No. 18-___

IN THE

Supreme Court of the United States

GE ENERGY POWER CONVERSION FRANCE SAS, CORP., A FOREIGN CORPORATION FORMERLY KNOWN AS CONVERTEAM SAS,

Petitioner,

v.

OUTOKUMPU STAINLESS USA, LLC, *ET AL.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") permits a non-signatory to an arbitration agreement to compel arbitration based on the doctrine of equitable estoppel.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is GE Energy Power Conversion France SAS, Corp. ("GE Energy"), a foreign corporation formerly known as Converteam SAS. Petitioner is a wholly owned subsidiary of General Electric Company. No publicly owned corporation owns 10% or more of General Electric Company's stock.

Respondents are Outokumpu Stainless USA, LLC; Sompo Japan Insurance Company of America, as subrogee of Outokumpu Stainless USA, LLC; Pohjola Insurance Limited; Aigel Europe Limited, as subrogee of Outokumpu Oyj; Tapiola General Mutual Insurance Company, as subrogee of Outokumpu Oyj; AXA Corporate Solutions Assurance SA UK Branch, as subrogee of Outokumpu Oyj; HDI Gerling UK Branch, as subrogee of Outokumpu Oyj; MSI Corporate Capital Ltd., as sole Corporate Member of Syndicate 3210, as subrogee of Outokumpu Oyj; Royal & Sun Alliance, PLC, as subrogee of Outokumpu Oyj.

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INTRODUCTION

Sometimes, a signatory to a contract may sue a non-signatory for claims that arise out of the contract. When that happens, is the signatory bound by the arbitration clause it agreed to in the contract? For domestic arbitration agreements, the answer is yes: Equitable estoppel allows the non-signatory to enforce the arbitration clause. But the Eleventh Circuit held that a non-signatory cannot compel arbitration if one of the parties is a foreign entity. That erroneous holding deepens a 2-to-2 circuit split and warrants this Court's review.

This scenario comes up in many different contexts, like cases involving subcontracting, distribution chains, and employment relationships. This case is a prime example. Respondents ("Outokumpu") entered contracts with Fives St. Corp. ("Fives") to purchase equipment; those contracts required arbitration of disputes in Germany. Fives subcontracted with Petitioner GE Energy, a foreign corporation, to provide parts for that equipment. When those parts failed, Outokumpu sued GE Energy in Alabama state court. Because Outokumpu sued GE Energy based on the purchase contracts, the doctrine of equitable estoppel should prevent Outokumpu from having it both ways: It cannot sue based on a contract while escaping the arbitral forum it agreed in the very same contract to use.

If all of these parties had been domestic entities, that is what would have happened. Chapter 1 of the Federal Arbitration Act ("FAA"), which governs domestic arbitration agreements, incorporates common-law contract doctrines like equitable

estoppel. Signatories, therefore, have to take the bitter with the sweet and arbitrate disputes arising from their agreements—even when those disputes involve a non-signatory. That result is consistent both with basic fairness and with the FAA's "emphatic federal policy in favor of arbitral dispute resolution." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985).

But this was an international agreement, not a domestic one. Chapter 2 of the FAA, which implements the New York Convention, governs arbitration agreements among individuals or entities from the Convention's nearly 160 signatory countries. The Convention's purpose was to "encourage the recognition and enforcement of commercial arbitration agreements in international contracts and . . . unify the standards by which agreements to arbitrate are observed . . . in the signatory countries." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974). In implementing the Convention, Chapter 2 piggybacks on Chapter 1: It adopts Chapter 1's provisions "to the extent [they are] not in conflict" with the Convention or other provisions in Chapter 2. 9 U.S.C. § 208. And because nothing in the Convention or Chapter 2 conflicts with the doctrine of equitable estoppel, that principle—which Chapter 1 incorporates—also applies to international arbitration agreements. So GE Energy should not have been worse off simply because it is a foreign corporation.

In the decision below, the Eleventh Circuit held otherwise, subverting this Court's recognition that the federal policy favoring arbitration applies with greater force, not less, "in the field of international

commerce." *Mitsubishi Motors*, 473 U.S. at 631. The Eleventh Circuit acknowledged that Chapter 1 incorporates equitable estoppel. But the court concluded that Chapter 2 rejects it, because the Convention requires that an arbitration agreement, to be valid, must be "signed by the parties." The court misread that language to mean that a valid arbitration agreement can be enforced only when it is "signed by the parties" *to the litigation before the court*. So it held that GE Energy could not compel arbitration—as it could have done if Chapter 1 applied.

