No. 13-1306

In The
Supreme Court of the United States

STATE OF WEST VIRGINIA, *ex rel.*
U-HAUL CO. OF WEST VIRGINIA,

Petitioner,

v.

THE HONORABLE PAUL ZAKAIB JR., AMANDA FERRELL, JOHN STIGALL, AND MISTY EVANS,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Appeals Of West Virginia

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether the question of incorporation by reference of a separate document containing, among other provisions, an arbitration clause, is a challenge to the formation of any agreement to arbitrate that must be resolved by the Court. *See Granite Rock Co. v. International Broth. of Teamsters*, 561 U.S. 287, 297, 130 S. Ct. 2847, 2856 (2010) (issues for the court "always include whether the [arbitration] clause was agreed to"); *see also Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440, 444 n.1 (2006).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

STATUTES & OTHER AUTHORITIES:

STATEMENT OF THE CASE

The dispute in this case does not involve any question of whether the arbitration clause at issue is valid. Nor does it involve the scope of the arbitration clause. The issue here is whether an agreement to arbitrate was ever formed. The courts below, based largely on undisputed evidence and general West Virginia contract law, correctly found that the document containing the arbitration clause was not part of the contracts between Petitioner and Respondents. Pet. App. 1a, Pet. App. 49a.

Petitioner U-Haul leases trucks and trailers to its customers for short-term use to transport cargo.[1] On several occasions, the three individual Respondents (Amanda Ferrell, John Stigall, and Misty Evans) separately rented equipment that belonged to U-Haul. Respondents' complaint alleges that they were quoted a particular price for a rental, but that on three specific occasions, U-Haul improperly and surreptitiously added either a $1.00, a $3.00, or a $5.00 "environmental charge" to the final price of their rentals.

On August 19, 2011, the Respondents filed a lawsuit in the Circuit Court of Kanawha County against U-Haul asserting that the inclusion of the environmental charge constituted a breach of contract; was false advertising in violation of W. Va. Code

[1] The following factual background has been taken from the decision of the Supreme Court of Appeals. *See* Pet. App. 4a-10a.

§ 32A-1-2 (1974); amounted to fraud; and violated the West Virginia Consumer Credit and Protection Act, W. Va. Code § 46A-1-101 *et seq*. Respondents pled that U-Haul overcharged other West Virginia citizens and asked the trial court to certify a class action.

U-Haul responded by filing a motion asking the circuit court to compel the Respondents to resolve their claims in arbitration. U-Haul contended that each time a customer rents equipment from U-Haul, the customer enters into an agreement comprised of two documents: (1) a one-page, signed Rental Contract and (2) a Rental Contract Addendum "Addendum." The Addendum contains a provision stating that U-Haul and the customer agree to submit all disputes to binding arbitration. U-Haul contends Respondents formed an agreement with U-Haul making them subject to this arbitration provision.

The record indicates that U-Haul customers entered into these agreements either on paper or electronically. At locations owned by independent dealers, customers would be presented with only a one-page pre-printed Rental Contract; customers were not initially shown the Addendum. Customers would sign the Rental Contract below a line that said, "I acknowledge that I have received and agree to the terms and conditions of this Rental Contract and the Rental Contract Addendum." Based on the record submitted, the trial court found that the Addendum was not provided to the Respondents prior to their signing the rental agreements. Pet. App. 26a.

At locations owned by U-Haul, interactive electronic terminals were used to show terms of the Rental Contract to customers. The terms of the Rental Contract would appear on successive screen pages, and before the customer could view a subsequent screen's rental terms, the customer would have to click a button marked "Accept" on the terminal at the bottom of the screen. None of the screens mentioned the arbitration clause at issue. After several screens had been displayed, the customer would reach a final screen that said, "By clicking Accept, I agree to the terms and conditions of this Rental Contract and Rental Contract Addendum." The customer would then have to sign their name on the screen with a stylus and click another button marked "Accept." If the customer clicked "Accept," a paper copy of the Rental Contract would then be printed by a U-Haul employee.

