UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 22-718 Caption [use short title] Bille et al v. Coverall North America, Inc.

Motion for: Leave to File Brief as Amicus Curiae

Set forth below precise, complete statement of relief sought:

Proposed Amici National Employment Law Project (NELP) and National Employment Lawyers' Association (NELA) seek leave to file a brief as amicus curiae

MOVING PARTY: NELA & NELP **OPPOSING PARTY:** Defendants-Appellants

☐ Plaintiff ☐ Defendant

☐ Appellant/Petitioner ☐ Appellee/Respondent

MOVING ATTORNEY: Michael J. Scimone **OPPOSING ATTORNEY:** Norman M. Leon

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Court- Judge/ Agency appealed from: District of Connecticut - Hon. Janet C. Hall

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain):

Opposing counsel's position on motion:
☑ Unopposed ☐ Opposed ☐ Don't Know

Does opposing counsel intend to file a response:
☐ Yes ☐ No ☑ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUCTIONS PENDING APPEAL:

Has this request for relief been made below? ☐ Yes ☐ No

Has this relief been previously sought in this court? ☐ Yes ☐ No

Requested return date and explanation of emergency:

Is oral argument on motion requested? ☐ Yes ☐ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☐ No If yes, enter date:

Signature of Moving Attorney:

/s/ Michael J. Scimone **Date:** 9/7/2022 Service by: ☑ CM/ECF ☐ Other [Attach proof of service]

No. 22-718

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CARIBE BILLIE and QUINCY REEVES, Individually and on behalf of all others similarly situated,

Plaintiff-Appellee,

v.

COVERALL NORTH AMERICA INC., et al.,
Defendant-Appellant.

On appeal from an interlocutory order of the United States District Court for the District of Connecticut No. 3:19-cv-00092 (JCH)

MOTION FOR LEAVE TO FILE BRIEF FOR *AMICI CURIAE* NATIONAL EMPLOYMENT LAW PROJECT AND NATIONAL EMPLOYMENT LAWYERS ASSOCIATION

Dated: September 7, 2022

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A), *amici curiae* National Employment Law Project ("NELP") and the National Employment Lawyers Association ("NELA") certify that they have no parent corporation and that no publicly held corporation owns 10% or more of their stock.

THE MOVANT'S INTEREST

Pursuant to Federal Rule of Appellate Procedure 29(a)(3)(A), NELP represents that it is a non-profit legal organization with over 50 years of experience advocating for the employment and labor rights of low-wage and unemployed workers. *See generally* https://www.nelp.org/. NELP seeks to ensure that all employees (and especially the most vulnerable ones) receive the full protection of labor laws. NELP has provided Congressional testimony regarding and participated in litigation addressing large corporations' use of franchise agreements, independent contractor agreements, forced arbitration agreements, and other contractual structures to skirt the workplace safeguards embodied in federal and state wage and labor laws. As such, NELP has a strong interest in the instant appeal because the franchise scheme implemented by Coverall North America, Inc. ("Coverall") in this litigation has enabled it to require low-wage and immigrant workers to purchase their jobs and pay other ongoing fees that are harmful and unfair to the workers, their families, and their communities.

The National Employment Lawyers Association (NELA) is the largest professional membership organization in the country comprised of lawyers who represent workers in labor, employment and civil rights disputes. Founded in 1985, NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace.

DESIRABILITY AND RELEVANCE OF THE PROPOSED *AMICUS CURIAE* BRIEF

Pursuant to Federal Rule of Appellate Procedure 29(a)(3)(B), *amici curiae* submit that the accompanying brief is both desirable and relevant to the instant appeal. The brief does not repeat arguments made by the parties. In the brief (which falls well within the applicable page limitations), *amici curiae* provide the Court with citations to reports, studies, and data demonstrating the harm caused to workers and the broader economy when corporations such as Defendant-appellant Coverall use franchise agreements, independent contractor agreements, forced arbitration agreements, and other intermediary structures to skirt the workplace safeguards embodied in federal and state wage and labor laws. In the instant litigation, such practices have enabled Coverall to require janitorial workers to purchase their jobs and pay ongoing fees to enforce their rights through arbitration, as a means to evade accountability under state wage and hour laws.

