

13-320

Supreme Court, U.S.
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**In The
Supreme Court of the United States**

—◆—
BACARDI INTERNATIONAL LIMITED,

Petitioner,

v.

V. SUAREZ & CO., INC.,

Respondent.

—◆—
**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit**

—◆—
PETITION FOR WRIT OF CERTIORARI

—◆—
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QUESTION PRESENTED

In *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation*, 460 U.S. 1 (1983), this Court held that, in determining the propriety of an order to stay a federal action out of deference to parallel litigation brought in state court, “the fact that federal law provides the rule of decision on the merits” must be weighed against abstention as part of the “exceptional-circumstances test” announced by this Court in *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976). 460 U.S. at 23-26. The question presented is:

Whether under *Moses H. Cone* the First Circuit was free to surrender subject-matter jurisdiction over a motion to confirm a “final and binding” arbitral award brought under Section 9 of the Federal Arbitration Act, 9 U.S.C. § 9, by staying the federal proceedings in deference to a parallel state court action, without taking into account the Act’s policies requiring piecemeal litigation to enforce the arbitration agreement.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the First Circuit include the Petitioner, Bacardi International Limited, and the Respondent, V. Suarez & Co., Inc. There are no parties to the proceedings before the First Circuit other than those named in the petition.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner Bacardi International Limited is a subsidiary of Bacardi Limited and there is no publicly held corporation owning ten percent or more of its stock.

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OPINIONS BELOW

The First Circuit's opinion of May 8, 2013, which is reported at 719 F.3d 1, is reproduced in the Appendix to this Petition ("App.") at 1-32. The First Circuit's order of June 13, 2013 denying rehearing and rehearing en banc is unpublished and reproduced at App. 183-184.

The district court's opinion and order of December 5, 2011 granting the respondent's motion to dismiss, which is reported at 826 F. Supp. 2d 433, is reproduced at App. 71-86.

JURISDICTION

The First Circuit filed its opinion on May 8, 2013. App. 1-32. Petitioner timely petitioned for rehearing and rehearing en banc, and on June 13, 2013, the First Circuit denied the petition. App. 183-184.

This Court has jurisdiction under 28 U.S.C. § 1254(1) to review on writ of certiorari the First Circuit's May 8, 2013 decision.

RELEVANT STATUTORY PROVISIONS

The Federal Arbitration Act ("FAA" or the "Act"), 9 U.S.C. §§ 1-16, mandates enforcement of the terms of arbitration agreements contained in contracts evidencing transactions in interstate commerce.

Section 2 of the FAA provides, in pertinent part, that written arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

Section 4 of the FAA provides, in pertinent part, that courts confronted with a valid arbitration agreement are to "direct[] the parties to proceed to arbitration in accordance with the terms of the agreement." 9 U.S.C. § 4.

Sections 9 of the FAA provides, in pertinent part, as follows:

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title.

* * *

9 U.S.C. § 9.

Section 10 of the FAA provides, in pertinent part, as follows:

(a) In any of the following cases the United States court in and for the district wherein

the award was made may make an order vacating the award upon the application of any party to the arbitration –

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

* * *

9 U.S.C. § 10.

STATEMENT OF THE CASE

This case arises from a dispute over the non-renewal of a sub-distribution agreement, by virtue of which Respondent, V. Suarez & Co., Inc. ("VSC"), a Puerto Rico corporation, was granted the exclusive right to import, sell, promote and distribute in Puerto Rico a specified inventory of Bacardi-brand products,

as to which Petitioner, Bacardi International Limited (“BIL”), a Bermuda corporation, is the principal investor and owner of the trademarks for commercial exploitation. See S. App. 1. BIL’s Puerto Rico affiliate and assignee of the sub-distribution agreement, Bacardi Corporation (“BC”), notified VSC in June of 2009 that it would not renew the contract beyond its stipulated five-year period.

When negotiations over new commercial terms with VSC broke down, BIL and BC initiated arbitration proceedings to enforce the validity of certain provisions in the sub-distribution agreement in which the parties stipulated a methodology for the computation of damages in the event of a non-renewal or termination without just cause and, alternatively, the existence of just cause. VSC contended that the damages provisions in the contract were null and void as conflicting with the Puerto Rico Dealers Act, known in Puerto Rico as “Law 75.”¹ After almost two years of contentious arbitration in the *first stage* of bifurcated proceedings, on July 19, 2011, a majority of the panel of arbitrators issued a lengthy, well-reasoned “Final Partial Award” validating the disputed contractual provisions. See App. 88-182.

As discussed in detail below, the sub-distribution agreement that is at the heart of this dispute is subject to the FAA, and contains an arbitration clause

¹ Law 75 of June 25, 1964 (“Law 75”), P.R. Laws Ann. tit. 10, §§ 278 *et seq.*

stipulating that any dispute under the agreement “shall be *finally* and *exclusively* determined by *binding* arbitration.” S. App. 16 (¶ 11.2) (emphasis added).² It also contains a clause allowing the parties to apply for judicial confirmation of an award. *Id.* (¶ 11.4). This language in the contract, as well as the parties’ submission of the dispute to arbitration under the Commercial Arbitration Rules of the American Arbitration Association (“AAA”), supposes both parties’ consent to the expedited confirmation of any award issued pursuant to the agreement.

Rather than honor the finality of the partial award issued by the panel and proceed with the second stage of arbitration, VSC chose to challenge the award on its merits by filing a proceeding to vacate the award in the Puerto Rico Court of First Instance. VSC invoked local arbitration law to seek *de novo* review on the merits of the award, as permitted by the Puerto Rico Supreme Court, whose jurisprudence applies a standard of judicial review for awards that is less rigorous than, and would not be permissible under, the FAA. In response, BIL timely removed to federal court the proceeding which had been brought by VSC under local law, and initiated an independent federal proceeding to confirm the award under the FAA’s Section 9.

² All “S. App.” cites are to the sealed appendix filed before this Court as “Appendix Volume II” under seal.

Before ruling on the consolidated motions to vacate and confirm, the District Court determined that a remand was proper as to the motion to vacate and also ordered the dismissal of the motion to confirm, based on a lack of subject-matter jurisdiction. As the First Circuit ultimately found, the District Court conducted a flawed analysis under Fed.R.Civ.P. 19 to require the presence of BIL's Puerto Rico affiliate, BC, as an indispensable party to the FAA confirmation proceeding, which destroyed complete diversity. *See* App. 14-25. Despite having found that the District Court abused its discretion in dismissing the proceeding, and despite its conclusion that the District Court, in fact, had subject-matter jurisdiction to entertain the motion under Section 9 of the FAA, the First Circuit ordered a *sua sponte* stay of proceedings, in deference to the remanded parallel state court action initiated by VSC to vacate the award. *See* App. 25-32.