The Addendum is a multicolor pamphlet made of rectangular cardstock, but folded into five sections and shaped like an envelope or narrow folder. One of the apparent outside panels of the pamphlet has the title, "RENTAL CONTRACT ADDENDUM," with the next line saying, "DOCUMENT HOLDER." Below that are a few lines in smaller text stating, "Additional Terms and Conditions for EQUIPMENT Rental, Place Rental Contract documents in this folder & keep available throughout your move." Following this text is a colored block with giant text stating, "RETURNING EQUIPMENT." The remainder of the outside of the pamphlet contains detailed instructions for

returning rental equipment. The other easily visible outside panels of the Addendum have advertisements for additional services offered by U-Haul, such as storage rooms. The Addendum must be opened to reveal the arbitration clause and other contractual provisions not at issue here contained inside.

As the Court below concluded: "[T]he Addendum itself was designed to look more like a document folder advertising U-Haul products, services, and drop-off procedures, rather than a legally binding contractual agreement." Pet. App. 26a.

After a Rental Contract is signed by a customer, the paper copy of the Rental Contract (whether a preprinted form or generated using the electronic terminals) is folded in thirds like a letter by a U-Haul employee or independent dealer. The Rental Contract is then slipped inside of the folder-shaped Addendum and both are handed to the customer either before or at the same time keys are provided for the rental equipment. *The customers were not provided with the Addendum containing the arbitration clause or presented with any of the information contained therein until after they clicked "Accept" on the electronic terminal or manually signed the paper copy of the preprinted form as the case may be.*

Petitioner filed a motion to compel arbitration of Respondents' claims in the trial court below. The trial court denied the motion finding based on West Virginia contract law that the Addendum was not part of Petitioner's contracts with Respondents. Pet. App.

60a. Petitioner then sought review of the refusal to compel arbitration in the Supreme Court of Appeals of West Virginia. After a lengthy review of the law regarding the doctrine of incorporation by reference, the Supreme Court of Appeals concluded as a matter of state contract law that the rental contracts formed between U-Haul and Respondents did not incorporate the Addendum. *State ex rel. U-Haul Co. of West Virginia v. Zakaib*, 232 W. Va. 432, 752 S.E.2d 586 (2013).

In short, the court below found, based on state contract law, that no agreement to arbitrate was formed. Given that the document with the arbitration clause was provided to the customers after they manifested their consent to the broader contract, and given that the document containing the arbitration clause resembled an advertisement and directions of where to drop off the vehicle at the end of the rental period, there was no arbitration agreement formed. Consequently, the court declined to overturn the trial court's refusal to compel arbitration.

REASONS FOR DENYING THE PETITION

I. Under This Court's Precedents, Determination Of Whether A Separate Document Containing An Arbitration Clause Along With Other Contractual Provisions Is Incorporated By Reference Into A Contract Is Question Of Formation Of The Agreement To Arbitrate For The Courts To Decide.

Petitioner first attempts to seek certiorari based upon a supposed conflict between this Court's precedents and the opinion of the Supreme Court of Appeals of West Virginia in this case.[2] Petitioner's argument confuses two separate concepts related to arbitration – formation and enforceability. This Court's precedents are clear. When the making of an agreement to arbitrate is not in dispute, questions relating to the *enforceability* of an agreement to arbitrate that relate to the *enforceability* of the contract as a whole are to be determined by the arbitrator. *Rent-A-Center, West, Inc. v. Jackson,* 561 U.S. 63, 130 S. Ct. 2772 (2010). Disputes over *formation* of the agreement to arbitrate, however, are treated differently. Resolution of whether the parties actually formed an agreement containing an arbitration clause is always for judicial

[2] Notably, the Petitioner does not even attempt to establish that the decision below conflicts with decisions of one or more federal courts of appeals or state courts of last resort on an important issue of federal law. In fact, courts below regularly decide the question presented here in a manner consistent with the decision below in this case. *See infra* p. 10, n.3.

determination even if the grounds asserted for the challenge to formation also relate to contractual provisions other than the arbitration provisions. *Granite Rock Co. v. International Broth. of Teamsters,* 561 U.S. 287, 130 S. Ct. 2847 (2010).

