state courts to enforce its federal rights under the FAA. When the state courts refuse to do so, only this Court can provide redress. Accordingly, this Court has not hesitated to step in when state courts have improperly refused to compel arbitration under the FAA. See, *e.g.*, *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440, 449 (2006) (reversing state-court decision and reaffirming FAA precedent from this Court); *Citizens Bank*, 539 U.S. at 56 (summarily reversing state-court decision that misapplied precedent from this Court to "limit . . . the FAA's reach").

Second, the decision below reflects the kind of judicial hostility to arbitration the FAA was designed to eliminate. Plaintiffs conceded below that any derivative claims were subject to binding arbitration. Pet. App. 34a (Tr. Oral Arg. 31). The trial court summarily refused to compel arbitration, even though it held that three of plaintiffs' four claims were derivative. *Id.* at 43a–45a. The court of appeal affirmed that order, without addressing whether two of plaintiffs' claims were derivative, and did so in a manner that leaves serious doubt about the court's willingness to enforce arbitration agreements against

nonparties even where mandated under the FAA. See *id*. at 31a (Tr. Oral Arg. 17) (THE COURT: "I'm going to be candid with you . . . I'm not very sympathetic to binding people who never signed an arbitration agreement to arbitrate."). This Court's precedents make clear that the FAA requires courts to enforce arbitration agreements against nonparties when the contract is enforceable against nonparties under traditional principles of state law. *Arthur Andersen*, 129 S. Ct. at 1902. The Florida courts are not at liberty to disregard that binding precedent based on their own views of the propriety of enforcing arbitration agreements against nonparties. Cf. *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 511 (2001) (per curiam) (summarily reversing where court improperly refused to defer to arbitrator's decision in violation of this Court's precedents).

Third, the decision below subjects KPMG to inconsistent obligations because other courts have ruled that KPMG's arbitration agreement is enforceable under the FAA against claims brought by limited partners that are materially indistinguishable from the claims advanced by plaintiffs here. *E.g., In re Tremont Secs. Law, State Law & Ins. Litig.*, No. 08-11183 (S.D.N.Y. Mar. 30, 2010) (Doc. No. 172). Thus, on the one hand, multiple district courts have already enforced KPMG's right to arbitrate similar claims under the FAA. The Florida court of appeal, however, in the decision below, has forced KPMG to litigate in court similar claims that are subject to arbitration elsewhere.

Finally, the decision below undermines Congress's intent in enacting the FAA and sanctions an ongoing violation of KPMG's federal rights. The FAA reflects a strong "statutory policy of rapid and unobstructed

enforcement of arbitration agreements." *Moses H. Cone*, 460 U.S. at 23. Because a "prime objective [of arbitration] is to achieve 'streamlined proceedings and expeditious results,'" *Preston* v. *Ferrer*, 552 U.S. 346, 357 (2008), Congress instructed the courts "to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible," *Moses H. Cone*, 460 U.S. at 22.[6]

Yet, despite a binding arbitration agreement, this dispute has been in litigation now for more than two years, with no end in sight. Plaintiffs have amended their complaint to reassert claims previously held to be derivative, and are seeking another further amendment to reassert derivative claims subject to binding arbitration. The trial court has refused to compel arbitration on the ground that its prior determination was affirmed by the Florida court of appeal. Put simply, the decision below denies KPMG the benefit of its arbitration agreement, contrary to federal law. See *Hall Street Assocs., LLC* v. *Mattel, Inc.*, 552 U.S. 576, 588 (2008) (the FAA creates "a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway").

This Court should grant the petition, summarily reverse the court of appeal's ruling, and put an end to the violation of KPMG's rights under the FAA.

---

[6] *See also Mitsubishi*, 473 U.S. at 633 ("it is typically a desire to keep the effort and expense required to resolve a dispute within manageable bounds that prompts [parties] to forgo access to judicial remedies"); *Southland*, 465 U.S. at 7 ("Contracts to arbitrate are not to be avoided by allowing one party to ignore the contract and resort to the courts. Such a course could lead to prolonged litigation, one of the very risks the parties, by contracting for arbitration, sought to eliminate.").

CONCLUSION

For these reasons, the Court should grant the petition for certiorari and summarily reverse the decision below, or alternatively, the Court should accept the case for plenary review.

Respectfully submitted,

JOHN K. VILLA
DAVID A. FORKNER
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, NW
Washington, DC 20005
(202) 434-5117

EDWARD A. MAROD
EDWARD A. MAROD, P.A.
400 S. Australian Avenue
Suite 750
W. Palm Beach, FL 33401-5044
(561) 832-0050

CARTER G. PHILLIPS*
PAUL J. ZIDLICKY
ERIC D. MCARTHUR
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000
cphillips@sidley.com

GARY F. BENDINGER
GREGORY G. BALLARD
SIDLEY AUSTIN LLP
787 Seventh Avenue
New York, NY 10019
(212) 839-5300

Counsel for Petitioner

June 15, 2011

* Counsel of Record