The First Circuit's decision to stay confirmation proceedings in this case directly conflicts with this Court's precedents governing abstention in parallel proceedings and mandating the rigorous enforcement of arbitration agreements under the FAA.

First, under *Moses H. Cone*, the presence of a federal law question – here, enforceability of an arbitration award under Sections 9 and 10 of the FAA – weighs heavily against the surrender of federal jurisdiction in the abstention analysis. *Moses H. Cone*, 460 U.S. at 23-24. Yet, the First Circuit's decision to abstain failed to take *Moses H. Cone* into

account, which creates a divergence from other federal circuit courts that have faithfully interpreted this Court's holding in *Moses H. Cone* in the context of FAA proceedings.

Second, under the FAA, agreements to arbitrate must be rigorously enforced, even if the result is "piecemeal" litigation. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218-221 (1985); *see also Moses H. Cone*, 460 U.S. at 24. Here, the parties agreed to *final* and *binding* arbitration, and consented to the entry of judgment in order to enforce any award rendered pursuant to the arbitration clause, which under Section 9 of the FAA supposes both parties' consent to the expedited confirmation of any award issued pursuant to the agreement. 9 U.S.C. § 9. Therefore, the First Circuit's reliance on the *avoidance* of piecemeal litigation as a factor weighing in favor of abstention directly conflicts with this Court's cases and other federal circuit cases recognizing the FAA's policies and weighing them *against* abstention.

Because the First Circuit's order to stay in this case is irreconcilable with this Court's decision in *Moses H. Cone*, and its other jurisprudence interpreting the FAA, BIL respectfully requests that the Court grant the petition for certiorari, summarily reverse the decision below, and remand for further proceedings consistent with these precedents. *See, e.g., KPMG LLP v. Cocchi*, 132 S. Ct. 23 (2011) (per curiam) (summarily reversing misapplication of this Court's precedent interpreting the FAA); *Citizens Bank v. Alafabco, Inc.*,

539 U.S. 52 (2003) (per curiam) (same). Alternatively, the Court should grant plenary review.

A. Statutory Framework

The FAA provides that written agreements to arbitrate are “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract,” so long as their subject involves “commerce.” 9 U.S.C. § 2. The FAA makes clear that courts confronted with a valid arbitration agreement are to “direct[] the parties to proceed to arbitration *in accordance with the terms of the agreement*.” *Id.* § 4 (emphasis added). As a result, this Court has repeatedly held, that the Act’s “central purpose” is to “ensure ‘that private agreements to arbitrate are enforced according to their terms.’” *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53-54 (1995) (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leeland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989)), *accord CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012). To that end, this Court has held that agreements to arbitrate must be “rigorously enforce[d] . . . even if the result is ‘piecemeal’ litigation.” *Dean Witter Reynolds, Inc.*, 470 U.S. at 218, 221; *see Moses H. Cone*, 460 U.S. at 20 (noting that “the [FAA] *requires* piecemeal resolution when necessary to give effect to an arbitration agreement”); *accord KPMG LLP*, 132 S. Ct. 23 at 25-26.

Pursuant to Section 9 of the FAA, a summary procedure for the judicial confirmation of awards is

available “[i]f the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration,” in which case “any part to the arbitration may apply to the court so specified for an order confirming the award.” 9 U.S.C. § 9. Where, as here, an arbitration agreement subject to the FAA stipulates that “judgment upon the arbitral award may be entered, and application for judicial confirmation or enforcement of the award may be made, in any competent court having jurisdiction thereof,” S. App. 16 (§ 11.4), the parties have expressly consented to confirmation under Section 9 of the Act. See *Marine Transit Corp. v. Dreyfus*, 284 U.S. 263, 276 (1932) (although contract did not expressly provide for judicial confirmation, consent to confirmation under Section 9 could be inferred from stipulation “that the award should be ‘final and binding’”); see also *Moses H. Cone*, 460 U.S. at 22 n.27 (“[T]he policy of the Arbitration Act requires a liberal reading of arbitration agreements.”).

As indicated by this Court in *Marine Transit*, parties to an arbitration agreement may also provide implicit consent to confirmation under Section 9 of the FAA by agreeing that arbitration proceedings shall be “final and binding.” See *Marine Transit*, 284 U.S. at 276; see also *Daihatsu Motor Co., Ltd. v. Terrain Vehicles, Inc.*, 13 F.3d 196 (7th Cir. 1993). Implicit consent is also established where parties have incorporated the AAA’s Commercial Arbitration Rules into their arbitration agreement, which rules expressly provide that parties to an arbitration agreement shall

be deemed to have consented to judicial confirmation. See AAA, Commercial Arbitration Rules, R-48(c) (2009); see, e.g., *Idea Nuova, Inc. v. GM Licensing Group, Inc.*, 617 F.3d 177, 180 (2d Cir. 2010); *P&P Indus., Inc. v. Sutter Corp.*, 179 F.3d 861, 866-868 (10th Cir. 1999);³ see also *Preston v. Ferrer*, 552 U.S. 346, 362-363 (2008) (incorporation of AAA rules weighed against inference from choice-of-law clause that dispute would be governed by California rule regarding primary jurisdiction); *Mastrobuono*, 514 U.S. at 61-62 (agreement to arbitrate in accordance with the rules of National Association of Securities Dealers controlled determination of parties' intent regarding availability of punitive damages). Both of these additional bases for consent to confirmation are present in the instant case. See S. App. 15-16 (¶¶ 11.2, 11.4).

The often cited precept that the FAA establishes “a liberal federal policy favoring arbitration agreements,” is premised on the principle of honoring party autonomy. *Moses H. Cone*, 460 U.S. at 24. It therefore covers more than simply the substantive scope of an arbitration clause, and must be applied to give effect

³ Since *Marine Transit*, a majority of federal circuit courts addressing the issue of consent under Section 9 of the FAA have concluded that evidence in the arbitration agreement indicating the parties' intent that arbitration be final and binding is sufficient for implied consent to judicial confirmation. See Erika Van Ausdall, *Confirmation of Arbitral Awards: The Confusion Surrounding Section 9 of the Federal Arbitration Act*, 49 Drake L. Rev. 41 (2000) (collecting cases).

to the parties' intent regarding the binding nature of an award. *See Am. Exp. Co., et al. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013) (indicating that requirement that "courts must 'rigorously enforce' arbitration agreements according to their terms," includes "the rules under which that arbitration will be conducted") (quoting *Dean Witter Reynolds, Inc.*, 470 U.S. at 221, and *Volt Info. Scis., Inc.*, 489 U.S. at 479).