The power of a Court to force submission of a dispute to arbitration is premised on the concept of consent. Indeed, as this Court has consistently held, consent is the "first principle that underscores all of [this Court's] arbitration decisions." *Granite Rock,* 130 S. Ct. at 2857. As the opinion in *Granite Rock* emphasized:

> Arbitration is strictly "a matter of consent," *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U. S. 468, 479 (1989), and thus "is a way to resolve those disputes – *but only those disputes* – that the parties have agreed to submit to arbitration," *First Options* [*of Chicago, Inc. v. Kaplan,* 514 U. S. 938, 943 (1995)].

130 S. Ct. at 2857 (footnote omitted; emphasis by Court). Thus, disputes over whether the parties have formed an agreement to arbitrate and consented to submit a dispute to arbitration must be resolved by "the court." *Granite Rock,* 130 S. Ct. at 2857-58 ("Where a party contests [the formation of the parties' arbitration agreement], 'the court' must resolve the disagreement." (quoting *First Options, supra*)).

The line of cases cited by Petitioner addressing the concept of severability are easily distinguishable.

The severability doctrine is grounded in Section 2 of the Federal Arbitration Act ("FAA") which provides "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." *Rent-A-Center,* 561 U.S. at 70, 130 S. Ct. at 2778 (quoting 9 U.S.C. § 2; emphasis in original). "[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*." *Id.* (emphasis added). Consequently, "as a matter of substantive federal arbitration law, *an arbitration provision* is severable from the *remainder* of the contract." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445, 126 S. Ct. 1204, 1208 (2006) (emphasis added); *see also Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S. 395, 403-04, 87 S. Ct. 1801 (1967); *Preston v. Ferrer,* 552 U.S. 346, 353-54, 128 S. Ct. 978 (2008).

The doctrine of severability presupposes the existence in the contract of a "written provision" constituting "a specific provision to arbitrate." *Cf. Rent-A-Center, supra.* As this Court's cases make clear, the doctrine of severability has no application to questions of formation of an agreement to arbitrate. Thus, for purposes of severability, the "issue of the agreement's 'validity' is different from the issue of whether any agreement between the parties 'was ever concluded.'" *Rent-A-Center*, 561 U.S. at 63, n.2, 130 S. Ct. at 2778, n.2; *Buckeye Check Cashing,* 546 U.S. 440, 444, n.1, 126 S. Ct. 1204, 1208, n.1 (citing cases).

The inapplicability of the severability doctrine to formation questions under this Court's precedents is not limited to claims that no contract exists between the parties. In *Granite Rock,* this Court concluded that the question of the effective date of the parties' collective bargaining agreement was, as with all issues of formation, an issue that was "always" for the court:

> Under [our precedents], a court may order arbitration of a particular dispute only where the court is satisfied that the parties agreed to arbitrate *that dispute*. To satisfy itself that such agreement exists, **the court must resolve any issue that calls into question the formation . . . of the specific arbitration clause** that a party seeks to have the court enforce. . . . **In addition, these issues always include whether the clause was agreed to**, and may include when that agreement was formed.

561 U.S. at 297, 130 S. Ct. at 2856 (citations omitted; bold added, italics in original); *see also id.* at 287, 130 S. Ct. at 2855-56 (characterizing holding that arbitration formation issues are questions for the courts as "well settled").

Notably, the *Granite Rock* Court reached this holding when the formation question (whether the collective bargaining agreement containing the arbitration clause was in effect) was co-extensive with the merits of the dispute (whether the new collective bargaining agreement with its "no-strike clause" was in effect). *See* 561 U.S. at 294, 130 S. Ct. at 2854.

Indeed, *Granite Rock* conclusively and repeatedly distinguished the very severability cases relied upon by Petitioner as inapplicable to arbitration formation questions. *Id.* at 296-97, 130 S. Ct. at 2856 (characterizing *Buckeye Check Cashing, Inc.* as "distinguishing treatment of the generally nonarbitral question of whether an arbitration agreement was ever concluded from the question whether a contract containing an arbitration clause was illegal when formed" (internal quotations omitted)); *id.* at 301, 130 S. Ct. at 2858 (finding severability cases distinguishable from formation questions citing *Southland Corp. v. Keating,* 465 U.S. 1, 4-5, 104 S. Ct. 852 (1984); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S. 395, 402-04, 87 S. Ct. 1801 (1967); *Buckeye Check Cashing, supra*; and *Rent-A-Center, supra*).[3]