Counsel for *amici curiae* have contacted counsel for Defendant-appellant Coverall as required under Second Circuit Local Rule 27.1(b). Coverall consents to the filing of this *amicus* brief but has not informed *amici* whether it will file an opposition to this brief.

CONCLUSION

WHEREFORE, *amici curiae* respectfully request that the Court grant this motion and permit it to file the accompanying brief.

Dated: September 7, 2022

Respectfully,

/s/ Michael J. Scimone

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BRIEF OF *AMICI CURIAE*
NATIONAL EMPLOYMENT LAW PROJECT AND
NATIONAL EMPLOYMENT LAWYERS ASSOCIATION
IN SUPPORT OF PLAINTIFF-APPELLEE AND FOR AFFIRMANCE

Dated: September 7, 2022

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE(S)**

STATUTES

OTHER AUTHORITIES

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THE INTEREST OF *AMICI*[1]

Pursuant to Federal Rule of Appellate Procedure 29(a)(3)(A), NELP represents that it is a non-profit legal organization with over 50 years of experience advocating for the employment and labor rights of low-wage and unemployed workers. *See generally* https://www.nelp.org/. NELP seeks to ensure that all employees (and especially the most vulnerable ones) receive the full protection of labor laws. NELP has provided Congressional testimony regarding and participated in litigation addressing large corporations' use of franchise agreements, independent contractor agreements, forced arbitration agreements, and other contractual structures to skirt the workplace safeguards embodied in federal and state wage and labor laws. As such, NELP has a strong interest in the instant appeal because the franchise scheme implemented by Coverall North America, Inc.

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), no party's counsel has authored this brief, either in whole or in part, and no party, party's counsel, or other person has contributed money that was intended to fund the preparation or submission of this brief.

("Coverall") in this litigation has enabled it to require low-wage and immigrant workers to purchase their jobs and pay other ongoing fees that are harmful and unfair to the workers, their families, and their communities.

The National Employment Lawyers Association (NELA) is the largest professional membership organization in the country comprised of lawyers who represent workers in labor, employment and civil rights disputes. Founded in 1985, NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace.

SUMMARY

If due process means anything, it means having one's day in court. And although it is possible under the Federal Arbitration Act for a party to have that day in private arbitration instead, the statute also provides a path out of arbitration. In fact, it provides two. Where a staying party defaults in proceeding with arbitration, the parties must return to court. The same result occurs where an arbitration has "been had" according to the parties' agreement. Here, both conditions were met.

Coverall tries to board up the exits. Its evident purpose in imposing arbitration on low-wage janitors in the first place was to prevent any enforcement of labor standards law. The result it seeks in this appeal is a continuation of that

strategy. Coverall insists that this Court turn arbitration from an option – available with the consent of the parties – into a graveyard where claims go to die. The fact that Reeves never had his day – in court or arbitration – is precisely the point for Coverall. But that result is not required by the FAA. The district court correctly concluded that the stay should be lifted once the parties' arbitration was closed. That holding was correct, and should be affirmed. Any other result would deny Reeves his day in court, and further undermine the clear intent of Congress to protect vulnerable workers like him against contractual terms being forced on them by employers with structurally superior bargaining power.

ARGUMENT

I. Arbitration Has Become a Perennial Source of Employer Abuse.

The Federal Arbitration Act ("FAA") was passed in 1926 to provide "a limited, modest system of private dispute resolution for commercial disputes."[2] Organized labor originally opposed the law, on the ground that it "might authorize federal judicial enforcement of arbitration clauses in employment contracts . . . ."[3] This was consistent with organized labor's legislative priorities at the time, which included banning "yellow dog" contracts, in which workers waived their right to

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[2] Imre S. Szalai, *Exploring the Federal Arbitration Act through the Lens of History Symposium*, 2016 J. Dispute Resol. 115, 117 (2016).

