No. 11-948

IN THE
Supreme Court of the United States

TITAN MARITIME LLC, A CROWLEY COMPANY, DBA TITAN SALVAGE,
Petitioner,

v.

CAPE FLATTERY LIMITED,
Respondent.

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

MOTION FOR LEAVE TO FILE AND BRIEF FOR *AMICUS CURIAE* CHICAGO INTERNATIONAL DISPUTE RESOLUTION ASSOCIATION IN SUPPORT OF PETITIONER

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March 2, 2012

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MOTION FOR LEAVE TO FILE

Amicus Chicago International Dispute Resolution Association ("CIDRA"), pursuant to Rule 37.2(b), respectfully moves for permission to file the attached brief *amicus curiae*. Petitioner has consented to CIDRA's filing of a brief.[1] In accordance with Rule 37.2(a), CIDRA has provided notice to counsel for Respondent of CIDRA's intent to file a brief. Respondent has not consented.

CIDRA is a not-for-profit forum for arbitration and mediation of transnational business disputes. It seeks to promote resolution of international commercial contests and to enhance the Chicago region's international legal infrastructure. Its members are widely recognized experts and practitioners in international commercial arbitration. They serve as arbitrators as well as counsel to parties engaged in arbitrations.

In cooperation with the Chicago Bar Association, CIDRA drafted what became the Illinois International Commercial Arbitration Act, 710 ILCS 30/1-1 *et seq*., to encourage and facilitate arbitration of international business disputes in Illinois. That statute, drafted with the UNCITRAL Model Law as a guide, provides that arbitral tribunals are competent to rule on their jurisdiction (Sec. 15-5), and are to apply the rules of law chosen by the parties (Sec. 25-5(a)).

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[1] The letter expressing consent has been filed with the Clerk of the Court.

CIDRA's arbitration rules, likewise, direct that decisions on jurisdiction and arbitrability are to be made by the arbitral tribunal (Art. 20), and that the arbitrators are to apply the law designated by the parties as applicable to the substance of the dispute (Art. 32(1)). *See* www.cidra.org/CIDRA-rules.htm.

Arbitration is regularly designated in dispute resolution clauses of international business agreements. *Amicus'* members are hired in disputes around the world and find themselves involved in disputes with businesses in any number of languages and locations, and according to the laws and customs of a multitude of jurisdictions. It is therefore normal to have the parties agree among themselves in their contracts to have the law of a particular jurisdiction apply, and, further, to agree to an efficient and effective mechanism for resolving any disputes. Arbitration is commonly preferred over litigation in the courts either of the parties' home countries or the countries where their claims arose.

To assist its members in functioning effectively, *Amicus* must be able to rely on a set of clear, commonsense rules that allow their members to efficiently resolve disputes. The Ninth Circuit's opinion in *Cape Flattery Ltd. v. Titan Maritime, L.L.C.,* 647 F.3d 914 (9th Cir. 2011), makes it more difficult for *Amicus*' members to perform these functions. This decision creates uncertainty as to what law will control in deciding whether a particular dispute should be arbitrated or litigated in a court. It also creates uncertainty on whether courts in the United States will depart from the

Federal Arbitration Act's expression of a strong public policy favoring arbitrability of business disputes. Unless review by this Court is granted, *Amicus,* its members, and other arbitral forums for resolution of international commercial disputes will have difficulty answering those questions, and the durability of the parties' intent expressed in dispute clauses in international agreements opting for arbitration will be diminished.

Amicus submits this brief to offer its insights into this important area and urge this Court to review and vacate the decision,[2] and thereby reaffirm that parties to international agreements will have their intent to arbitrate enforced.

Dated March 2, 2012.

Respectfully submitted,

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[2] *See Marmet Health Care Center, Inc. v. Brown*, 565 U.S. __, 2012 WL 538286, *1-2 (2012) *per curiam* (simultaneously granting the petition for writ of certiorari and vacating a state supreme court decision that did not follow precedents of this Court interpreting the Federal Arbitration Act).