The Eleventh Circuit's decision cemented what is now a 2-to-2 split about whether the Convention allows a non-signatory to compel arbitration. The answer to that question is important to the viability of international arbitration agreements in many contexts. And the decision below was wrong because the Convention requires only that a valid arbitration agreement be "signed by the parties" to the agreement; once there is a valid arbitration agreement, the Convention does not preclude a non-signatory from invoking it. This Court's review is warranted.

OPINIONS BELOW

The Magistrate Judge's report and recommendation regarding Respondents' motions to remand and GE Energy's motion to dismiss (Pet.App. 53a–81a) is unpublished but is available at 2016 WL 7423406 (S.D. Ala.). The district court's order adopting that report and recommendation (Pet.App. 51a–52a) is unpublished but is available at 2016 WL 7422675 (S.D. Ala.). The district court's opinions granting GE Energy's motions to compel arbitration

and to dismiss (Pet.App. 23a–50a) are unpublished but are available at 2017 WL 401951 and 2017 WL 480716 (S.D. Ala.). The Eleventh Circuit's decision reversing and remanding in relevant part (Pet.App. 1a–19a) is published at 902 F.3d 1316 (2018). The Eleventh Circuit's decision denying GE Energy's petition for rehearing en banc (Pet.App. 20a–22a) is unpublished.

JURISDICTION

The Eleventh Circuit denied GE Energy's petition for rehearing en banc on November 9, 2018. GE Energy timely filed this petition within 90 days. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND OTHER PROVISIONS INVOLVED

1. Article II, § 1 of the New York Convention provides:

> Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. Article II, § 2 of the New York Convention provides: "The term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams."

3. Article V, § 1(a) of the New York Convention provides:

> Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
>
> > (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made;

4. 9 U.S.C. § 201 provides: "The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter."

5. 9 U.S.C. § 202 provides:

> An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located

> abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states.

6. 9 U.S.C. § 206 provides: "A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States. Such court may also appoint arbitrators in accordance with the provisions of the agreement."

7. 9 U.S.C. § 208 provides: "Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States."

STATEMENT

1. The FAA reflects a "'liberal federal policy favoring arbitration.'" *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). Chapter 1 of the FAA "codifies the original Federal Arbitration Act of 1925, 43 Stat. 883; it applies to all domestic awards and to all other awards not otherwise covered by another legal instrument." *Johnson Controls, Inc. v. Edman Controls, Inc.*, 712 F.3d 1021, 1024 (7th Cir. 2013). Chapter 2 of the FAA implements the New York Convention, an international agreement that provides for the enforcement of foreign arbitration agreements or arbitral awards "when both or all countries concerned are" among the nearly 160 parties to that Convention. *Id.* at 1025–26; *see*

http://www.newyorkconvention.org/countries (last visited February 7, 2019).

a. Chapter 1 makes written arbitration agreements "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 Court has held that, by referring to "such grounds as exist at law or in equity," the FAA incorporates "background principles of state contract law regarding the scope of agreements (including the question of who is bound by them)." *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630 (2009) (citation omitted). Chapter 1 therefore permits enforcement of a domestic arbitration clause "against (or for the benefit of) a third party"—*i.e.*, a non-signatory—if enforcement would be permitted "under state contract law." *Id.* at 631.

The state contract law applicable under Chapter 1 includes "'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, p. 183 (4th ed. 2001)). This petition involves equitable estoppel, which allows a non-signatory to enforce an arbitration agreement when "a signatory to the written agreement must rely on the terms of that agreement in asserting its claims against the nonsignatory." 21 Williston on Contracts § 57:19. Equitable estoppel prevents a signatory from "cherry-pick[ing] beneficial contract terms while ignoring other provisions that do not benefit it or that it would prefer not to be governed by such as an arbitration clause." *Id.*