[3] *Circuit City Stores v. Adams*, 532 U.S. 105, 126-27 (2001) (Stevens, J., dissenting).

join unions.[4] Labor's effort to prevent the weaponization of contract law to undercut worker organizing culminated in the Norris-LaGuardia Act, which makes unenforceable "any undertaking or promise" that interferes with workers' "concerted activities for the purpose of collective bargaining or other mutual aid or protection."[5]

Although proponents of the FAA did not intend it to reach employment agreements, and adopted an exclusion to resolve labor's concerns,[6] the Supreme Court has narrowed the exemption and broadened the law's coverage to cover most employment contracts.[7] The Court later held that the FAA trumps the Norris-LaGuardia Act.[8] As a result, the precise fears that organized labor expressed nearly a century ago have come to pass. It is estimated that more than half of all U.S. workers are now subject to mandatory arbitration, with approximately 39.5% of such policies having been adopted in the last 5 years.[9] The impact on enforcement of labor standards has been catastrophic. With avenues to enforce minimum labor standards narrowed or eliminated, NELP estimates, based on

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4 *See Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1634 (2018) (Ginsburg, J., dissenting).

5 29 U.S.C. §§ 102, 103.

6 *See Circuit City Stores*, 532 U.S. at 126-27 (dissent).

7 *Id.* at 109-24 (majority op.).

8 *See Epic Sys. Corp.*, 138 S. Ct. at 1619-32 (majority op.).

9 Alexander J.S. Colvin, *The Metastasization of Mandatory Arbitration*, 94 Chi.-Kent L. Rev. 3, 9-10 (2019).

existing studies of the prevalence of wage theft, that arbitration allowed employers to steal over $9.2 billion in wages from their workers in 2019 alone.[10]

It is inherently difficult to estimate how many employees are both misclassified as independent contractors and subject to mandatory arbitration, because many labor statistics do not include people who have been labeled – erroneously or otherwise – as independent contractors. But studies of worker misclassification have extensively demonstrated the damage it causes. Worker misclassification creates a market environment where workers have less power, long-established norms have less influence, and companies set disadvantageous or impossible terms.[11] Workers lose union rights, minimum labor standards, and access to unemployment insurance, workers' compensation, Social Security, and anti-harassment and discrimination laws.[12] By avoiding these obligations,

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[10] Hugh Baran & Elisabeth Campbell, *Forced Arbitration Helped Employers Who Committed Wage Theft Pocket $9.2 Billion in 2019 From Workers in Low-Paid Jobs*, Nat'l Emp't L. Project (June, 2021), *available at* https://s27147.pcdn.co/wp-content/uploads/Data-Brief-Forced-Arbitration-Wage-Theft-Losses-June-2021.pdf.

[11] *See* David Weil, *Enforcing Labor Standards in Fissured Workplaces: The US Experience*, The Economic And Labor Relations Review V. 22, No. 2, pp. 36–37 (July 2011), *available at* http://www.fissuredworkplace.net/assets/Weil.Enforcing-Labour-Standards.ELRR-2011.pdf.

[12] Maya Pinto, Rebecca Smith and Irene Tung, *Rights at Risk: Gig Companies' Campaign to Upend Employment as we Know It* (2019), *available at* https://www.nelp.org/publication/rights-at-risk-gig-companies-campaign-to-upend-employment-as-we-know-it/.

employers who misclassify workers reduce their payroll costs by upwards of 30%,[13] which deprives government at all levels of tax revenue,[14] causes unfair competition for law-abiding employers, and undercuts the wages of other workers.[15] Mandatory arbitration exacerbates all of these problems. The Federal Trade Commission recently concluded that mandatory arbitration agreements systematically undercut workers' bargaining power in the labor market, by, among other things, eliminating information about employers' misconduct.[16] Because arbitration is typically private, there is no developing law for companies to follow; no public record of a company losing a misclassification challenge; and no notice to employers with similar practices.[17]