[3] The courts below at all levels understand the distinction between enforceability where severability is required and formation where it is not. *See, e.g., Solymar Investments, Ltd. v. Banco Santander S.A.,* 672 F.3d 981, 990 (11th Cir. 2012) ("There is thus a two-step process required in considering the arbitrability of any contract containing an arbitration clause: 1) resolution of any formation challenge to the contract containing the arbitration clause, in keeping with *Granite Rock*; and 2) determination of whether any subsequent challenges are to the entire agreement, or to the arbitration clause specifically, in keeping with *Prima Paint.*"); *OMG, LP v. Heritage Auctions, Inc.*, 2014 WL 1315872, 4 (N.D. Tex. 2014) (distinguishing formation issue to be decided by court based on *Granite Rock* from enforceability issues requiring severability analysis); *Benezra v. Zacks Inv. Research*, *Inc.,* 2012 WL 1067559, 3 (M.D.N.C. 2012) (same); *WB, The Building Company, LLC v. El Destino, LP,* 227 Ariz. 302, 306-07, 257 P.3d 1182, 1186-87 (Ariz. App. 2011) (same).

Throughout its petition, Petitioner repeatedly characterizes the conclusion of the court below as a determination regarding the validity or the enforceability of the arbitration language contained in the Addendum. The Supreme Court of Appeals made no such findings. Instead, the Supreme Court of Appeals, like the trial court before it, found that the contracts formed did not contain the arbitration language because Petitioner's attempts to incorporate the language by reference failed as a matter of state law. Pet. App. 26a.

The rejection by the Supreme Court of Appeals of Petitioner's severability argument is consistent with this Court's precedents. While the court below relied on its precedent, *see* Pet. App. at 27a, n.15 (citing syl. pt. 4, *State ex rel. Richmond American Homes of West Virginia, Inc. v. Sanders,* 228 W. Va. 125, 717 S.E.2d 909 (2011), a review of that precedent makes it evident that *Sanders* is both based on this Court's precedent and a correct statement of the law. *Id.* at 134, nn.24-25, 717 S.E.2d 918 at nn.24-25 (citing *Buckeye Check Cashing, Inc., supra*; *Rent-A-Center, supra*; *Preston v. Ferrer,* 552 U.S. 346, 354, 128 S. Ct. 978 (2008); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S. 395, 403-04, 87 S. Ct. 1801, 18 L.Ed.2d 1270 (1967)). Indeed, the court below correctly noted that severability does not prohibit a reviewing court from "consider[ing] any extrinsic evidence detailing *the formation and use of the contract*." Pet. App. at 27a, n.15 (emphasis added).

Here the Supreme Court of Appeals emphasized that Respondents' challenges were based on formation arguments: "the plaintiffs argued to the circuit court that the entire Addendum – including the arbitration provision – was never presented to them as part of the overall agreement of the parties, and, therefore, they never agreed to any of the terms in the Addendum." *Id.* The Court acknowledged that the Addendum contained other contractual provisions not at issue in this case, but emphasized that the severability doctrine was "properly applied" by the trial court because its "analysis specifically centered on whether the parties mutually agreed to arbitrate their disputes." *Id.* The Court's discussion of severability and formation is wholly consistent with this Court's clear distinction between these two concepts in cases like *Granite Rock*, *Rent-A-Center*, and *Buckeye Check Cashing*.

In sum, Petitioner presents a superficial analysis of severability based on *Rent-A-Center* that wholly ignores *Granite Rock,* a case decided by this Court just three days later. Reading these two cases together in context with this Court's other precedents, it is clear that the arbitration severability rule has no application to questions of formation. The decision of the Supreme Court of Appeals of West Virginia to judicially resolve the question of whether the Addendum containing an arbitration clause and other contractual provisions was incorporated into the parties' rental contracts is consistent with the decisions of this Court.

II. Summary Reversal Is Inappropriate.

Petitioner argues that the decision of the Supreme Court of Appeals justifies summary reversal by this Court. For the reasons noted above, the decision below is wholly consistent with this Court's precedents. Even if there is some doubt on this question, however, this case is still not an appropriate case for summary disposition.