Classic circumstances in which equitable estoppel arises include suits involving subcontractors, employment agreements, third-party beneficiaries, and insurance agreements. *See id.* For example, in a case cited approvingly by the leading treatise, equitable estoppel allowed a third-party company to invoke a partnership agreement's arbitration clause in a suit brought by the partnership. *See id.* (discussing *26th Street Hospitality, LLP v. Real Builders, Inc.*, 879 N.W.2d 437 (N.D. 2016)). The partnership, which had been created to operate a hotel, sued one of the individual partners and the third-party company, arguing that the individual partner had contracted with the third-party company without the partnership's permission. *See id.* The partnership's "claims [were] intertwined with [the individual partner's] power or authority under the Partnership Agreement," the court explained. *26th St. Hosp.*, 879 N.W.2d at 449. And "[i]t would be inequitable to allow the Partnership to rely on the Partnership Agreement in formulating its claims but to disavow the availability of the arbitration provision of that same agreement because [the third-party company] was not a signatory to the agreement." *Id.*

b. Chapter 2 of the FAA implements the New York Convention in United States courts. *See* 9 U.S.C. § 201. "The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was 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 and arbitral awards are

enforced in the signatory countries." *Scherk*, 417 U.S. at 520 n.15. To that end, the Convention says that "[e]ach Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration." N.Y. Convention, Art. II § 1. The Convention defines the "term 'agreement in writing,'" in turn, to "include an arbitral clause in a contract or an arbitration agreement, signed by the parties." *Id.*, Art. II § 2. Cases may be removed from state court to federal court when the "subject matter . . . relates to an arbitration agreement . . . falling under the Convention"; federal courts may also order that arbitration be conducted pursuant to a Convention-based arbitration agreement. 9 U.S.C. §§ 205, 206.

The Convention's implementing provisions in Chapter 2 of the FAA incorporate the background principles set forth in Chapter 1. "Chapter 1 applies to actions and proceedings brought under" the Convention and related provisions, "to the extent that chapter is not in conflict" with them. *Id.* § 208.

2. Respondent Outokumpu operates a stainless-steel plant in Alabama. Pet.App. 3a. In November 2007, while the plant was under construction, Outokumpu executed a series of contracts with Fives[1] for the purchase of three "cold rolling mills"—pieces of equipment used to manufacture steel products. *Id.*

[1] Both Outokumpu and Fives had different names when these contracts were entered. The entities, however, are the same.

The Outokumpu-Fives contracts define Outokumpu as "Buyer" and Fives as "Seller," and refer to both "Buyer and Seller" as "Parties." *Id.* at 4a. They also say that "Seller . . . shall be understood as Sub-contractors included, except if expressly stated otherwise." *Id.* "Sub-contractor," in turn, includes "any person (other than the Seller) used by the Seller for the supply of any part of the Contract Equipment, or any person to whom any part of the Contract has been sub-let by the Seller." *Id.* A list of "Preferred Brands or Manufacturers," which includes GE Energy, is appended to each contract. *Id.*

In addition, the Outokumpu-Fives contracts contain arbitration clauses, which provide for arbitration of "[a]ll disputes arising between both parties in connection with or in the performance of the Contract." *Id.* The clauses state that arbitration will take place in Germany in accordance with the Rules of Arbitration of the International Chamber of Commerce. *Id.*

Fives subcontracted with GE Energy to supply motors for the three mills. *Id.* at 4a–5a. GE Energy manufactured the motors in France and delivered them to Outokumpu's Alabama plant between 2011 and 2012. *Id.* The motors later failed. *Id.*

4. Outokumpu and its insurers sued GE Energy in Alabama state court. D.Ct. Dkt. 1-2. GE Energy timely removed, relying on 9 U.S.C. § 205, which authorizes removal of an action if its subject matter "relates to an arbitration agreement . . . falling under the Convention." D.Ct. Dkt. 1. Outokumpu moved to remand; GE Energy moved to dismiss and compel

arbitration under the Outokumpu-Fives contracts. D.Ct. Dkts. 6, 34, 35.

The district court denied Outokumpu's remand motion. The court adopted the magistrate judge's report and recommendation, which found removal proper under § 205 because the case "relates to an arbitration agreement . . . falling under the Convention." *See* Pet.App. 51a–81a. The district court then granted GE Energy's motion to dismiss and compel arbitration. *See id.* at 23a–50a. The court reasoned that the Outokumpu-Fives contracts contain "an arbitral clause . . . signed by the parties," as the Convention requires. N.Y. Convention, Art. II § 2.