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QUESTIONS PRESENTED

1. Whether, notwithstanding the parties' clear choice of an English venue, English substantive law, and English arbitration rules to govern the entirety of their dispute, the U.S. Court of Appeals for the Ninth Circuit wrongly split from other Circuits and erred in holding that some other "clear and unmistakable" evidence must be shown to avoid applying U.S. law to resolve questions of arbitrability?

2. Even assuming that arbitrability was to be decided under the Federal Arbitration Act, and not English law, whether the U.S. Court of Appeals for the Ninth Circuit erroneously departed from the decisions of this Court and split from other Circuits interpreting that Act by narrowly interpreting the terms "arising under" in the parties' dispute resolution clause to exclude arbitration?

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INTEREST OF AMICUS CURIAE[3]

The interest of *amicus curiae* Chicago International Dispute Resolution Association ("CIDRA") is set forth in the Motion for Leave to File a Brief which is submitted as part of this brief.

SUMMARY OF ARGUMENT

The Ninth Circuit wrongly substituted its judgment for the expressed selection of arbitration by parties to an arbitral agreement. Courts have long recognized the federal policy favoring arbitration, found in the Federal Arbitration Act ("FAA"), as well as this Court's decisions enforcing arbitration agreements. These decisions recognize that, as with other questions of contract interpretation, the existence of an agreement to arbitrate is to be enforced based upon the parties' intentions in entering into the contract and a presumption strongly favoring expressed choices to arbitrate disputes. In entering international contractual arrangements, businesses and individuals rely heavily on the policy favoring arbitration, and especially on the determination by U.S. courts, until this decision, to enforce arbitration clauses in accordance with the parties' intent.

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[3] No counsel for a party wrote this brief in whole or in part, and no counsel for a party or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae,* its members, or its counsel made a monetary contribution to this brief's preparation or submission. Counsel of record for all parties received notice of *amicus'* intent to file this brief more than 10 days before it was due, and Petitioner has consented to its filing. An appropriate motion is being filed concurrently with this brief.

Here, the parties provided for arbitration, the application of English law and rules, and the situs of London. The omission of the words "relating to" was used by the Ninth Circuit to override the parties' consistent expressions of a choice of arbitration and the presumption for arbitration expressed in *AT&T Mobility LLC v. Conception*, 131 S.Ct. 1740, 1748-49 (2011), and other recent decisions by this Court.[4]

The Ninth Circuit held that the arbitrability of a dispute must be decided under the FAA, rather than the law prescribed in the contract, absent "clear and convincing proof" otherwise. By superimposing a heavy new test on party intent, the Ninth Circuit's decision would void the long-standing rule that interpretation of a contract is governed by the stated intention of the parties. Instead of honoring the FAA as an expression of a policy favoring arbitration, the Ninth Circuit's decision turns the FAA on its head and converts it into a shield against enforcement of an arbitration clause. The Ninth Circuit's decision thereby undermines the strong presumption in favor of the parties' expressed intent for arbitration, and poses substantial obstacles to the use of arbitration to resolve international commercial disputes.

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[4] *Marmet Health Care Center, Inc. v. Brown*, 565 U.S. __, 2012 WL 538286 (2012) *per curiam*; *Rent-A-Center, West, Inc. v. Jackson*, 130 S.Ct. 2772, 2776 (2010); *Stolt-Nielsen,S.A. v. AnimalFeeds International Corp.*, 130 S.Ct. 1758, 1773-74 (2010).

ARGUMENT

I. The Ninth Circuit's Heightened Standard for Deciding Which Law Should Apply to Resolve Arbitrability Disputes in International Agreements Will Lead to Greater Uncertainty in International Commerce.