As this Court explained in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, "[u]nder the terms of § 9, a court 'must' confirm an arbitration award 'unless' it is vacated, modified, or corrected 'as prescribed' in §§ 10 and 11" of the Act. 552 U.S. 576, 582 (2008) (emphasis added) (also holding "that §§ 10 and 11 respectively provide the FAA's exclusive grounds for expedited vacatur or modification"). In turn, the grounds for vacating an award "under § 10 focus[] on misconduct rather than mistake," meaning that the FAA does not allow review for legal error. *AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011) (noting that pursuant to *Hall Street*, "parties may not contractually expand the grounds or nature of judicial review" under the FAA); *see also Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2068 (2013) ("[A]n arbitral decision 'even arguably construing or applying the contract' must stand, regardless of a court's view of its (de)merits.") (quoting *E. Assoc. Coal Corp. v. United Mine Workers of Am.*, 531 U.S. 57, 62 (2000)). Therefore, a request to confirm an arbitration award brought under Section 9 of the FAA "will get streamlined treatment as a motion," with limited judicial

review under the grounds provided for in § 10 of the FAA. *Hall Street*, 552 U.S. at 582 (explaining that summary confirmation “obviat[es] the separate contract action that would usually be necessary to enforce or tinker with an arbitral award in court”).

The FAA’s provisions for limited judicial review reflect a clear Congressional intent to preserve the final and binding nature of arbitral awards. *See, e.g., Southland Corp. v. Keating*, 465 U.S. 1, 7 (1984) (referring to Congress’s intent to establish a system of “final, binding arbitration”). They also operate to ensure “[a] prime objective of an agreement to arbitrate,” which is “to achieve ‘streamlined proceedings and expeditious results.’” *Preston*, 552 U.S. at 357-358 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985)); *see also Moses H. Cone*, 460 U.S. at 29 (the FAA “calls for a summary and speedy disposition of motions or petitions to enforce arbitration clauses”); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1962) (noting “the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts”); *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 278 (1995) (noting that Congress wrote the FAA to help parties avoid the costs and delay of litigation); *Southland Corp.*, 465 U.S. at 7 (“Contracts to arbitrate are not to be avoided by allowing one party to ignore the contract and resort to the courts. Such a course could lead to

prolonged litigation, one of the very risks the parties, by contracting for arbitration, sought to eliminate.”).

This Court has consistently invalidated procedural rules that “interfere[] with fundamental attributes of arbitration and thus create[] a scheme inconsistent with the FAA.” *AT&T Mobility, LLC*, 131 S. Ct. at 1748; *see, e.g., Am. Express Co., et al. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2312 (2013); *Preston*, 552 U.S. at 353; *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 684-685 (1996); *Allied-Bruce Terminix Cos.*, 513 U.S. at 278; *Southland Corp.*, 465 U.S. at 7.

B. Factual and Procedural Background

The underlying arbitration in this case arose from a dispute over the non-renewal of a sub-distribution agreement, as to which Respondent, VSC is a signatory and Petitioner, BIL, is a named party.⁴ S. App. 1. The sub-distribution agreement includes grounds to permit termination for just cause,⁵ a specific methodology for the computation of damages in the event of a termination without just cause,⁶

⁴ As explained in the First Circuit’s opinion below, *see* App. 3-4, the sub-distribution agreement was executed on August 2, 2004 between VSC and Bacardi Caribbean Corporation (“BCC”), with BIL and BC’s consent. S. App. 1. After a merger with BCC in 2006, BC became the assignee of the sub-distribution agreement with VSC. Joint Appendix (“J.A.”) 45-47.

⁵ *See* S. App. 12-13 (¶ 9.2).

⁶ *See* S. App. 14-15 (¶¶ 9.4(d) and 9.5). The parties stipulated the value of the distribution rights at the time of execution

(Continued on following page)

and provisions for dispute resolution requiring arbitration. S. App. 15-16 (Art. XI).

Specifically, as to arbitration, the sub-distribution agreement provides that any dispute “shall be finally and exclusively determined by binding arbitration . . . in accordance with the Commercial Arbitration Rules of the AAA . . .” *Id.* (§ 11.2). It provides, further, that “[t]he arbitrators shall decide the Dispute in accordance with the substantive law set forth in Article X⁷ [i.e., the law of Puerto Rico].” *Id.* at 16 (§ 11.3). The arbitration agreement also indicates, without qualification or exception, that

[e]ach party acknowledges and agrees that arbitration pursuant to this Article shall be the sole and exclusive procedure for resolving any Dispute, and that any award rendered by the majority of the arbitral tribunal shall be final and binding upon the parties. A judgment upon the arbitral award may be entered, and application for judicial confirmation or enforcement of the award may be made, in any competent court having

at \$2,073,398.00, and agreed that, in the event of a termination or a non-renewal without just cause, VSC’s damages were to be calculated based on the net income earned in *excess* of the stipulated distribution value for the fiscal year ending prior to the termination or non-renewal. *See* App. 40-41 (summarizing these provisions in the contract).

⁷ Article X of the sub-distribution agreement, titled “Governing Law,” states in pertinent part, that “[t]his Agreement shall be construed, interpreted and governed by and pursuant to the laws of the Commonwealth of Puerto Rico . . .” S. App. 15.

jurisdiction thereof, and the parties hereto submit to the jurisdiction of such court for purposes of enforcement of this Article and any award rendered hereunder.

S. App. 16 (¶ 11.4).

On October 10, 2009, BIL, BC and BCC (collectively referred to in the arbitration as “Bacardi”) filed a demand for arbitration with the International Center for Dispute Resolution of the AAA. J.A. 577, 604.⁸ Bacardi asserted, *inter alia*, claims under Puerto Rico law to enforce the validity of the contractual provisions stipulating the methodology for the computation of damages and, alternatively, the existence of just cause for non-renewal or termination. J.A. 585-590, 610-622. VSC accepted arbitration and filed a response to the demand and its own counterclaim, arguing, *inter alia*, that the contractual provisions regarding computation of damages were null and void because they conflict with Puerto Rico law, that Bacardi did not have just cause for non-renewal or termination, and that VSC was entitled to damages in excess of \$30 million. J.A. 591-592, 603, 629-631.

The arbitral panel, composed of three neutral attorneys, bifurcated the arbitration proceedings in order to first decide whether the contested contractual provisions were valid and binding under Puerto

⁸ All “J.A.” cites are to the Joint Appendix filed in the First Circuit in Case No. 12-1032, designated as Doc. 24 (Feb. 27, 2012).

Rico law. App. 93-94. All the other claims asserted by the parties, including issues relating to the existence of just cause and determination of damages, were to be tried at a later stage. App. 94.