5. The Eleventh Circuit affirmed the district court's denial of Outokumpu's remand motion, but reversed its decision to dismiss the case and compel arbitration.

As to the remand motion, the court emphasized that Chapter 2 of the FAA requires only that "the subject matter of [the] action . . . relate[ ] to an arbitration agreement." Pet.App. 9a (quoting 9 U.S.C. § 205). That requirement, the court held, is satisfied whenever "the arbitration agreement [is] sufficiently related to the dispute such that it conceivably affects the outcome of the case." *Id.* at 10a. Applying that standard, the Eleventh Circuit found that the district court properly exercised jurisdiction because, "[a]s alleged in the pleadings, the present lawsuit against GE Energy concerns the performance of the Outokumpu-Fives Contracts, and the arbitration agreement contained in those Contracts is sufficiently related to the instant

dispute such that it could conceivably affect the outcome of this case." *Id.* at 13a.

As to the motion to compel arbitration, however, the Eleventh Circuit held that GE Energy could not require Outokumpu to arbitrate because GE Energy had not itself signed the Outokumpu-Fives contracts. The court began by explaining that "a party may compel arbitration under the Convention only if," among other things, "there is an agreement in writing within the meaning of the Convention." *Id.* at 14a (quoting *Bautista v. Star Cruises*, 396 F.3d 1289, 1294 n.7 (11th Cir. 2005)). That requirement derives from Article II, § 1, which provides that "[e]ach Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration." "Agreement in writing," in turn, is defined in Article II, § 1 to "include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams."

"The requirement that the agreement to arbitrate be 'signed by the parties,'" the Eleventh Circuit explained, "applies to both an arbitral clause and an arbitration agreement." Pet.App. 14a–15a. And the court understood "the parties" to refer to "the parties before the court," rather than "the parties" to the arbitration agreement. *Id.* at 16a–17a. The court thus held that, "to compel arbitration, the Convention requires that the

arbitration agreement be *signed by the parties before the Court* or their privities." *Id.* at 16a (emphasis added). Because GE Energy had not itself signed the agreement with Outokumpu, the Eleventh Circuit reversed the district court's order granting its motion to compel arbitration.

The Eleventh Circuit reached this result even though it recognized that equitable estoppel allows non-signatories in GE Energy's position to compel arbitration under Chapter 1 of the FAA. *Id.* at 17a. "[E]stoppel," the court reasoned, "is only available under Chapter 1 because Chapter 1 does not expressly restrict arbitration to the specific parties to an agreement." *Id.* But the Convention, in the court's view, "imposes precisely such a restriction." *Id.* And "Congress has specified that the Convention trumps Chapter 1 of the FAA where the two are in conflict." *Id.* (citing 9 U.S.C. § 208).

The Eleventh Circuit denied GE Energy's petition for rehearing. *Id.* at 20a–22a. This petition followed.

REASONS FOR GRANTING THE WRIT

The Courts of Appeals are split 2-to-2 on the question presented. The First and Fourth Circuits have held that non-signatories may compel a signatory to arbitrate under the Convention based on the doctrine of equitable estoppel. But the Ninth and Eleventh Circuits have held that the Convention does not allow non-signatories to compel arbitration, even if equitable estoppel would otherwise apply. Respondents acknowledged that disagreement below. And it alone warrants certiorari.

Certiorari is even more warranted, however, because of the importance of the issue and the errors in the Eleventh Circuit's approach. This fact pattern arises in a host of economically important international contracting scenarios, from employment agreements to distribution chains to subcontracting arrangements. And equitable estoppel is just as important in the context of international arbitration agreements as it is for domestic ones—if not more so—to prevent "the federal policy in favor of arbitration effectively [from being] thwarted." 21 Williston on Contracts § 57:19. The Eleventh Circuit misconstrued the New York Convention and contravened 9 U.S.C. § 208's mandate that, all else equal, domestic and international arbitration agreements must be treated the same. This Court should grant the petition, reverse the decision below, and enforce international arbitration agreements.

I. THE COURTS OF APPEALS ARE DIVIDED.

A. The First and Fourth Circuits Have Held that Non-Signatories *Can* Enforce Arbitration Agreements Under the New York Convention.