Arbitration agreements are essential to international commerce. They are preferred in international commerce because of differences (as here) in the home countries of the parties, the fact that the parties often are organized and operate under different laws, and because of considerations as to whether the parties wish to litigate their disputes under the judicial system of the place of their activity. Their desire for certainty is sought through negotiation of the dispute resolution terms, particularly the choice of law and forum.

Based on that understanding, businesses around the world agree to arbitrate their disputes, with the expectation that they have reached agreement as to what law will apply in resolving any dispute with their contract partner. According to a 2006 survey of international corporations, a significant majority (73%) of respondents prefer international arbitration for cross-border disputes.[5] As reported in the Petition for Writ of Certiorari (at 6), as many as 90% of international contracts may contain such clauses

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[5] School of International Arbitration, Queen Mary, University of London and PricewaterhouseCoopers, *International Arbitration: Corporate Attitudes and Practices*, 2006, *2 (2006), www.pwc.be/en_BE/be/publications/ia-study-pwc-06.pdf.

relating to application of foreign law, including specifically, which law shall apply. *See* Otto Sandrock, *The Choice Between Forum Selection, Mediation and Arbitration Clauses: European Perspectives*, 20 AM. REV. INT'L ARB. 8, 37 & n.151; *see also* Loukas Mistelis, *International Arbitration—Corporate Attitudes and Practices—12 Perceptions Tested: Myths, Data and Analysis Research Report*, 15 AM. REV. INT'L ARB. 525, 528, 532-533 (2004). Other Circuits have recognized a "growing trend to include choice-of-forum and choice-of-law clauses in sophisticated commercial agreements." *See, e.g., Certain Underwriters at Lloyd's London v. Argonaut Ins. Co.,* 500 F.3d 571, 577 (7th Cir. 2007) (citing to similar decisions out of the First and Fifth Circuits).

The effectiveness and utility of arbitration agreements depends upon uniform interpretation and enforcement. As expressed by the Fourth Circuit, courts "must not only observe the strong policy favoring arbitration, but must also *foster the adoption of standards which can be uniformly applied on an international scale.*" *I.T.A.D. Assocs., Inc. v. Podar Bros.,* 636 F.2d 75, 77 (4th Cir. 1981) (emphasis added). And, as this Court observed in the context of enforcing the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention"), [1970] 21 U.S.T. 2517, T.I.A.S. No. 6997, "many decisions have noted that the Convention demonstrates a shared understanding of the necessity for uniform rules to facilitate efficient international arbitration." *Certain Underwriters at Lloyd's London,* 500 F.3d at 577; *see also Scherk v. Alberto-Culver Co.,* 417 U.S. 506, 520 n.15 (1974) (goal of Convention was facilitation of

uniformity in recognition and enforcement of arbitration provisions and awards); *Smith/Enron Cogeneration Ltd. P'ship v. Smith Cogeneration Int'l, Inc.,* 198 F.3d 88, 96 (2d Cir. 1999) ("goal of simplifying and unifying international arbitration law").

This need for uniformity of interpretation and enforcement is particularly critical to *Amicus* and its members, who regularly are called upon by international commercial agreements to arbitrate international disputes. Without uniformity of interpretation and enforcement, commercial parties will be discouraged from arbitration. Reflecting the strong policy in favor of arbitration, *Amicus* recognizes that the success of an arbitration agreement depends on predictability. "The elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting." *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 13-14 (1972); *see also Norfolk S. Ry. Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14, 28 (2004) (noting that the "touchstone" in interpreting maritime contracts is "a concern for the[ir] uniform meaning").