A highly contested period of discovery limited to the bifurcated issue ensued, lasting approximately eight months. The panel then held six days of evidentiary hearings, which included extensive oral testimony and voluminous documentary evidence. App. 94-95; J.A. 1670-2789. Pursuant to ¶ 11.2 of the sub-distribution agreement, all proceedings were conducted in accordance with the Commercial Arbitration Rules of the AAA. *See* App. 88.

On July 19, 2011, a majority of the panel issued a seventy-two page “Final Partial Award on Bifurcated Issue” overruling VSC’s objections to the sub-distribution agreement and concluding that the contested damages provisions were valid and enforceable under Puerto Rico law. App. 88-182. In its ruling, the panel noted “[VSC’s] admission that it signed the Agreement freely, knowingly and voluntarily.” App. 129; *see also id.* at 113-114 (pin-pointing admissions). In short, the arbitral panel found in Bacardi’s favor by giving effect to the parties’ contracted methodology for the computation of damages in the event of a termination without cause.

Dissatisfied with this result, on August 5, 2011, VSC initiated a special action to vacate the award in the Puerto Rico Court of First Instance under the Puerto Rico Arbitration Act, P.R. Laws Ann. tit. 32,

§§ 3222 and 3224 (allowing *vacatur* of award and stay of proceedings to enforce award, pending resolution of *vacatur*). App. 36; J.A. 166. VSC claimed, based on an expansive reading of the substantive choice of law clause in the sub-distribution agreement, *see* S. App. 15 (Art. X), that Puerto Rico rather than federal arbitration law governed its request to vacate the award.⁹ J.A. 61, 166.

Importantly, under the Puerto Rico Arbitration Act, awards may be reviewed *de novo* for legal error, *see, e.g., S.I.U. of P.R. v. Otis Elevator Co.*, 5 P.R. Offic. Trans. 1156, 1163-1171 (1977) (review of awards for legal error recognized in Puerto Rico where agreement expressly provides that arbitrator shall decide dispute “according to law”), which is a less restrictive form of review than may be applied to arbitrators’ determinations under the FAA, *see AT&T Mobility, LLC*, 131 S. Ct. at 1752 (“review under § 10

⁹ As the Puerto Rico Court of First Instance eventually found, *see* App. 48-55, the FAA applies exclusively in these circumstances because the choice of law provision in the sub-distribution agreement is a standard clause incorporating solely Puerto Rico substantive law, but not Puerto Rico’s arbitration law or rules for the review or enforcement of awards. *Mastrobuono*, 514 U.S. at 63-64; *Preston*, 552 U.S. at 362-363; *see also P.R. Tel. Co. v. U.S. Phone Mfg. Corp.*, 427 F.3d 21, 29 (1st Cir. 2005) (“[E]very circuit that has considered the question . . . [has] held that the mere inclusion of a choice-of-law clause within the arbitration agreement is insufficient to indicate the parties’ intent to contract for the application of state law concerning judicial review of awards.”), *rev’d on other grounds by Hall Street*, 552 U.S. at 583 n.5.

[of the FAA] focuses on misconduct rather than mistake”). Thus, VSC based its request for *vacatur* of the award on Puerto Rico arbitration law and procedure, and argued that the majority had erred in its appreciation of the evidence and interpretation of the law. J.A. 175-176. VSC also raised bare allegations of partiality and prejudice by the panel’s majority. See App. 33, 56, 58-60; J.A. 175-176.

On September 1, 2011, BIL and BC timely removed to federal court VSC’s proceeding to vacate (Case No. 11-1858), asserting diversity jurisdiction under 28 U.S.C. § 1332(a)(2). J.A. 150. They requested an order to drop BC as a dispensable party, since the only contractual rights ultimately at stake in the award involved the recognition of BIL’s ownership rights as the principal. J.A. 160-163.

The following day, September 2, 2011, BIL exercised its rights under the FAA and filed against VSC a motion for expedited confirmation of the Award under Section 9 of the Act, initiated as a separate proceeding in federal court (Case No. 11-1871). J.A. 30. In the proceeding to confirm, BIL pleaded complete diversity and the requisite jurisdictional amount for original subject-matter jurisdiction under 28 U.S.C. § 1332(a)(2). J.A. 21. The District Court then consolidated the proceedings *sua sponte*, into lead Case No. 11-1858. J.A. 143.

On September 29, 2011, VSC filed motions to remand the proceeding to vacate, and to dismiss the proceeding to confirm under Fed.R.Civ.P. 12(b)(1), for

lack of subject-matter jurisdiction. J.A. 288, 296. As to the removed action, VSC argued, *inter alia*, that the presence of BCC and BC as defendants destroyed complete diversity. J.A. 319-337. Regarding the proceeding to confirm, VSC contended that BCC and BC were required and indispensable parties under Fed.R.Civ.P. 19. *Id.* VSC also moved the court for a stay of proceedings, pending resolution of the motions to remand and dismiss. J.A. 1426.

On October 17, 2011, the District Court denied VSC's request for a stay, *see* J.A. 15, and as a result, the parties fully briefed the merits of the motions to confirm and to vacate the award. J.A. 20, 1432, 1614. The question of the award's enforcement and finality, thus, stood submitted before the District Court as of November 22, 2011. J.A. 1514, 1557, 1567, 1614.

However, before reaching the merits of the motions, on December 5, 2011, the District Court entered separate judgments remanding VSC's motion to vacate in Case No. 11-1858, and dismissing BIL's motion to confirm in Case No. 11-1871, for lack of subject-matter jurisdiction. J.A. 4, 17, 147, 1667. In its Opinion and Order, of the same date, the District Court reasoned that dismissal was warranted because BC was an indispensable party under Fed.R.Civ.P. 19, whose presence as a "Plaintiff" destroyed complete diversity. App. 82-86. In a docket entry, the court mooted BIL's motion to confirm without ruling on its merits, noting that "the issues may be raised in the Court of First Instance." App. 87.

Although the remand order was not subject to appeal, *see* 28 U.S.C. § 1447(d), BIL filed a timely appeal from the District Court's order of dismissal regarding the motion to confirm, on December 9, 2011. J.A. 1668. The First Circuit's disposition of that appeal is the subject of this Petition.