1. In *Sourcing Unlimited, Inc. v. Asimco Int'l, Inc.*, 526 F.3d 38 (1st Cir. 2008), the First Circuit held that the New York Convention incorporates the doctrine of equitable estoppel. "The fact that the defendants are not signatories," the court held, "is not a basis on which arbitration may be denied." *Id.* at 48. "Equitable estoppel," the court explained, "precludes a party from enjoying rights and benefits under a contract while at the same time avoiding its burdens and obligations." *Id.* at 47 (internal

quotation omitted). The court then applied the doctrine to compel arbitration of claims against a non-signatory defendant by an entity who had an arbitration agreement with the defendant's corporate parent. *Id.* at 40–43. Because the plaintiff's claims were "sufficiently intertwined with" the contract between the plaintiff and the corporate parent, the court found the "application of estoppel to be appropriate." *Id.* at 47.

In so doing, the court rejected the argument—accepted by the Eleventh Circuit in this case, *see infra* 18—that the Convention's "agreement in writing" requirement precluded equitable estoppel. Article II of the Convention, the court recognized, "does require some writing to render an arbitration agreement enforceable." *Id.* at 45 n.7. "[I]t [was] undisputed," however, "that there [was] a writing" in that case: the contract between the plaintiff and the defendant's corporate parent. *Id.* That is all the Convention requires.

In addition to its straightforward statutory reasoning, the court emphasized the particular importance of allowing non-signatories to enforce *international* arbitration agreements. For one thing, "Chapter 2 of the FAA employs broader statutory language than does Chapter 1" in describing when district courts may compel arbitration. *Id.* at 45 (comparing 9 U.S.C. § 4 with 9 U.S.C. § 206). For another, "the national policy favoring arbitration has extra force when international arbitration is at issue." *Id.*

The court thus ordered arbitration under the Convention—even though the defendant had not

signed the contract that the plaintiff sought to enforce, or the arbitration clause that it contained.

2. The Fourth Circuit has also twice held that equitable estoppel applies to arbitration agreements subject to the Convention. *See Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d 355 (4th Cir. 2012); *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411 (4th Cir. 2000).

Aggarao involved claims of violations of maritime law arising out of injuries that the plaintiff suffered while employed aboard a ship. He brought his claims against both his employer (with whom he had an employment agreement containing an arbitration clause) and other entities associated with the ship (who were not parties to the employment agreement). Seeing nothing in the New York Convention that precluded application of common-law contract principles, the court held that "the doctrine of equitable estoppel applie[d]." 675 F.3d at 375. That doctrine allowed the non-signatories to the employment agreement to compel arbitration, because the claims against them related to "the course and scope of [the plaintiff's] employment." *Id.* at 373 (citation omitted). The Convention thus allowed "a nonsignatory to an arbitration clause [to] compel a signatory to the clause to arbitrate the signatory's claims against the nonsignatory despite the fact that the signatory and nonsignatory lack[ed] an agreement to arbitrate." *Id.* (citation omitted).

International Paper involved a distribution chain. "Well-established common law principles," the court reasoned, "dictate that in an appropriate case a nonsignatory can enforce, or be bound by, an arbitration provision within a contract executed by

other parties." 206 F.3d at 416–17. Those principles, the court explained, "also appl[y] to nonsignatories to arbitration agreements governed by the Convention." *Id.* at 418 n.7. The court then applied those principles to compel arbitration of a suit by a buyer of an industrial saw against the product manufacturer, in reliance on a contract between the manufacturer and a distributor. *Id.* at 413. That contract contained an arbitration clause subject to the New York Convention. *Id.* at 413, 418 n.7. Because the plaintiff sought to benefit from the contract at issue, the court held that the plaintiff was equitably estopped from avoiding arbitration. *See id.* at 418.

B. The Ninth and Eleventh Circuits Have Held that Non-Signatories *Cannot* Enforce Arbitration Agreements Under the New York Convention.

1. The Ninth Circuit reached the opposite result in *Yang v. Majestic Blue Fisheries, LLC*, 876 F.3d 996 (9th Cir. 2017). *Yang*, like *Aggarao*, involved a maritime-related suit against a non-signatory to an employment agreement containing an arbitration clause. *Id.* at 998. The Ninth Circuit held that "the Convention Treaty does not allow non-signatories or non-parties to compel arbitration." *Id.* at 1001. In the court's view, that result followed from Article II's requirement of "'an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between *them*,'" as well as its definition of "'agreement in writing' to 'include an arbitral clause in a contract or an arbitration agreement, *signed by the parties*.'" *Id.* at 999–1001 (quoting N.Y.

