No. 10-____

IN THE

Supreme Court of the United States

CNG FINANCIAL CORPORATION,
Petitioner,

v.

ALLEN L. DAVIS,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Ohio

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under this Court's longstanding precedent, a presumption of arbitrability applies where an arbitration agreement is ambiguous about whether it covers the dispute at hand. However, state and federal courts are divided about whether the presumption applies to questions about which parties are subject to an arbitration agreement. Some courts apply the presumption if the question requires interpreting the language of a valid arbitration agreement. Other courts hold that the issue of a party's ability to enforce an agreement is always a question of contract formation to which the presumption does not apply. This case thus presents the question:

> Whether the presumption of arbitrability applies to questions of contractual interpretation about which parties are entitled and required to arbitrate under a valid, enforceable arbitration agreement.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RULE 29.6 STATEMENT

There is no parent corporation or publicly-held corporation owning 10% or more of the stock of Petitioner CNG Financial Corporation.

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OPINIONS BELOW

The decision of the Ohio Supreme Court declining jurisdiction to hear the case is reprinted in the appendix to this petition ("Pet. App.") at 1a. Its entry declining reconsideration of that decision is reprinted at Pet. App. 2a. The decision of the Ohio Court of Appeals is unpublished and is reprinted at Pet. App. 3a-6a. The decision of the Court of Common Pleas of Hamilton County, Ohio is reprinted at Pet. App. 7a-8a.

JURISDICTION

The decision of the Ohio Supreme Court was entered on May 26, 2010. Pet. App. 2a. Petitioner filed a timely motion to reconsider its jurisdictional decision. That motion was denied on July 21, 2010. *Id*. at 1a. The jurisdiction of this Court is invoked in a timely manner under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

This case involves the scope of the statutory injunction to enforce contracts to arbitrate contained in the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq*. The FAA provides, *inter alia*:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or

> refusal, 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.

STATEMENT OF THE CASE

This Court has repeatedly emphasized that, pursuant to the arbitration policies embodied in the FAA, ambiguities about the scope of arbitration agreements should be resolved in favor of arbitration. Yet there is considerable confusion in the state and federal courts about whether that presumption in favor of arbitration extends to ambiguities about which parties can enforce an arbitration agreement. In this case, the Ohio courts sided with those courts that refuse to apply the presumption. The decision below refused to apply the presumption to the question of whether a signatory to a valid, enforceable arbitration agreement can compel another signatory to arbitrate.

The decision below exemplifies a growing split. Though some courts use the presumption in favor of arbitration to resolve ambiguities in arbitration agreements about who can compel arbitration, *Washington Square Sec., Inc. v. Aune*, 385 F.3d 432, 438 (4th Cir. 2004), others hold that the presumption simply cannot apply to "the issue of a party's standing to compel arbitration." *Paul Revere Variable Annuity Ins. Co. v. Kirschhofer*, 226 F.3d 15, 25 (1st Cir. 2000). The latter courts view all issues regarding the "parties" as formation questions to which the presumption does not apply. Courts have expressly recognized this split. *MONY Sec. Corp. v. Bornstein*, 390 F.3d 1340, 1342 n.1 (11th Cir. 2004) (contrasting

Fifth Circuit's position with that of the Fourth and Eleventh Circuits).

The decision below presents this Court with an ideal vehicle to resolve this split. Many of the cases implicated by the split involve non-signatories, third-party beneficiaries, issues of enforceability, or other issues that pose nuanced questions of state law. This case, however, involves a straightforward interpretation of the rights of a signatory to a valid arbitration agreement. In this case, the Ohio courts refused to apply the presumption to resolve an alleged ambiguity in a valid arbitration agreement about whether one signatory could enforce that agreement against another signatory and instead resorted to a maxim of contract interpretation to resolve the ambiguity. The Ohio decision thus allowed a signatory to avoid the presumption through carefully structured pleadings. Such results undermine the federal policy favoring enforceability of agreements to arbitrate in corporate settings, where a signatory can easily sue another entity or an officer not mentioned in the arbitration agreement. This Court should accept *certiorari*, reverse the decision below, and clarify that the presumption in favor of arbitration applies to interpretative questions about a party's ability to enforce an arbitration agreement.