Approximately seven months after BIL's appeal had been filed, but before oral arguments had been scheduled in this matter, the Puerto Rico Court of First Instance decided the remanded motion to vacate. In a July 23, 2012 Judgment, the Court of First Instance denied VSC's motion to vacate and confirmed the Award. App. 36-73. VSC then moved for review of that Judgment before the intermediate Puerto Rico Court of Appeals.¹⁰

In the meantime, on May 8, 2013, the First Circuit issued its Opinion on BIL's appeal from the dismissed motion to confirm. App. 1-32. The First Circuit concluded that the District Court had abused its discretion in failing to conduct a proper Rule 19 analysis, and determined that there is subject-matter jurisdiction for the federal court to entertain BIL's motion brought under Section 9 of the FAA for expedited confirmation of the Award. App. 14-25. In

¹⁰ Subsequent to the First Circuit's decision in this case, on June 25, 2013 (notified on July 3rd), the Puerto Rico Court of Appeals issued a resolution denying VSC's petition for writ of certiorari. A motion for reconsideration filed by VSC on July 18, 2013 is currently pending before the local intermediate appellate court.

so ruling, the First Circuit noted that judicial review of an award under the FAA “is ‘extremely narrow and exceedingly deferential,’” App. 24 (quoting *Bangor Gas Co., LLC v. H.Q. Energy Servs. (U.S.), Inc.*, 695 F.3d 181, 186 (1st Cir. 2012)), and cited *Moses H. Cone*, 460 U.S. at 29, for the proposition that “the policies of the FAA encourage speedy and efficient resolution of judicial review of arbitral awards,” App. 15.

Despite these findings, the First Circuit did not reverse the District Court’s dismissal and remand for further proceedings to confirm the award. Instead, the panel chose to reverse and order a *sua sponte* stay “pending final disposition of the appellate process in the Puerto Rico courts.” App. 31. The panel cited general principles of “wise and sound judicial administration and comity,” App. 25, and indicated that “[w]hether or not this case fits within the formal strictures of *Colorado River* or other formal categories of staying the exercise of federal jurisdiction, a stay is appropriate,” App. 27 (footnote omitted). The First Circuit based its decision to order a stay on the “desirability of avoiding piecemeal litigation,” App. 28, as well as its perception that the state court litigation involving review of the same award was already at a more advanced stage, noting that it had been filed “a month” prior to the federal confirmation proceeding, App. 27. In addition, the First Circuit indicated that “forum shopping” was a concern in this case “for obvious reasons.” App. 30.

BIL timely requested a partial rehearing and rehearing *en banc* regarding the panel’s decision to

order the stay, which the First Circuit denied on June 13, 2013. App. 183-184.



REASONS FOR GRANTING THE PETITION

Review should be granted because the First Circuit's *sua sponte* decision to order a stay in this case disregards this Court's holdings in *Moses H. Cone* by employing an abstention analysis that discounts the nature of the proceeding at issue in the federal court, and affords undue weight to "comity" concerns that are immaterial in the context of an FAA Section 9 proceeding.

To begin, the First Circuit failed to weigh in its abstention analysis, the impact of the applicable rule of decision in this case – Sections 9 and 10 of the FAA – which is in direct conflict with *Moses H. Cone*. 460 U.S. at 26 (holding, *inter alia*, that "the presence of federal-law issues must always be a major consideration weighing against surrender" of federal jurisdiction). In addition, by affording undue weight to the "desirability of avoiding piecemeal litigation," the First Circuit's decision again conflicts directly with *Moses H. Cone*, where this Court held that the piecemeal-litigation factor weighs *against* abstention in the FAA context. *Id.* at 19. Other federal courts of appeals have uniformly applied *Moses H. Cone* in FAA proceedings to conclude that enforcement of the FAA's policies weighs against a stay or dismissal in

favor of parallel state litigation. The decision below directly conflicts with these settled principles.

The First Circuit's stay order also contravenes this Court's precedents requiring rigorous enforcement of arbitration agreements under the FAA. *See Dean Witter Reynolds, Inc.*, 470 U.S. at 218-221; *Moses H. Cone*, 460 U.S. at 24. In this case, the parties stipulated the *final and binding* nature of the arbitral award, as well as their consent to confirmation under Section 9 of the Act. S. App. 16 (¶ 11.4). BIL was therefore within its rights to seek confirmation of the award in the federal courts. *See* 9 U.S.C. § 9. Consequently, the First Circuit clearly transgressed FAA policies by ascribing to BIL a pernicious forum shopping intent.

Summary reversal is warranted in this case, because the governing principles set forth in this Court's cases are well-established, and the decision of the First Circuit contravenes those settled standards as to an important and recurring issue of federal law. Alternatively, the Court should grant plenary review because the First Circuit's decision conflicts directly with decisions of this Court and other federal appellate courts on a recurrent issue regarding the enforcement of arbitral awards.

I. The First Circuit's *Sua Sponte* Order to Stay Proceedings Disregards This Court's Holding in *Moses H. Cone* Mandating That the FAA's Policies Be Weighed Against Abstention.

In *Colorado River*, this Court first recognized the possibility of staying or dismissing a federal action in favor of concurrent state litigation “for reasons of wise judicial administration,” absent the “weightier considerations” that justify traditional forms of abstention.¹¹ 424 U.S. at 814-818. In so holding, the Court indicated that the circumstances permitting this type of abstention “are considerably more limited” because, in the context of state-federal concurrent jurisdiction, federal courts have a “virtually unflagging obligation . . . to exercise the jurisdiction given them.” *Id.* at 817-818 (citations omitted); see *Moses H. Cone*, 460 U.S. at 15 (noting *Colorado River*’s admonition in this respect); *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996) (same).

It is in that context that *Colorado River* identified factors to be considered in determining whether “exceptional circumstances” exist to merit abstention

¹¹ As indicated in *Colorado River*, “[this Court’s] decisions have confined the circumstances appropriate for abstention to three general categories,” namely, (1) to avoid a federal constitutional determination by allowing a state court to construe state law; (2) to defer difficult questions of state law that involve significant policy considerations to the state courts; and (3) to disallow invocation of federal jurisdiction to restrain state criminal proceedings. 424 U.S. at 814-817.

merely to avoid duplicative litigation, 424 U.S. at 818-820, which this Court later expanded upon in *Moses H. Cone*, 460 U.S. at 15-16 (referring to “*Colorado River’s* exceptional-circumstances test”). Moreover, in *Moses H. Cone*, the Court clarified that “the decision whether to dismiss a federal action because of parallel state-court litigation does not rest on a mechanical checklist, but on a careful balancing of the important factors *as they apply in a given case, with the balance heavily weighted in favor of the exercise of jurisdiction.*” 460 U.S. at 16 (emphasis added).