Convention, Art. II §§ 1–2). The court rejected the defendant's reliance on Chapter 1 of the FAA, finding that cases interpreting Chapter 1 "offer no guidance in interpreting the Convention Act's requirement that an agreement in writing be signed by the parties." *Id.* at 1002. That is because, in the court's view, "[t]o the extent [Chapter 1 of] the FAA provides for arbitration of disputes with non-signatories or non-parties, it conflicts with the Convention Treaty and therefore does not apply." *Id.* (citing 9 U.S.C. § 208).

2. The Eleventh Circuit adopted the same rule as the Ninth, in the context of a subcontracting arrangement. *See supra* 11–13. In so doing, it, too, relied on the Convention's requirement of an "agreement in writing"—*i.e.*, an agreement "signed by the parties." Pet.App. 14a–15a (quoting N.Y. Convention, Art. II § 2). Because of that requirement, the court reasoned that, "to compel arbitration, the Convention requires that the arbitration agreement be signed by the *parties before the Court*." *Id.* at 16a (emphasis added). Because "GE Energy is undeniably not a signatory to the Contracts," the court held that GE Energy could not rely on equitable estoppel to compel arbitration. *Id.* at 15a. The court reached this result even though it recognized that non-signatories like GE Energy "can compel arbitration through estoppel under Chapter 1 of the FAA," which governs domestic arbitration agreements. *Id.* at 17a.

* * *

As Respondents acknowledged below, the Courts of Appeals are thus split 2-to-2 on whether the doctrine of equitable estoppel applies to agreements

subject to the Convention. *See* Supp. Ans. Br. of Appellants Sompo Japan et al., 5–6 (Ct. App. Dkt. Feb. 2, 2018) (acknowledging circuit court "opinions in which equitable estoppel was used in a Convention context"). District courts in other circuits are also divided. *Compare, e.g., Alghanim v. Alghanim*, 828 F. Supp. 2d 636, 647 (S.D.N.Y. 2011) (holding that "the fact that [defendants] are non-signatories to the March Agreements does not by itself foreclose their resort to arbitration" on an equitable estoppel theory), *with Invista N. Am., S.A.R.L. v. Rhodia Polyamide Intermediates S.A.S.*, 503 F. Supp. 2d 195, 203 (D.D.C. 2007) ("[T]he Court finds that equitable estoppel is not a valid basis upon which a party may compel arbitration pursuant to Section 206 of the FAA."). The factual circumstances of these cases vary. But the common question, on which there is a clear split, is whether an equitable estoppel analysis applies at all when a non-signatory seeks to enforce an agreement subject to the Convention. The Court should grant certiorari to resolve that division of authority.

II. THE QUESTION PRESENTED IS IMPORTANT.

1. Arbitration agreements are supposed to ensure a predictable, reliable, and efficient means of resolving commercial disputes. For this reason, the FAA reflects an "emphatic federal policy in favor of arbitral dispute resolution." *Mitsubishi Motors*, 473 U.S. at 631. Likewise, "[t]he goal of the Convention," this Court has explained, "was 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 and arbitral awards are

enforced in the signatory countries." *Scherk*, 417 U.S. at 520 n. 15.

The justifications for protecting arbitration agreements "appl[y] with special force in the field of international commerce." *Mitsubishi Motors*, 473 U.S. at 631; *see also Sourcing Unlimited*, 526 F.3d at 45 ("[T]he national policy favoring arbitration has extra force when international arbitration is at issue."). Enforcing arbitration agreements promotes "international comity [and] respect for the capacities of foreign and transnational tribunals." *Mitsubishi Motors*, 473 U.S. at 629. Moreover, because of the complexity of international transactions, certainty and uniformity of enforcement are particularly critical. *See id.* (citing "the need of the international commercial system for predictability in the resolution of disputes"). Beyond that, the dangers of forum shopping based on perceived home-court advantage are especially acute when parties hail from different countries. *See Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 51 (2d Cir. 2004) (explaining that honoring the terms of an arbitration agreement "is necessary to . . . avoid forum shopping" and that "[t]his is especially true of contracts between transnational parties").