Instead of promoting uniformity, however, the Ninth Circuit has created uncertainty and promoted forum shopping by substituting the parties' contractual choice of law with a judicially invented presumption that U.S. federal law should apply to decide disputes over arbitrability. This is at odds with the holdings of the First, Second, and Seventh Circuits, which apply ordinary principles of contract

interpretation to determine the parties' choice of law in arbitrability disputes. *See Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 50-51 (2d Cir. 2004); *In re Oil Spill by the "Amoco Cadiz" Off the Coast of France*, 659 F. 2d 789, 793 (7th Cir. 1981); So*ciete Generale de Surveillance, S.A. v. Raytheon European Mgmt. & Systems Co.*, 643 F.2d 863, 867-868 (1st Cir. 1981); c*ontra Becker Autoradio U.S.A., Inc. v. Becker Autoradiowerk GmbH*, 585 F.2d 39, 44-46 (3d Cir. 1978).

Prior to this decision by the Ninth Circuit, such uncertainties were minimal as most courts enforced choice of law provisions in international arbitration agreements to apply the law of another country to all arbitration disputes, including those concerning arbitrability. But, the determination to disfavor arbitration clauses opting for the application of foreign law through the use of a "clear and unmistakable evidence" standard jeopardizes the certainty sought by parties as to the choice of law and forum for resolving contractual disputes. The Ninth Circuit's decision encourages a contracting party to reassess whether it would be better off having the law of a particular forum apply in determining arbitrability, and, post-controversy, to resort to the courts in the United States to either defeat the arbitration clause entirely or delay the arbitration.

What is so remarkable about the Ninth Circuit's conclusion that U.S. law should apply in the case at bar is that the parties' arbitration agreement specifies the *venue* for the parties' arbitration (London, England), the *rules* by which the

arbitration is to be governed ("English Arbitration Act of 1996"), and the *substantive law* to apply to the parties' dispute ("English law and practice"). *Cape Flattery Ltd. V. Titan Maritime, LLC*, 647 F. 3d 914, 916 (9th Cir. 2011). There is no suggestion whatever in the parties' arbitration agreement that they intended any law other than English law to apply to their dispute, including to any dispute over whether their dispute is arbitrable.

If allowed to stand, this decision will create uncertainty for parties in existing and future international commercial agreements which, like this one, contain similar boilerplate arbitration provisions. Notwithstanding the strong expression of intent to arbitrate manifested in these contractual provisions, the Ninth Circuit's decision imposes the additional requirement that contracting parties specify in arbitration clauses of *international* contracts a separate choice of law provision designating the law under which a court or an arbitrator should decide disputes over arbitrability.

This new burden is particularly disruptive to non-U.S. contracting parties who have entered, or will in the future enter, into arbitration agreements that employ a simple, broad selection of forum and law. Parties expecting that their selected law would apply to the totality of their dispute now will risk having U.S. law presumptively apply to any disputes over arbitrability, notwithstanding the fact that their contract provides for the arbitration of their dispute as a whole in a foreign forum under the rules of a foreign arbitral body.

II. Creating a Presumption in Favor of U.S. Arbitrability Law Is Contrary to Long-Standing Principles of U.S. Arbitration Policy that the Parties' Intentions Control.

The Ninth Circuit's adoption of a heightened standard for reviewing an international agreement's arbitration clause that opted for English law frustrates the purposes of arbitration and "damages the fabric of international commerce and trade itself" by "imperil[ing] the willingness and ability of businessmen to enter into international commercial agreements." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516-17 (1974); *see also M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972) ("The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts.").

This expression of resistance in the Ninth Circuit's decision to the parties' designation of fora in other countries risks similar responses in other countries. A party may decide that, notwithstanding its arbitration clause, another country's law and courts seem more attractive, and follow a similar course there as the plaintiff did in a U.S. federal court. This unraveling of the recognition and enforcement of the parties' agreed-to fora jeopardizes the interest of the United States and of the international community in reliable international commercial arbitration.