Among the factors to be weighed are some of those relied upon by the First Circuit to reach its decision in this case, namely, “the desirability of avoiding piecemeal litigation” and the relative progress of litigation in each forum. App. 28-31. See *Moses H. Cone*, 460 U.S. at 15-16 (listing *Colorado River* factors as including [1] whether state court has assumed jurisdiction over any *res* or property, [2] the relative inconvenience of the federal forum, [3] the avoidance of piecemeal litigation, and [4] the order in which jurisdiction was obtained) (quoting *Colorado River*, 424 U.S. at 818-819). However, the Court in *Moses H. Cone* incorporated additional factors to the exceptional-circumstances test,¹² including “[whether] federal law

¹² In addition to [5] the source-of-law factor, *Moses H. Cone* incorporated the following factors to the exceptional-circumstances test: [6] the adequacy of the state court action to protect the federal plaintiff’s rights, *id.* at 26-28, [7] the relative progress of

(Continued on following page)

provides the rule of decision on the merits.” *Id.* at 23-26 (relying on *Calvert Fire Ins. Co.*, 437 U.S. 655); see *Quackenbush*, 517 U.S. at 728-729 (noting the Court’s holding to this effect in *Moses H. Cone*).

Conspicuously missing from the First Circuit’s analysis in this case is any mention of the governing rule of decision: Sections 9 and 10 of the FAA. See *Hall Street*, 552 U.S. at 582; *AT&T Mobility, LLC*, 131 S. Ct. at 1752.¹³ The First Circuit’s failure to account for the fact that the proceeding at issue in this case is governed by the FAA and its policies directly contravenes *Moses H. Cone*, which also established binding precedent interpreting those policies against the surrender of federal jurisdiction.

Moses H. Cone involved a suit brought in diversity to compel arbitration under Section 4 of the FAA, 9 U.S.C. § 4, which the district court had stayed in favor of a parallel state court action filed as a challenge to arbitrability under the contract. 460 U.S. at 5-7. This Court affirmed the Fourth Circuit’s reversal of the stay under *Colorado River*. 460 U.S. at 19. In evaluating the propriety of abstention, the Court emphasized that “[t]he basic issue presented in [the]

the state and federal proceedings, *id.* at 21-23, and [8] the vexatious nature of either the federal or state litigation, *id.* at 17 n.20 (noting application of this factor by the Seventh Circuit on remand from *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655 (1978)). See, e.g., *Nazario-Lugo v. Caribevision Holdings, Inc.*, 670 F.3d 109, 115 (1st Cir. 2012) (listing factors).

¹³ See Statutory Framework, *supra* at 8-13.

federal suit was the arbitrability of the dispute,” and concluded that “[f]ederal law *in the terms of the Arbitration Act* governs that issue in either state or federal court.” *Id.* at 24 (emphasis added). After declaring the FAA’s “liberal federal policy favoring arbitration,” *id.* at 24-25, the Court in *Moses H. Cone* held that, even though “the federal courts’ jurisdiction to enforce the Arbitration Act is concurrent with that of the state courts . . . the presence of federal-law issues must always be a major consideration [in the abstention analysis] weighing against surrender” of federal jurisdiction, *id.* at 26.

This Court’s holding in *Moses H. Cone* controls in this case because the FAA governs enforceability of the award in either state or federal court. *See App.* 24, n.16; *id.* at 49-50; *see also Southland Corp.*, 465 U.S. at 12 (holding that the FAA’s “body of federal substantive law” applies in both state and federal court). Moreover, because the court’s role in a proceeding to confirm under Section 9 of the Act is limited to review for “misconduct rather than mistake,” *AT&T Mobility, LLC*, 131 S. Ct. at 1752, the court was not required to consider questions relating to Puerto Rico law or policy that might underlie the award. *See Hall Street*, 552 U.S. at 582; *Oxford Health Plans LLC*, 133 S. Ct. at 2068.¹⁴ Consequently, there were no state-law concerns at the center of the dispute *sub judice* and the First Circuit had no basis to invoke state-federal

¹⁴ *See* Statutory Framework, *supra* at 11-12.

“comity” concerns as supportive of its decision to order a stay. *See* App. 25-27. Since BIL’s motion to confirm under Section 9 of the FAA “implicates a substantial federal concern for the enforcement of arbitration agreements,” *Quackenbush*, 517 U.S. at 728-729, the rule-of-decision factor should have been weighed against abstention by the First Circuit.

In addition, because of the nature of the proceeding at issue, the First Circuit’s reliance on “the avoidance of piecemeal litigation” as a factor weighing in favor of abstention also conflicts directly with *Moses H. Cone*. Just as in *Moses H. Cone*, “[t]here is no force here to the consideration that was paramount in *Colorado River* itself – the danger of piecemeal litigation.” *Moses H. Cone*, 460 U.S. at 19. This Court has stressed that multiplicity of proceedings is acceptable in order to enforce arbitration agreements that are governed, as here, by the FAA. “The overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings.” *AT&T Mobility, LLC*, 131 S. Ct. at 1748; *see Hall Street*, 552 U.S. at 582. This purpose has been held to “require[] that [courts] rigorously enforce agreements to arbitrate, *even if the result is ‘piecemeal’ litigation*, at least absent a countervailing policy manifested in another federal statute.” *Dean Witter Reynolds, Inc.*, 470 U.S. at 217 (emphasis added); *accord KPMG LLP*, 132 S. Ct. at 26.

Moses H. Cone is controlling on this point. There, this Court held that the FAA “requires piecemeal resolution when necessary to give effect to an arbitration agreement,” and concluded that “[t]his provides a sharp contrast with the key statute at issue in *Colorado River*,” which had as its primary policy “the avoidance of piecemeal litigation.” *Moses H. Cone*, 460 U.S. at 20 & 20 n.22 (both emphases in original) (citing *Colorado River*, 424 U.S. at 819-820). The Court emphasized that the federal statute at issue in *Colorado River*, the McCarran Amendment, 43 U.S.C. § 666, represented “Congress’s judgment that the field of water rights [was] *peculiarly appropriate* for comprehensive treatment” in state forums. *Id.* at 16 (emphasis added) (citing *Colorado River*, 424 U.S. at 819-820). The FAA reflects the inverse policy judgment: procedures under the Act are meant to facilitate enforcement of arbitration agreements, even if it results in “the possibly inefficient maintenance of separate proceedings in different forums.” *KPMG LLP*, 132 S. Ct. at 26.