The Eleventh Circuit's decision stands these principles on their heads by making international arbitration agreements less effective than their domestic counterparts. *See* Pet.App. 17a (acknowledging that non-signatories "can compel arbitration through estoppel under Chapter 1 of the FAA" but holding that they cannot do so under Chapter 2). Moreover, a circuit split about the ability of non-signatories to enforce international

arbitration agreements creates exactly the kind of enforcement uncertainty that the New York Convention was designed to combat.

2. Absent this Court's intervention, international commerce will suffer. For domestic agreements, the point of equitable estoppel is to prevent signatories from evading arbitration agreements, and thereby circumventing "the federal policy in favor of arbitration," by suing non-signatories. 21 Williston on Contracts § 57:19. That rationale applies fully to international agreements, yet the Eleventh Circuit's decision eviscerates it.

That evisceration matters. As the cases implicated in this circuit split show, equitable estoppel arises in all sorts of scenarios. *See supra* 14–19; *see also* 21 Williston on Contracts § 57:19. The decision below illustrates one such context: subcontracting. International transactions can be exceedingly complex, so businesses must often rely on specialized expertise from subcontractors to fulfill their contractual obligations. By design, subcontractors generally contract with one of the parties to the original agreement—not both. But, as this case demonstrates, disputes can and do arise between subcontractors and the other party to the original agreement. Under the Eleventh Circuit's rule, subcontractors will be unable to enforce the arbitration clauses in those agreements—even when signatories seek to invoke the agreement's other terms against them.

That is exactly what has to happened to GE Energy. As a subcontractor to Fives, GE Energy falls within the definition of "Seller" under the purchase contracts and therefore is treated as one under the

contract terms "except if expressly stated otherwise." Pet.App. 4a. Outokumpu, as the Buyer, is trying to enforce the terms of the contracts against GE Energy, while at the same time avoiding the arbitral remedy it bargained for.

The Eleventh Circuit's decision therefore forces businesses to choose between entering subcontracts and preserving access to the arbitral forum. The business community loses either way: Either beneficial commercial transactions will not take place, or those transactions will become more costly and unpredictable. A decision by this Court making clear that subcontractors and other non-signatories can rely on the arbitration clauses in contracts that signatories seek to enforce against them would avoid putting businesses to that choice.

And that is just one of the many contexts in which equitable estoppel often arises. The Eleventh Circuit's decision, if let stand, will complicate other commercial agreements with international dimensions. Any chain of commerce with several links, or any contract with a third-party beneficiary, may create a circumstance in which a signatory to a contract containing an arbitration clause relies on that contract to sue a non-signatory. *See* 21 Williston on Contracts § 57:19 (discussing examples of cases in which equitable estoppel applies). The cases that constitute the circuit split—which involve signatories to agreements involving corporate parents, product distribution agreements, and employment agreements—illustrate the point. *See Sourcing Unlimited*, 526 F.3d 38 (agreement with corporate parent); *International Paper*, 206 F.3d 411 (distribution agreement); *Yang*, 876 F.3d 996

(employment agreement); *Aggarao*, 675 F.3d 355 (employment agreement). In all of these contexts, the Eleventh Circuit's decision stifles efficient international contracting. Parties will think twice before entering otherwise-beneficial commercial arrangements if doing so may subject them to contract-based lawsuits—while leaving them without recourse to the arbitral forum agreed to in those very contracts.

3. This Court often grants certiorari to ensure the consistent enforcement of arbitration agreements—including in the international context. *See, e.g., BG Grp., PLC v. Republic of Argentina*, 134 S. Ct. 1198, 1205 (2014) (granting certiorari "[g]iven the importance of the matter for international commercial arbitration"); *New Prime Inc. v. Oliveira*, No. 17-340, 2019 WL 189342, at *9 (U.S. Jan. 15, 2019) ("grant[ing] certiorari only to resolve existing confusion about the application of the Arbitration Act"); *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 528 (2019) (granting certiorari "[i]n light of disagreement in the Courts of Appeals over whether the 'wholly groundless' exception is consistent with the Federal Arbitration Act"). It should do the same here.