The Ninth Circuit's extension of the heightened evidentiary standard set forth in *First Options of*

Chicago, Inc. v. Kaplan, 514 U.S. 938, 944-945 (1995), to choice of law disputes over arbitrability also unreasonably interferes with parties' expectations that the written expression of their intent to resolve their entire dispute under the law of a foreign country will be honored. Indeed, the only question decided by this Court in *Kaplan* was the gateway issue of *who* should decide arbitrability—a court or an arbitrator. In answering that particular question, this Court held that "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so." *Kaplan*, 514 U.S. at 944 (internal quotations omitted). The Court decided to impose this heightened standard because it sought to protect parties from being "force[d] unwilling[ly] . . . to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide." *Id.* at 945.

No such concern is implicated here because the parties reduced to writing their intent to arbitrate their disputes in a particular forum and subject to the laws and rules of a particular sovereign. There is no precedent for disregarding the parties' contractual choice of law simply because the question of what law should be applied to decide arbitrability—as opposed to the parties' underlying dispute—is at issue. As to any question of contract interpretation *other* than the limited one answered in *Kaplan* (*i.e.*, *who* should decide arbitrability), this Court has held that, "as with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability." *Mitsubishi Motors Corp. v. Soler Chrysler-*

Plymouth, Inc., 473 U.S. 614, 626 (1985). The Ninth Circuit does not offer a valid reason for departing from this Court's jurisprudence broadly construing the parties' intent in favor of arbitrability.

Thus, the parties' choice of law must be "generously construed" when their arbitration agreement specifies, as does this one, a choice of law and forum. When an arbitration agreement specifies a *foreign* law and forum to govern the parties' dispute, U.S. arbitration law should not presumptively supplant the determination of arbitrability. No federal policy prefers the application of U.S. law over the parties' choice of a foreign law (or arbitral body) to govern their dispute. To the contrary, by acceding to the New York Convention, the United States sought "to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed . . . in the signatory countries." *Scherk*, 417 U.S. at 520, n.15.

III. The Ninth Circuit's Narrow Interpretation of "Arising Under" Is Contrary to Federal Arbitration Law and to Decisions Outside of that Circuit Which Construe Any Ambiguity in Favor of Arbitration.

Even assuming that the Ninth Circuit was correct in applying federal arbitration law to resolve the parties' dispute over the choice of foreign law, it erred in its decision to interpret the scope of the

parties' arbitration agreement narrowly.[6] The decision, which compounded the same error in two earlier cases it relied on,[7] was fundamentally inconsistent with well-established federal arbitration policy to construe such terms broadly and resolve any ambiguity in favor of arbitration.

Courts have long recognized that parties may find arbitration preferable to court litigation for a number of reasons. For example, arbitration may be "a less expensive alternative to litigation." *14 Penn Plaza LLC v. Pyett,* 556 U.S. 247, 255-56 (2009); *Allied-Bruce Terminix Cos. v. Dobson,* 513 U.S. 265, 280-281 (1995) (same); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 633 (1985) (same). Parties are often drawn to arbitration because it avoids, or minimizes, "delays, expense, uncertainties, loss of control, *. *. *. and animosities that frequently accompany litigation." Y2K Act, 15 U.S.C. §§ 6601(a)(3)(B)(iv), 6601(b)(3) (2010) (encouraging businesses and users of technology to use "alternative dispute mechanisms" to avoid "costly and time-consuming litigation"); *see also Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.,* 130 S. Ct. 1758, 1775 (2010) ("[P]arties forgo the procedural rigor and appellate review of the courts in order to realize

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[6] That CIDRA and other arbitral associations offer model clauses with the phrase "relating to" does not diminish the need for reversal in order to reaffirm that courts should broadly interpret arbitration clauses and enforce the parties' expressed preference for arbitration.

[7] *Mediterranean Enters, Inc. v. Ssangyong Corp.*, 708 F.3d 1498 (9th Cir. 1983); *Tracer Research Corp. v. Nat'l Envt'l Servs., Co.*, 42 F.3d 1292 (9th Cir. 1994).

the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes."). For international agreements, enforceability through the New York Convention is especially essential.