In this respect, the decision below conflicts with decisions by other federal circuit courts that adhere to the holding of *Moses H. Cone* and weigh these FAA policies against abstention. For example, the Fifth Circuit has held that “[r]egardless of the procedural mechanism, the fact that enforcing an arbitration agreement may lead to piecemeal litigation does not weigh in favor of abstention.” *Saucier v. Aviva Life & Annuity Co.*, 701 F.3d 458, 463-464 (5th Cir. 2012) (also concluding that “the district court should retain

jurisdiction and determine” enforceability of the arbitration agreement).¹⁵ Similarly, the Sixth Circuit has held that “the desire to avoid litigating a single issue in multiple forums is insufficient to overcome the strong federal policy supporting arbitration.” *PaineWebber, Inc. v. Cohen*, 276 F.3d 197, 207 (6th Cir. 2001) (weighing piecemeal litigation factor against abstention in the context of a motion to compel arbitration) (citing *Moses H. Cone*, 460 U.S. at 20). The Eleventh Circuit has likewise held, also in the context of a motion to compel arbitration under the FAA, that “the potential for piecemeal litigation . . . has ‘no force,’” since it is “piecemeal litigation that the parties and federal policy have together made mandatory.” *First Franklin Fin. Corp. v. McCollum*,

¹⁵ See *Brown v. Pacific Life Ins. Co.*, 462 F.3d 384, 396 (5th Cir. 2006) (“Allowing a federal court to order arbitration, even where a state court may construe an arbitration clause differently, is fully consistent with . . . established congressional intent. This conclusion is not altered simply because a state court’s arbitrability decision may involve a party to the arbitration agreement [that cannot be joined in the federal action].”); *Snap-on Tools Corp. v. Mason*, 18 F.3d 1261 (5th Cir. 1994) (pursuant to *Moses H. Cone*, “if some piecemeal litigation does result, that sometimes is the inevitable result of a congressional policy strongly favoring arbitration”); see also *Am. Fam. Life Assur. Co. of Columbus v. Biles*, 714 F.3d 887, 893 (5th Cir. 2013) (applying *Moses H. Cone* to affirm denial of abstention, where arbitrability of claims was “the only legal issue disputed in the federal lawsuit,” federal law governed that issue “whether it is raised in state or federal court,” and “any concern of piecemeal litigation is outweighed by the strong federal policy supporting arbitration”).

144 F.3d 1362, 1364 (11th Cir. 1998) (quoting *Moses H. Cone*, 460 U.S. at 19-20).

In *First Franklin*, the Eleventh Circuit also recognized that, because the petitioner could not have known that the respondent would not honor the arbitration agreement prior to his filing of the state court action, the order in which the tribunals obtained jurisdiction weighed against discretionary dismissal. *Id.* at 1364-1365; *accord Saucier*, 701 F.3d at 465 (where “the only factor weighing in favor of abstention is the greater progress made in the state court case,” that factor alone does not “in itself, . . . give rise to ‘exceptional circumstances’ capable of overcoming the strong presumption in favor of retaining jurisdiction”) (citing *Moses H. Cone*, 460 U.S. at 16, 19); *see also PaineWebber, Inc.*, 276 F.3d at 208 (holding that “the presence of concurrent jurisdiction . . . is insufficient to justify abstention . . . where a congressional act provides the governing law and expresses a preference for federal litigation.”) (citing *Moses H. Cone*, 460 U.S. at 25 n.32, where this Court indicated that the FAA “represents federal policy to be vindicated by the federal courts where otherwise appropriate”).

The First Circuit’s decision in this case cannot be defended merely on the ground that the progress of litigation was greater in the state court action at the time that it issued its order to stay proceedings. This Court’s precedent requires that the FAA’s policies be heavily weighed against a stay or dismissal, despite

the existence of concurrent jurisdiction in state court. *Moses H. Cone*, 460 U.S. at 25-26.

II. The First Circuit’s *Sua Sponte* Order to Stay Proceedings Disregards the Parties’ Consent to Confirmation under Section 9 of the FAA, Which Conflicts with This Court’s Precedents Mandating Rigorous Enforcement of Arbitration Agreements.

The conflict between the First Circuit’s stay order and this Court’s precedent in *Moses H. Cone* is compounded by the fact that the federal proceeding at issue in this case was brought under Section 9 of the FAA, and sought expedited confirmation of a “final and binding” arbitral award rendered under the Commercial Arbitration Rules of the AAA, and as to which the parties had agreed that judgment could be entered “in any competent court having jurisdiction.” S. App. 16 (¶ 11.4). *See* 9 U.S.C. § 9; AAA, Commercial Arbitration Rules, R-48(c) (2009); *see also Marine Transit*, 284 U.S. at 276.¹⁶ Section 9 of the FAA therefore expressly affords BIL venue in the federal courts to seek confirmation of the award on the basis of the sub-distribution agreement. *See Moses H. Cone*, 460 U.S. at 25 n.32 (“[A]lthough enforcement of the Act is left in large part to the state courts, it nevertheless represents federal policy to be vindicated by the federal courts where otherwise appropriate.”); *see also*

¹⁶ *See* Statutory Framework, *supra* at 9-10.

Cortez Byrd Chips, Inc. v. Bill Harbert Const. Co., 529 U.S. 193, 201 (2000) (interpreting the FAA’s venue provisions for actions to confirm, 9 U.S.C §§ 9-11, as permissive and noting “the FAA’s ‘statutory policy of rapid and unobstructed enforcement of arbitration agreements’”) (quoting *Moses H. Cone*, 460 U.S. at 23).

The First Circuit clearly contravened this Court’s precedents requiring the rigorous enforcement of arbitration agreements, by ascribing to BIL a pernicious “forum shopping” intent from the straightforward exercise of its right under the sub-distribution agreement to seek confirmation of the award in federal court. See *PaineWebber, Inc.*, 276 F.3d at 203 (rejecting argument that party moving to compel arbitration in federal court was engaging in “impermissible forum shopping” merely because removal under 28 U.S.C. § 1441 would not be possible, noting that “the FAA allows any party to an arbitration to file a petition to compel arbitration”). BIL had a right under Section 9 and the sub-distribution agreement to remain in federal court through its independent motion to confirm, once the improper dismissal had been reversed on appeal by the First Circuit. See *Smart v. Sunshine Potato Flakes, L.L.C.*, 307 F.3d 684, 686 (8th Cir. 2002) (rejecting proposition that doctrines of preclusion, estoppel, or election of remedies bar sequential pursuit of alternative venues, including the right to remove and simultaneously seek confirmation of award); *Great Earth Cos., Inc. v. Simons*, 288 F.3d 878, 888 (6th Cir. 2002) (rejecting petitioner’s similar

contention that this argument weighed in favor of abstention); *see also Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 290 (1988) (rejecting contention “that the decision of a party to spurn removal and bring a separate suit in federal court invariably warrants the stay or dismissal of the suit under the *Colorado River* doctrine”).

In this context, the FAA leaves little discretion to federal courts with concurrent jurisdiction to abstain from deciding a motion to confirm. *See Quackenbush*, 517 U.S. at 731 (“Under [this Court’s] precedents, federal courts have the power to dismiss or remand cases based on abstention principles only where the relief being sought is equitable or otherwise discretionary.”); *cf. Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 293 (2005) (concurrent federal jurisdiction does not vanish if a state court reaches judgment on the same or related question).