III. THE ELEVENTH CIRCUIT'S DECISION IS WRONG.

The decision below is wrong. It misconstrues the New York Convention and the FAA provisions implementing it. And it contravenes the Convention's purpose, leaving international arbitration agreements with less protection than domestic ones.

1. The New York Convention's implementing provisions in Chapter 2 of the FAA state that "Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States." 9 U.S.C. § 208. Chapter 1, in turn, incorporates "background principles of state contract law regarding the scope of agreements (including the question of who is bound by them)." *Arthur Andersen*, 556 U.S. at 630. As this Court has recognized, these background principles "allow a contract to be enforced by or against nonparties to the contract through," among other mechanisms, equitable estoppel. *Id.* at 631 (citing 21 Williston on Contracts § 57:19). Chapter 1 thus permits enforcement of a domestic arbitration clause "against (or for the benefit of) a third party" non-signatory, *id.*, where, as here, "a signatory to the written agreement must rely on the terms of that agreement in asserting its claims against the nonsignatory." 21 Williston on Contracts § 57:19. That rule makes sense: "A signatory . . . cannot have it both ways . . . [by] seek[ing] to hold the nonsignatory liable pursuant to duties imposed [by] an agreement, which contains an arbitration provision, but deny the arbitration provision's applicability because the defendant is a nonsignatory." *Id.*

Under § 208, the same is true of arbitration agreements subject to the New York Convention, absent a "conflict with" the Convention or its implementing provisions. 9 U.S.C. § 208. There is no conflict here. Neither the Convention nor Chapter 2 of the FAA speaks to the availability of

equitable estoppel or other common-law enforcement mechanisms. So "Chapter 1," which allows enforcement through equitable estoppel, "applies." *Id.*

2. In holding otherwise, the Eleventh Circuit relied on the Convention's requirement that an arbitration agreement be "signed by the parties" to be enforceable. New York Convention, Article II, § 2. But that provision simply prohibits unwritten arbitration agreements—that is, it requires only that an agreement be signed by the parties to that agreement for the arbitration clause to be valid. Once an "agreement in writing" exists—*i.e.*, one "signed by the parties" to that agreement—Article II § 2 says nothing about who can enforce it. The "signed by the parties" requirement cannot be read to contravene ordinary common-law principles by restricting enforcement of a valid arbitration clause to only the signatories.

If the drafters of the Convention (and the Congress that ratified it) had intended that result, they would have said so. After all, this Court generally presumes that legislation incorporates background principles of common law. *Cf., e.g., Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 347 (2013) ("This, then, is the background against which Congress legislated in enacting Title VII, and these are the default rules it is presumed to have incorporated, absent an indication to the contrary in the statute itself."); *Meyer v. Holley*, 537 U.S. 280, 285 (2003) ("[W]hen Congress creates a tort action, it legislates against a legal background of ordinary tort-related . . . rules and consequently intends its legislation to incorporate those rules."). And it would

have been simple enough to bar enforcement by non-signatories or bar application of equitable estoppel if the drafters had wanted to.

Beyond that, the term "parties," in this context, can only mean parties *to the arbitration agreement*, not parties *to the court case*. Subsection 1(a) Article V, which provides that enforcement of an arbitration award "may be refused" if "[t]he parties to the agreement referred to in article II were . . . under some incapacity," makes that clear. By referring to the "parties . . . referred to in article II," that provision confirms that Article II's "signed by the parties" requirement can only be read to refer to "the parties to the agreement."

3. Because Petitioner's interpretation of the text is clearly correct, the Court need go no further: The FAA says to "appl[y]" Chapter 1 (including the doctrine of equitable estoppel) absent "conflict with" the Convention or its implementing provisions, and there is no such conflict. But for what it's worth, Petitioner's reading also best serves the Convention's purpose of "encourag[ing] the recognition and enforcement of commercial arbitration agreements in international contracts and . . . unify[ing] the standards by which agreements to arbitrate are observed . . . in the signatory countries." *Scherk*, 417 U.S. at 520 n.15. And it furthers the broader federal policy favoring arbitration, which "applies with special force," not lesser effect, "in the field of international commerce." *Mitsubishi Motors*, 473 U.S. at 631. The Eleventh Circuit's opposite interpretation, by contrast, discourages international arbitration agreements by making them harder to enforce in run-of-the-mill contracting scenarios.

CONCLUSION

The petition for a writ of certiorari should be granted.

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