These problems are especially pronounced in the janitorial industry. Wages for janitorial work – already a low-wage sector – have been undercut by decades of

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13 Catherine Ruckelshaus and Ceilidh Gao, *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries*, (2017), *available at* http://stage.nelp.org/wp-content/uploads/NELP-independent-contractors-cost-2017.pdf.

14 *See* U.S. General Accounting Office, *Employment Arrangements: Improved Outreach Could Help Ensure Proper Worker Classification*, GAO-06-656, 25 (2006), available at https://www.gao.gov/new.items/d06656.pdf.

15 *See* 29 U.S.C. § 202(a) (describing purposes of Fair Labor Standards Act, which include promoting fair competition and living wages).

16 Federal Trade Commission, *The State of Labor Market Competition* (March 7, 2022), *available at* https://home.treasury.gov/system/files/136/State-of-Labor-Market-Competition-2022.pdf.

17 *See* Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. Rev. 679 (2018), *available at* https://scholarship.law.unc.edu/cgi/viewcontent.cgi?article=5972&context=nclr.

outsourcing, a trend that was well underway more than 20 years ago.[18] A 2009 study found that at least 26% of building and ground services workers had not received minimum wages, and 71% had not received overtime pay. Over half did not receive required meal breaks.[19] These practices, though widespread, are illegal – at least for employees. Coverall's business model, by casting janitors as contractual "franchisees," dodges these laws. That puts competitive pressure on other employers in the industry – a classic "race to the bottom."[20] And Coverall is not an isolated case. Other janitorial services companies follow the same business model of misclassifying janitors as franchisees to evade legal obligations.[21]

This context is important because Coverall's business strategy is of a piece with its arbitration strategy. The wage structure of the janitorial industry has

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[18] *See* Ratna Sinroja, Sarah Thomason, and Ken Jacobs, *Misclassification in California: A Snapshot of the Janitorial Services, Construction, and Trucking Industries* (March 11, 2019), *available at* http://laborcenter.berkeley.edu/pdf/2019/Misclassification-in-CA-Fact-Sheet.pdf.

[19] Annette Bernhardt, et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities*, 31, 34, 37 (2009), *available at* https://www.nelp.org/wp-content/uploads/2015/03/BrokenLawsReport2009.pdf.

[20] *See* David Weil, *The Fissured Workplace: Why Work Became So Bad For So Many and What Can Be Done to Improve It*, p. 142, Harv. Univ. Press (2014).

[21] *See Roman v. Jan-Pro Franchising Int'l, Inc*., No. 16 Civ. 5961, 2022 U.S. Dist. LEXIS 137190 (N.D. Cal. Aug. 2, 2022) (holding that similar janitor franchising model misclassified janitorial employees under California law); *Williams v. Jani-King*, 837 F.3d 314, 325 (3d Cir. 2016) (describing similar business model in appeal from grant of class certification).

effectively collapsed, with sub-minimum wages becoming a prevailing norm. This is the exact problem the Fair Labor Standards Act was designed to confront:

> The legislative history of the Fair Labor Standards Act shows an intent on the part of Congress to protect certain groups of the population from sub-standard wages and excessive hours which endangered the national health and well-being and the free flow of goods in interstate commerce. The statute was a recognition of the fact that *due to the unequal bargaining power* as between employer and employee, certain segments of the population required federal compulsory legislation to *prevent private contracts* on their part which endangered national health and efficiency and as a result the free movement of goods in interstate commerce.[22]

Coverall evades the FLSA using the exact mechanism the law was designed to prevent: employers weaponizing contract law to foist unconscionably low wages on workers who lack the bargaining power to demand better terms. The company uses the same mechanism – adhesive contractual terms – to immunize those contracting arrangements from effective legal scrutiny in arbitration.