A. Factual Background

Petitioner CNG Financial Corporation ("CNG") is a closely-held corporation with four shareholders. Two of those shareholders, Jared Davis and David Davis, serve on CNG's three-member board of directors and are officers of CNG. CNG is a party to a Close Corporation Agreement also signed by Jared Davis, David Davis, and Respondent Allen Davis. Among

other things, the Close Corporation Agreement addresses shareholder meetings, the board of directors' authority, and distributions to shareholders.

The Close Corporation Agreement contains a broad arbitration clause requiring arbitration of any dispute "arising out of or relating to" the Close Corporation Agreement after an informal negotiation procedure:

> If the Original Shareholders dispute any matter arising out of or relating to this Agreement . . . each Original Shareholder shall designate a representative (. . . collectively, the "Committee"). The Committee shall meet at least once and attempt to resolve the dispute. . . . If the matter has not been resolved . . . , the controversy will be settled by arbitration in accordance with the commercial rules of the American Arbitration Association then in effect. . . . Each arbitration may be conducted by one impartial arbitrator unanimously selected by the Committee . . . Judgment upon any arbitration award, including any award of monetary damages, may be entered in any court of competent jurisdiction. All fees and costs of the arbitration other than an any award of monetary damages and all fees and costs of the Corporation and the Committee, including reasonable attorneys' fees, travel and sustenance expenses of the Original Shareholders shall be paid by the non-prevailing party. The decision of the arbitrator . . . shall be binding on the parties and may be entered in any courts of competent jurisdiction.

The Original Shareholders are Jared Davis, David Davis, and Respondent. The "arising out of or relating to" language renders the clause a prototypical "broad" arbitration clause as recognized by federal and state courts alike. *Highlands Wellmont Health Network v. John Deere Health Plan*, 350 F.3d 568, 578 (6th Cir. 2003) (agreeing that "arising out of" language was "extremely broad") (citation omitted); *Gerig v. Kahn*, 769 N.E.2d 381, 385 (Ohio 2002) (describing a similarly-worded clause as "undeniably broad"). When a broad clause is at issue, only the "most forceful evidence" will exclude a claim from its purview. *Highlands Wellmont*, 350 F.3d at 577, citing *AT&T Techs., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 650 (1986).

The clause requires the Original Shareholders to create a committee which will then choose the arbitrators. That committee was never convened in this instance because Respondent disavowed the arbitration clause by filing suit without any attempt to engage in alternative dispute resolution.

On the same day that the Close Corporation Agreement was executed, CNG also entered a stock option agreement that granted Respondent an option to purchase certain shares of CNG stock. Respondent ultimately exercised a "cashless" feature of the option that allowed him to receive about $37 million in CNG stock without making any payments in exchange. After consulting with an independent accounting firm, CNG's board treated this cashless exercise as taxable compensation.

B. Ohio State Court Proceedings

Dissatisfied with CNG's decision to treat the cashless exercise of the option as compensation, Respon-

dent sued CNG for a declaratory judgment in state court in Ohio, claiming that CNG should have treated the option as a capital transaction for tax purposes. He also claimed that he received fewer shares than he was entitled to pursuant to the option exercise and requested to know the identity of CNG's shareholders. Because these matters are governed by the Close Corporation Agreement, CNG moved to compel arbitration pursuant to the FAA.[1] CNG argued, citing to this Court's cases interpreting the FAA, that the trial court must resolve any doubts in favor of arbitration.

Before the trial court ruled on CNG's arbitration motion, Respondent obtained a preliminary injunction that prevented CNG from paying dividends, enjoined borrowing outside of the ordinary course of business, and barred shareholder meetings. This decision directly implicated key provisions of the Close Corporation Agreement that specifically required the payment of certain dividends, permitted shareholder meetings, and permitted the board to incur debt outside of the ordinary course of business.