III. The Court Should Summarily Reverse the First Circuit’s *Sua Sponte* Order to Stay Proceedings.

In light of the conflict between the First Circuit’s stay order and this Court’s and federal circuit court precedents governing abstention under the FAA, BIL respectfully requests that the Court grant the petition for certiorari, summarily reverse, and remand the case for further action not inconsistent with this Court’s precedents. Alternatively, the Court should accept the case for plenary review.

Although summary reversal is strong medicine, it is appropriate where, as here, “the law is well settled and stable, the facts are not in dispute, and the decision below is clearly in error.” Eugene Gressman, et al., *Supreme Court Practice* 350 (9th ed. 2007) (quoting *Schweiker v. Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting)); see, e.g., *KPMG LLP*, 132 S. Ct. at 26 (summarily reversing where opinion below “failed to give effect to the plain meaning of the [FAA] and the holding of *Dean Witter*”); *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 271 (2001) (summarily reversing where opinion below “cannot remotely” be reconciled with what “[the Court’s] cases require”). Aside from the clear conflict between the decision below and this Court’s precedents, there are other considerations of weight that warrant summary reversal in this case.

The decision below undermines Congress’s intent in enacting the FAA and sanctions an ongoing violation of BIL’s federal rights. The FAA reflects a strong “statutory policy of rapid and unobstructed enforcement of arbitration agreements,” *Moses H. Cone*, 460 U.S. at 23, and of preserving the final and binding nature of arbitral awards, see *Southland Corp.*, 465 U.S. at 7. Because a “prime objective [of arbitration] is to achieve ‘streamlined proceedings and expeditious results,’” *Preston*, 552 U.S. at 357, this Court noted in *Moses H. Cone* that Congress instructed the courts “to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible,” 460 U.S. at 22. The same principle

applies to the enforcement of an already final arbitral award. *See, e.g., Cortez Byrd Chips, Inc.*, 529 U.S. at 201 (emphasis added) (noting the “obviously liberalizing effect” of the FAA’s enactment of special venue provisions, indicating that “§ 9 authorizes a *binding* agreement selecting a forum for confirming an arbitration award”).

Yet, despite the existence in this case of an arbitration agreement providing that any award rendered by the arbitral tribunal would be “final and binding upon the parties,” and expressly consenting to judicial confirmation under Section 9 of the FAA, S. App. 16 (¶ 11.4), this dispute over the award’s enforcement has been in litigation now for two years, with no end in sight. BIL filed its motion to confirm the award in federal court *the day after it timely removed* VSC’s state court action seeking *vacatur* of the award under local law. App. 10. The two actions were promptly consolidated by the District Court, and would have been adjudicated as cross motions as early as November of 2011, *supra* at 20, had it not been for the District Court’s improper remand and dismissal of this case the following month for lack of jurisdiction. App. 14-25. Because of this delay in confirming the partial award in the *first stage* of bifurcated proceedings, the parties have not been able to continue arbitration on the remaining matters and finally resolve their disputes. *Moses H. Cone*, 460 U.S. at 28 (“If there is any substantial doubt” as to whether “the parallel state-court litigation will be an adequate vehicle for the complete and *prompt*

resolution of the issues between the parties. . . . it would be *a serious abuse of discretion* to grant the stay or dismissal at all.”) (Emphases added).

Put simply, the First Circuit’s stay order denies BIL the benefit of its arbitration agreement, contrary to federal law. *See Hall Street*, 552 U.S. at 588 (the FAA creates “a national policy favoring arbitration with just the limited review needed to maintain arbitration’s essential virtue of resolving disputes straightaway”).

The Judgment of the Puerto Rico Court of First Instance, though favorable to BIL by confirming the award, as noted in the First Circuit’s opinion, *see* App. 12 and 31, is not *final and binding* until all appeals have been exhausted before the Puerto Rico courts. *Cruz v. Melecio*, 204 F.3d 14, 20 (1st Cir. 2000) (explaining that under Puerto Rico law, “a commonwealth court judgment cannot be accorded preclusive effect until all available appeals have been exhausted”); *cf.* 18A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4433 (2d ed. 2002) (“Wright & Miller”) (federal rule is to grant preclusive effect to final judgment even when appeal is pending). Upon a decision by the Puerto Rico Court of Appeals regarding VSC’s request for reconsideration, *supra* at 20 n.10, VSC may still file a petition for review before the Puerto Rico Supreme Court, whose decision whether to grant or deny the writ is again subject to two rounds of reconsideration, each one considered by a separate three-judge panel. *See* P.R. Supreme Court Rules, R. 4(b) and R. 45, P.R. Laws Ann. tit. 4,

App. I. Moreover, the Puerto Rico Supreme Court session ended on June 30, 2013, and will not reconvene to rule upon pending petitions until the beginning of the next session, in October of this year. See P.R. Supreme Court Rules, R. 4(d), P.R. Laws Ann. tit. 4, App. I. Thus, even assuming that the Court of Appeals will act promptly upon VSC's pending motion for reconsideration, and that the motion will be denied, additional delay is inevitable. This circumstance affects the adequacy of the state-court litigation "for the complete and *prompt* resolution" of the dispute. *Moses H. Cone*, 460 U.S. at 28 (emphasis added).

Furthermore, Puerto Rico is not the only jurisdiction where judgments do not carry preclusive effect until all available appeals have been exhausted (or the time for taking them has expired). See *Wright & Miller* § 4433 n.16 (identifying Puerto Rico, Guam, California, Georgia, Hawaii, and Utah as jurisdictions where judgment subject to attack on appeal is not final for preclusive effect; indicating Illinois, Pennsylvania and Wisconsin may also follow same rule). A lack of uniformity in the finality of a judgment of confirmation creates an additional disadvantage or burden to litigants seeking to enforce arbitration awards under the FAA in jurisdictions that do not follow the federal *res judicata* rule. See *McDonald v. City of West Branch*, 466 U.S. 284, 287-288 (1984) (noting that "federal courts are not required by statute to give *res judicata* or collateral-estoppel effect to an unappealed arbitration award," and holding that "full faith and credit" provision in 28

U.S.C. § 1738 does not apply to arbitral award unless it has received judicial confirmation); *see also Dean Witter*, 470 U.S. at 222-223 (discussing *McDonald* holding).

This Court should grant the petition, summarily reverse the First Circuit's ruling, and ratify BIL's rights under the FAA to have a federal court with concurrent jurisdiction confirm the award.

◆

CONCLUSION

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

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Respectfully submitted,

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