And "immune" is the proper term, because immunity is the goal. It is a fiction to pretend that arbitration merely changes the forum, while still providing a viable avenue to enforce legal rights. Coverall's true goal is to make enforcement proceedings so expensive and difficult that workers never bring them at all.[23] That intent can be seen here, in (1) Coverall's choice to adopt the more expensive AAA

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[22] *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 706-07 (1945) (emphases added).

[23] *See* Estlund, *supra* n.17.

Commercial Rules in its arbitration agreements and (2) its efforts in the Reeves arbitration to apply the more expensive set of rules, even after – or perhaps because – Reeves had disclosed his inability to pay. (APP. 418.)

Although this appeal presents a narrow issue of how to interpret the FAA, it is important to remember that the purpose of the FAA is only to place arbitration on an "equal footing" with other contracts.[24] The statute "is about treating arbitration contracts like all others, not about fostering arbitration."[25] Here, the question is not when someone must be compelled *to* arbitration, but rather when they should be deemed to *leave* it. If workers may be found to have waived their rights by entering an agreement, then employers may equally be found to waive their rights to insist on that agreement. The path out of arbitration cannot be made more treacherous than the path in – that is the definition of a trap.

II. The Federal Arbitration Act Provides Two Paths Out of Arbitration.

As with any statute, in interpreting the FAA, courts must start with its text. At issue here is Section 3 of the FAA, which says in pertinent part that a court must stay a case pending arbitration, "until such arbitration has *been had* in accordance with the terms of the agreement, providing the applicant for the stay is not *in default* in proceeding with such arbitration."[26] This describes two distinct

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24 *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 293 (2002).
25 *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1713 (2022).
26 9 U.S.C. § 3 (emphases added).

conditions that can lead to a stay being lifted: (1) where arbitration has "been had"; or (2) where the party who sought the stay defaults in proceeding.

Of the circuit courts that have considered fact patterns like the one at issue here, there is no disagreement – in every case, whether analyzed under the first ground, the second, or both, stays of arbitration have been lifted.[27] Coverall's appeal seeks a different result, premised only on its desire to raise new insurmountable barriers to Reeves having his day in court.

A. Coverall's Conduct Should Be Construed as a Waiver Because It Is Inconsistent with the Fundamental Attributes of Arbitration.

Courts have reached a consensus that "[o]ne way that an applicant can 'default in proceeding with such arbitration' is by waiving the right to arbitrate."[28] Historically, this Court and others have evaluated waiver by considering (1) whether the party has acted "inconsistently" with the arbitration right, and (2) whether that conduct has prejudiced the other party."[29] But the Supreme Court recently overruled the latter half of this standard, squarely holding that "the usual

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[27] *See Noble Capital Fund Mgmt., L,L,C. v. US Capital Glob. Inv. Mgmt., L.L.C.*, 31 F.4th 333, 335 (5th Cir. 2022) (arbitration had been had); *Freeman v. SmartPay Leasing, LLC*, 771 F. App'x 926, 933 (11th Cir. 2019) (staying party defaulted); *Tillman v. Tillman*, 825 F.3d 1069, 1074 (9th Cir. 2016) (arbitration had been had); *Pre-Paid Legal Servs. v. Cahill*, 786 F.3d 1287 (10th Cir. 2015) (arbitration had been had, and staying party defaulted).

[28] *Freeman*, 771 F. App'x at 932; *see also Pre-Paid Legal Servs.*, 786 F.3d at 1296 ("'default' in § 3 includes 'waiver.'").