As the Justices of this Court have emphasized, summary disposition is inappropriate when this Court's prior precedents do not "mandate" or "compel" reversal, *United States v. Hollywood Motor Car Co.,* 458 U.S. 263, 272, 275, 102 S. Ct. 3081, 3086-87 (1982) (dissenting opinion), or when the issues do not involve settled issues of law. *EEOC v. FLRA,* 476 U.S. 19, 26, n.5, 106 S. Ct. 1678, 1682, n.5 (1986) (dissenting opinion); *Rhodes v. Stewart*, 488 U.S. 1, 7, n.1, 109 S. Ct. 202, 205, n.1 (1988) (dissenting opinion). Respondents believe that the decision below is wholly consistent with this Court's precedents. Given *Granite Rock,* it is not clear that reversal is compelled or that it is settled that severability analysis is appropriate to a formation question based on the alleged incorporation by reference of a document containing more than the arbitration provisions.

Indeed, Respondents are not aware of any court other than the court below to address severability and formation of an agreement to arbitrate in the context of an arbitration clause contained in a document alleged to be incorporated by reference. Given

the paucity of precedent on this specific issue, rather than summarily disposing of this case or granting certiorari, this Court should await further development of the case law in the courts below.

Much of Petitioner's basis for summary reversal seems to be this Court's opinion in *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. ___, 132 S. Ct. 1201 (2012) (per curiam). *Marmet Health* was cited by Petitioner eight times in spite of the fact that its holding (that West Virginia's prohibition against pre-dispute agreements to arbitrate personal-injury or wrongful-death claims was preempted by the FAA) has little relevance to the issues here. Petitioner's insinuation that the Supreme Court of Appeals of West Virginia is hostile to arbitration, the FAA, and this Court's precedents is contrary to the numerous recent decisions of the Supreme Court of Appeals regularly enforcing arbitration agreements.[4]

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[4] *See, e.g., State ex rel. Ocwen Loan Servicing, LLC v. Webster,* 232 W. Va. 341, 752 S.E.2d 372 (2013) (compelling arbitration of claim against mortgage loan servicer); *New v. GameStop, Inc.*, 232 W. Va. 564, 753 S.E.2d 62 (2013) (compelling arbitration of claim by employee against employer); *Green Tree Servicing, LLC v. Figgatt*, 2013 WL 5730431 (W. Va. 2013) (memorandum decision) (compelling arbitration by borrower who financed mobile home); *Price v. Morgan Financial Group*, 2013 WL 3184671, 4 (W. Va. 2013) (memorandum decision) (compelling arbitration of claim against financial advisor and broker); *Credit Acceptance Corp. v. Front*, 231 W. Va. 518, 745 S.E.2d 556, 570 (2013) (compelling arbitration of consumer credit dispute); *Shorts v. AT&T Mobility*, 2013 WL 2995944, 7 (W. Va. 2013) (memorandum decision) (compelling arbitration of consumer fraud claims); *Mid-Ohio Valley Transit Auth. v. Amalgamated Transit Union Local 1742*, 2013 WL 2157750, 3 (W. Va.

(Continued on following page)

Petitioner posits as a second reason for summary reversal the Supreme Court of Appeals' statement requiring arbitration only when the writing allegedly requiring arbitration is "clear and unmistakable." Pet. at 17 (quoting Pet. App. 2a). Petitioner argues that this statement is contrary to the FAA's pro-arbitration policies. Pet. 17-18.

The full quote from the Court below is as follows:

> Arbitration is a matter of contract, and a party cannot be required to arbitrate a dispute that it has not agreed to arbitrate. "Under the Federal Arbitration Act, 9 U.S.C. § 2, parties are only bound to arbitrate those issues that by clear and unmistakable writing they have agreed to arbitrate. An agreement to arbitrate will not be extended by construction or implication." Syl. pt. 10, *Brown v. Genesis Healthcare Corp.*, 228 W.Va. 646, 724 S.E.2d 250 (2011) ("*Brown I*"), *overruled on other grounds by Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. ___, 132 S. Ct. 1201, 182 L.Ed.2d 42 (2012) (per curiam).