Emphasizing that the preliminary injunction involved matters directly governed by the Close Corporation Agreement, CNG pressed its motion to compel arbitration. Nearly four years after it was filed, the trial court denied the motion, giving three reasons: (1) the Close Corporation Agreement's arbitration clause applies only to "Original Shareholders"; (2) CNG waived any right to compel arbitration by failing to invoke the informal negotiation procedures; and (3) Respondent's claims could be re-

[1] It has never been disputed that the FAA applies here. CNG is an Ohio corporation and Respondent is a Florida citizen.

solved without reference to the Close Corporation Agreement. Pet. App. 7a-8a.

CNG appealed the arbitration decision to the Ohio Court of Appeals, which affirmed the trial court's order. Pet. App. at 3a. Again citing to this Court's FAA jurisprudence, CNG argued that ambiguities in the arbitration agreement must be construed in favor of arbitration. The court of appeals recognized that there was an ambiguity as to whether CNG could enforce the arbitration agreement because "[t]here was no mechanism in the agreement to allow anyone other than the Original Shareholders to participate." *Id*. at 5a. But rather than apply the presumption in favor of arbitration, the court of appeals resorted to the state law doctrine of *expressio unius* to interpret the arbitration agreement as excluding CNG. *Id*. at 5a-6a & 6a n.4 (citing to *Bank One N.A. v. Pic Photo Finish, Inc*., 2006 Ohio 5308, P23 (Ohio Ct. App.)). It therefore presumed that the parties to the Close Corporation Agreement meant to exclude CNG from the arbitration process "[b]y specifically naming only some of the parties to the [Close Corporation Agreement]" in the arbitration clause. *Id*. at 5a.

CNG appealed to the Ohio Supreme Court, arguing that it should accept jurisdiction over the appeal because the decision below "calls into question long-established presumptions favoring arbitrability" and "undermines Ohio's presumption in favor of arbitration by holding that ambiguities in the scope of an arbitration clause may be construed against arbitrability." The Ohio Supreme Court declined jurisdiction, and then denied a subsequent motion for reconsideration that again argued that the court of appeals had disregarded the presumption of arbitrability. This Petition followed.

REASONS FOR GRANTING THE PETITION

I. The Courts Below Have Rejected This Court's Arbitration Precedent on Issues That Have Created Conflict and Confusion Among State and Federal Courts

For over half a century, this Court has interpreted the FAA to require state and federal courts to resolve ambiguities in arbitration agreements in favor of covering the parties' dispute. *Volt Info. Scis. v. Bd. of Trs.*, 489 U.S. 468, 475-476 (1989) ("in applying general state-law principles of contract interpretation to the interpretation of an arbitration agreement within the scope of the Act . . . ambiguities as to the scope of the arbitration clause itself [must be] resolved in favor of arbitration"). Where there is an enforceable arbitration agreement, "[d]oubts should be resolved in favor of coverage." *United Steelworkers of Am. v. Warrior & Gulf Navig. Co.*, 363 U.S. 574, 582-83 (1960). Courts universally follow this presumption in favor of arbitration to determine what subject matters are covered by a broad arbitration clause. However, the last decade has seen a growing split in state and federal courts about whether this presumption can resolve ambiguities in arbitration agreements about what parties are covered by arbitration agreements. In this case, the Ohio courts refused to apply the presumption to the question of whether CNG could compel Respondent to arbitrate under a valid arbitration agreement signed by both parties.

A court facing a motion to compel arbitration under the FAA must address two questions: (1) whether the parties have a valid, enforceable agreement to arbitrate, and (2) whether the agreement covers their

dispute. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626-28 (1985). As arbitration is a creature of contract, there is no presumption of arbitrability when addressing issues of contract formation in the first question. *Volt Info. Scis.*, 489 U.S. at 478 ("the FAA does not require parties to arbitrate when they have not agreed to do so"). However, when determining the scope of the agreement in the second question, "there is a presumption of arbitrability in the sense that '[an] order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'" *AT&T Techs.*, 475 U.S. at 650 (citing *Warrior & Gulf*, 363 U.S. at 583). The presumption applies "whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).