[29] *Carcich v. Rederi A/B Nordie*, 389 F.2d 692, 696 (2d Cir. 1968).

federal rule of waiver does not include a prejudice requirement. So . . . prejudice is not a condition of finding that a party . . . waived its right to stay litigation or compel arbitration under the FAA."[30] The Court is thus left with the question of whether the district court was correct to hold that Coverall acted "inconsistently" with the right to arbitration.[31]

At the outset, it should be noted that FAA § 3 properly places the focus on the conduct of "the applicant for the stay."[32] Coverall makes great efforts to focus this appeal on Reeves' conduct, casting it as a willful refusal to pay arbitration fees rather than a true inability to pay (as the district court found). But that is not where Section 3 puts the focus – it is Coverall's conduct that the Court must examine.

And Coverall's conduct before and during the arbitration reflected a scorched-earth attempt to make the proceedings more expensive, more

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30 *Morgan*, 142 S. Ct. at 1714.

31 Coverall does not squarely include the question of who – court or arbitrator – should decide the default issue in the Questions Presented. But it does argue this point in its brief. Br. at 47-49. In doing so, it ignores the FAA's text. Section 3 of the FAA speaks to when a *court* must stay litigation in favor of arbitration, and when that stay must be lifted. It would be nonsensical to read Section 3 as requiring that an arbitrator dictate when a court must lift its own stay. *See Pre-Paid Legal Servs*, 786 F.3d at 1296 (court decides waiver); *Grigsby & Assocs. v. M Sec. Inv.*, 664 F.3d 1350, 1353-54 (11th Cir. 2011) (same); *JPD, Inc. v. Chronimed Holdings, Inc.*, 539 F.3d 388, 393-94 (6th Cir. 2008) (same); *Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207, 217-19 (3d Cir. 2007) (same); *Marie v. Allied Home Mortgage Corp.*, 402 F.3d 1, 14-15 (1st Cir. 2005) (same); *Tristar Fin. Ins. Agency, Inc. v. Equicredit Corp.*, 97 Fed. Appx. 462, 464 (5th Cir. 2004) (same).

32 9 U.S.C. § 3.

burdensome, and more time-consuming than they might otherwise have been. To ensure that Reeves' claim would go to arbitration in the first place, Coverall had (conditionally!) represented to the district court that it would cover the arbitration fees, to overcome Reeves' objection that the cost of arbitration would be prohibitive. (APP. 322:12-16; 323:5-7.) But it then spent most of the next two years in arbitration trying to ensure the more expensive set of rules would apply, that Reeves would be saddled with those costs, and arguing *against* Coverall's own responsibility to cover the fees. (APP. 416, 413-14.) In that time, the arbitrator never approached the merits of Reeves' claim.

This conduct is inconsistent with the right to arbitrate. The Supreme Court has held that states cannot require that arbitrations proceed on a class basis, because "the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment."[33] That is a perfect description of Coverall's conduct here, which eliminated what the Supreme Court has described as the key benefits of arbitration: "lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes."[34]

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33 *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 348 (2011).

34 *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010).

Coverall's refusal to pay the modest arbitration fees, knowing that Reeves could not, was merely the culmination of this strategy. It is more than sufficient, standing alone, to justify a finding that Coverall defaulted in proceeding with arbitration.[35]

But Coverall's actions are more fundamentally inconsistent with arbitration, because they denied Reeves the supposed benefits of arbitration – including the benefit of obtaining a merits ruling *at all*. Section 3, as noted, places the focus on the conduct of the party that sought the stay. And when a party seeks to stay a case in favor of arbitration, then acts at every turn to frustrate the forward progress of the case, courts should find that the party has acted inconsistently with arbitration and thereby defaulted in proceeding. A refusal to pay fees is simply a bright line that should make that conclusion inevitable.