Pet. App. 13a. It is unclear specifically in what context the Court is making the quoted statement. If the Court is referring to the scope of an arbitration agreement once it is formed, the language is clearly dicta in this case, which should not be subject to

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2013) (memorandum decision) (compelling arbitration under collective bargaining agreement).

review here, let alone summary reversal. "This Court reviews judgments, not statements in opinions."[5] *California v. Rooney,* 483 U.S. 307, 311, 107 S. Ct. 2852 (1987) (per curiam) (internal quotation marks omitted); *see also Bunting v. Mellen*, 541 U.S. 1019, 1023, 124 S. Ct. 1750, 1754 (2004) (dissenting opinion) ("We sit, after all, not to correct errors in dicta. . . .").

If, however, the Court's statement applies to formation questions, it still does not meet the high standard for summary reversal. Indeed, as applied to formation, it is consistent with both the text of the FAA and this Court's precedents.

This Court has made clear that arguing that the "liberal federal policy favoring arbitration," *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24, 103 S. Ct. 927 (1983), applies to formation questions "overreads [this Court's] precedents." *Granite Rock*, 561 U.S. at 299, 130 S. Ct. at 2857. Because consent is the "first principle that underscores all of [this Court's] arbitration decisions," a reviewing court must be "satisfied" that formation of an agreement to arbitrate is not "at issue." *Id.,* 130 S. Ct. at 2557-58. "[P]olicy grounds" cannot substitute for "persuad[ing the court] that the parties' arbitration agreement was validly formed." *Id.* at 300, 130 S. Ct. at 2858.

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[5] Similarly, the Supreme Court of Appeals reliance on *Brown v. Genesis, supra,* supports this conclusion. The challenged statements which first appear in *Brown* are also dicta in *Brown*. *Brown* did not involve either formation or construction of an arbitration clause.

> Accordingly, we have never held that this policy [favoring arbitration] overrides the principle that a court may submit to arbitration "only those disputes . . . that the parties have agreed to submit." *First Options,* 514 U.S., at 943, 115 S. Ct. 1920; see also *Mastrobuono v. Shearson Lehman Hutton, Inc.,* 514 U.S. 52, 57, 115 S. Ct. 1212, 131 L.Ed.2d 76 (1995) ("[T]he FAA's proarbitration policy does not operate without regard to the wishes of the contract parties"); *AT & T Technologies,* 475 U.S., at 650-651, 106 S. Ct. 1415 (applying the same rule to the "presumption of arbitrability for labor disputes"). Nor have we held that courts may use policy considerations as a substitute for party agreement. See, *e.g., id*., at 648-651, 106 S. Ct. 1415; *Volt, supra,* at 478, 109 S. Ct. 1248. We have applied the presumption favoring arbitration, in FAA and in labor cases, only where it reflects, and derives its legitimacy from, a judicial conclusion that arbitration of a particular dispute is *what the parties intended because their express agreement* to arbitrate was validly formed. . . .

Granite Rock, 561 U.S. at 302-03, 130 S. Ct. at 2859-60 (emphasis added).

Indeed, the FAA itself supports the language of the Supreme Court of Appeals as it allows an order compelling arbitration only "*upon being satisfied* that the making of the agreement for arbitration . . . is *not in issue*." 9 U.S.C. § 4 (emphasis added); *see also* 9 U.S.C. § 3 (allowing a federal court to compel

arbitration of pending case "*upon being satisfied* that the issue involved in such suit or proceeding is referable to arbitration" (emphasis added)).

Neither the FAA nor this Court's precedents permit (let alone require) arbitration when the agreement is implied or gleaned through contract construction. Instead, an "express agreement" is required. *Granite Rock, supra.* The statement of the court below that "a party cannot be required to arbitrate a dispute that it has not agreed to arbitrate," is consistent with this Court's requirement that arbitration be founded on consent. *First Options,* 514 U.S. at 943; *Granite Rock, supra*. This Court consistently requires that a court be "satisfied" or "persuaded" that an agreement to arbitrate has been formed before compelling arbitration. This formulation is not materially different from the challenged statements of the Supreme Court of Appeals taken in their full context. As such, summary reversal is not appropriate.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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