Recognizing these substantial benefits, Congress enacted the Federal Arbitration Act ("FAA"), 9 U.S.C.§ 1*, et seq*. [I]t is "beyond dispute that the FAA was designed to promote arbitration." *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1749 (2011). Congress enacted the FAA in large part to avoid judicial action refusing to give full force and effect to the parties' desire to arbitrate their private dispute. *See Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213, 219-220 (1985) (quoting H.R. Rep. No. 68-96, (1924), for the proposition that the FAA was passed "to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate" and place arbitration agreements "'upon the same footing as other contracts'"). Under the FAA, Congress ensured that the parties' intent would be fulfilled. Accordingly, any agreement "to settle by arbitration a controversy thereafter arising out of such contract or transaction *. *. *. shall be valid, irrevocable, and enforceable." 9 U.S.C. § 2.

Cases construing the FAA go farther than simply to provide that arbitration clauses are enforceable. The FAA embodies "a liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). [I]ssues "of arbitrability must be addressed with a healthy regard for [this] federal policy

favoring arbitration." *Id.*

The Ninth Circuit failed to honor this tradition of favoring arbitration and, instead, used an exceedingly narrow interpretation of "arising under" to read out of the dispute resolution provision any dispute that is not "'relat[ed] to the interpretation and performance of the contract itself.'" *Cape Flattery Ltd. v. Titan Maritime, LLC,* 647 F.3d 914, 922 (9th Cir. 2011) (quoting *Mediterranean Enters, Inc. v. Ssaangyong Corp.*., 708 F.2d 1458, 1464 (9th Cir. 1983)). That Circuit's repeated approach of narrowly interpreting arbitration clauses[8] is inconsistent with this Court's jurisprudence interpreting the same terms and federal arbitration policy:

> [A]s a matter of federal law, any doubts concerning the scope of arbitral issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.

Moses H. Cone Mem'l Hosp., 460 U.S. at 24-25. In other words, "there is a presumption of arbitrability in the sense that an order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *AT&T Techs., Inc. v. Commc'ns*

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[8] See cases cited at note 7, *supra.*

Workers of Am., 475 U.S. 643, 650 (1986) (internal quotations omitted).

The Ninth Circuit recognized that its narrow interpretation of the terms "arising under" is at odds with the majority of Circuit Courts which have examined this precise contract language and construed it broadly and consistently with the strong federal policy favoring arbitration. *Cape Flattery,* 647 F. 3d at 920 (citing disagreement with the Third, Fourth, Sixth, and Eleventh Circuits); *see also Dialysis Access Ctr., LLC v. RMS Lifeline, Inc.*, 638 F.3d 367, 377 (1st Cir. 2011) (disagreeing with narrow interpretation of "arising under"); *Mar-Len of Louisiana, Inc. v. Parsons-Gilbane*, 773 F.2d 633, 637 (5th Cir. 1985) (same).

It is also contrary to this recent Court's ruling that a similar phrase in the FAA – "arising out of" – has no exception for tort claims. *Marmet Health Care Center v. Brown,* 565 U.S. __, *3 (2012) *per curiam*. The Ninth Circuit's narrow interpretation of the parties' arbitration agreement, if not vacated, will allow the same kind of artful pleading in the international commercial context that the Court condemned in *Marmet* – that is, the crafting of claims as tort or other claims in the hope that they fall outside the scope of "'the interpretation and performance of the contract itself'" and avoid arbitration. *Cape Flattery,* 647 F.3d at 922 (quoting *Mediterranean*, 708 F.2d at 1464).

CONCLUSION

Important policies underlie the efficient resolution of disputes through arbitration. Particularly in the international commercial context, U.S. courts should respect the intent of the parties, as expressed in their agreements. If left standing, the Ninth Circuit's decision narrowing the availability of arbitration for international disputes will undermine those policies. *Amicus* urges this Court to grant the petition of Titan Maritime, LLC, and vacate the decision below.

Dated March 2, 2012.

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