B. The District Court's Order Reflects Only One of Two Possible Grounds to Find that Arbitration Has "Been Had."

Section 3 of the FAA directs courts to lift a stay where arbitration has "been had" in accordance with the terms of the agreement. Like other courts to have considered this issue, the district court noted that the parties' arbitration agreement here incorporated the rules of the arbitration forum, AAA. And because those

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[35] *Freeman*, 771 F. App'x at 928-33 (party waived arbitration where, after parties stipulated to arbitration, one party refused to pay due to a dispute over arbitration fees); *Pre-Paid Legal Servs*, 786 F.3d at 1287-88 (party waived arbitration where, after moving for stay, it refused to pay arbitration fees).

rules allow AAA to direct parties to pay fees, and close an arbitration when they do not – and because AAA did exactly that here – the district court found that arbitration had "been had" under the terms of the agreement.

The district court also carefully analyzed whether Reeves' nonpayment was in good faith. That factual finding, which is subject to clear-error review,[36] was correct. But it should not have been necessary. The parties here conducted an arbitration proceeding under the rules of the forum, and that proceeding ended with AAA closing the case. (APP. 444.) Arbitration was had. It should not be the job of courts to scrutinize those proceedings, or the motives of the parties. Nothing in Section 3 suggests such an inquiry is necessary.[37] And requiring that inquiry would demand that courts evaluate the rules of the arbitration forum – precisely the kind of inquiry courts have found are more appropriately left to arbitrators.[38]

When the rule that requires a showing of good faith is closely examined, it turns out that the requirement is a policy-based, judge-made rule that is derived

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[36] *See Freeman*, 771 F. App'x at 931 ("We review an order denying a motion to stay proceedings and compel arbitration *de novo* . . . . We review the district court's factual findings for clear error") (internal citation omitted).

[37] Contrast this with the final clause of Section 3 – providing that a stay can be lifted where the staying party defaults – which explicitly places the focus on the conduct of one party. The first clause of the statutory provision – regarding whether arbitration has "been had" – does not. This suggests a focus on outcomes, not motivations.

[38] *See Grigsby*, 664 F.3d at 1354 (discussing the relative expertise of courts and arbitrators).

from the notion that there is a "liberal" federal policy favoring arbitration. But as the Supreme Court recently pointed out, "the FAA's 'policy favoring arbitration' does not authorize federal courts to invent special, arbitration-preferring procedural rules."[39] It is not the responsibility of federal courts to "foster[]" arbitration – it is to treat arbitration agreements like other contracts.[40] And where both parties walk away from their contract, they should be left free to do so.

Courts that have required a showing of "good faith" did so out of a solicitous attitude toward arbitration that was derived from pure pro-arbitration policy concerns. The district court in this case relied most heavily on *Tillman v. Tillman*, where the Ninth Circuit wrote in footnoted *dicta*, "[e]ven if such an arbitration has been terminated in accordance with the rules governing the arbitration . . . it may be contrary to the structure and purpose of the FAA to allow a party to an arbitration agreement to benefit from their intentional noncompliance with an arbitrator's rules."[41]

The district court also relied on *Cota v. Art Brand Studios*, which followed *Tillman*, but as the district court noted, did not consider whether the non-paying

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39 *Morgan*, 142 S. Ct. at 1713.

40 *Id.*

41 *Tillman*, 825 F.3d at 1075 n.1 (internal alterations omitted). The Ninth Circuit did not reach the question of whether a willful refusal to pay could satisfy Section 3, because it accepted the defaulting party's inability to pay as genuine. *Id.*

party had made good-faith efforts.[42] It also cited *CellInfo, LLC v. Am. Tower Corp.*, which rested its conclusion that a good-faith showing was needed on the court's desire to ensure the "integrity and efficacy of the arbitration institution."[43] This is exactly the kind of judge-made rule the Supreme Court rejected in *Morgan* – a judicial desire to "foster" arbitration that goes beyond the FAA's policy, which is merely to eliminate judicial *hostility* to arbitration.[44]

The core holding of *Morgan* is that courts should not "invent special, arbitration-preferring procedural rules."[45] Arbitration agreements should be treated like other contracts – no better or worse. Here, AAA eventually determined that *both* parties owed fees to the arbitrator. (APP. 438-39.) Neither party paid, and Reeves announced in advance that he would not be able to pay. (APP. 503.) In other words, with performances due simultaneously, one party (Reeves) failed to offer performance, which discharged both parties' obligations under the contract,

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42 *See* Op. at 20 (citing *Cota v. Art Brand Studios*, No. 21 Civ. 1519, 2021 U.S. Dist. LEXIS 199325, at *1 (S.D.N.Y. Oct. 15, 2021).

43 *CellInfo, LLC v. Am. Tower Corp*., 506 F. Supp. 3d 61, 67 (D. Mass. 2020). The district court also cited *Pre-Paid Legal Services*, as did *CellInfo*, but it is not clear why. Although *Pre-Paid Legal Services* noted in passing that one party had refused to pay without a showing of inability, this was pursuant to a finding that the party in question had defaulted. This conclusion did not arise under the question of whether arbitration had "been had." *See Pre-Paid Legal Servs.*, 786 F.3d at 1294.

44 *Morgan*, 142 S. Ct. at 1713.

45 *Id*.

without giving rise to a breach.[46] There is therefore no occasion for a court to order specific performance – here, to order both parties back to arbitration.

And in any event, ordering the parties to return to arbitration would be impractical. At best, that kind of boondoggle would cause delay, which is contrary to the ostensible purpose of arbitration. As the Fifth Circuit held in *Noble*, "[t]here [was] no arbitration to return this case to and parties may not avoid resolution of live claims through compelling a new arbitration proceeding after having let the first arbitration proceeding fail."[47] The *Noble* court did not require a showing of good faith. In *Noble* as here, both parties walked away from the arbitration, making it senseless to require them to return.

The same pattern arose in *Tillman*, *Pre-Paid Legal Services*, and *Cota*. Neither *Pre-Paid Legal Services* nor *Cota* required a showing that the non-paying party acted in good faith. And while *Tillman* noted in *dicta* (and assumed without deciding) that the refusal to pay was in good faith, that entire discussion flowed from the supposed "liberal federal policy favoring arbitration"[48] – precisely the consideration *Morgan* directed courts to eschew.[49]

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46 *See* Restat. 2d of Contracts, § 238 ("Until a party has at least made such an offer, however, the other party is under no duty to perform, and if both parties fail to make such an offer, neither party's failure is a breach.").

47 *Noble Capital Fund Mgmt., L,L,C.*, 31 F.4th at 336.

48 *Tillman*, 825 F.3d at 1075.

49 *Morgan*, 142 S. Ct. at 1713.

Coverall tries to distinguish these cases unpersuasively. Its various arguments for requiring a more stringent showing about *why* an arbitration failed can rest only on the insistence that arbitration is special. And it is not. Arbitration is a matter of contract – no more – and courts should not create special rules that favor it. That is no more or less than legislating from the bench, and oversteps the proper role of Article III courts.

CONCLUSION

The past 20 years of arbitration jurisprudence has taken this country dangerously close to a new *Lochner* era. Under the *Lochner* regime, courts routinely privileged contract law over other legislation on specious constitutional grounds. The FAA is a mere statute – not a constitutional provision – and it does not privilege arbitration over other kinds of law. It simply renders arbitration agreements enforceable, with exceptions equivalent to ordinary contract law. The district court here applied ordinary contract law – and perhaps a dash of policy-driven rulemaking by the judge in favor of arbitration – and still concluded that the stay should be lifted. Although the district court went farther than it should have in trying to preserve arbitration in this case, it reached the right result – Coverall waived its right to arbitrate by abusing the system, and when its insistence on forcing Reeves to pay led to AAA closing the case, arbitration was "had." That satisfies both prongs of FAA Section 3. The district court should be affirmed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 32(a)(7)(B), and 29(a)(5), I hereby certify that this brief contains 5,063 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii), as established by the word count of the computer program used for preparation of this brief.

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 14-point size Times New Roman font.

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