Although *Moses H. Cone* dictates that the presumption applies to questions of "the construction of contract language itself," *id.*, in this case, the Ohio courts rejected these principles and instead invoked a state-law canon of contractual interpretation (the *expressio unius* doctrine) to resolve an ambiguity in the contract against arbitrability. Having disavowed the presumption, the courts below allowed Respondent to avoid a broadly-worded arbitration clause in a close corporation agreement in a suit against the corporation (which was also a signatory). They held that CNG could not compel arbitration because it was not explicitly named in the arbitration clause (although it was, *see infra* at 5-7). Thus, they effectively limited the presumption in favor of arbitration

as only applicable to which *issues* are covered by an arbitration agreement – but not which *parties* can enforce that agreement.

This artificial distinction in the application of the presumption has gained currency in some state and federal courts, creating a circuit split and confusion about when an arbitration clause can be enforced against a signatory. However, as demonstrated in this case, rejecting the application of the presumption to all interpretive issues regarding "parties" contravenes this Court's precedents and undermines the pro-arbitration policies of the FAA. This Court should grant *certiorari* to resolve the uncertainty on this important issue.

A. Granting *Certiorari* Would Allow This Court to Resolve the Split in the Lower Courts Over the Scope of the Presumption in Favor of Arbitration

This Court should grant *certiorari* to resolve the split within state and federal courts about whether the presumption in favor of arbitration applies to the contract interpretation question of whether a particular party can enforce (or is bound by) an agreement to arbitrate. *See* Sup. Ct. R. 10(a). Some courts, notably the Second, Fourth, and Eleventh Circuits, hold that the presumption applies because the question is one of interpreting the scope of an agreement (as indicated by *Moses H. Cone*). Others, including the lower courts here and the First, Fifth, Seventh, and Eighth Circuits, find that it is a threshold question of contract formation to which the presumption does not apply. The Third Circuit, though recognizing the confusion in its own cases, has not taken a definitive position. This split is mature and ripe for this Court's consideration.

1. Courts That Apply the Presumption

The Fourth Circuit holds that the presumption in favor of arbitration applies to the question of whether a party is covered by an arbitration agreement. In *Washington Square Sec., Inc. v. Aune*, 385 F.3d 432, 435-38 (4th Cir. 2004), the court applied the presumption to the issue of whether the investors were "customers" under the agreement, and thus covered by the scope of the NASD arbitration clause. It explicitly rejected "the district court's finding that no presumption in favor of arbitration applied," holding the question was one of contract *interpretation* rather than *formation*. *Id*. at 435.

In similar vein, the Second Circuit holds that the question of a party's ability to compel arbitration under an existing arbitration agreement is subject to the presumption. In *John Hancock Life Ins. Co. v. Wilson*, 254 F.3d 48, 59 (2d Cir. 2001), the court decided whether the defendant investors were "customers" under the NASD Code and could therefore compel arbitration. The court applied the presumption to compel arbitration and to reject the plaintiff's proffered reading:

> Even if we were to accept [plainitff's] interpretation . . . , at best it would raise an ambiguity as to the definition of 'customer.' In the face of such an ambiguity, we would be compelled to construe the provision in favor of arbitration, unless we could say with 'positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.' *AT&T Techs*., 475 U.S. at 650

Id. at 59 (citations omitted).

The Eleventh Circuit agrees that the presumption can apply even where there is "no direct written agreement to arbitrate" between the two parties. *Multi-Financial Secs. Corp. v. King*, 386 F.3d 1364, 1367 (11th Cir. 2004). The court in *King* interpreted a signatory's arbitration agreement to determine that the non-signatory could enforce the agreement. *Id*. It held that "unlike other contracts, 'any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.'" *Id*. (citation omitted). Another Eleventh Circuit panel noted that this result directly conflicts with a decision from the Fifth Circuit. *MONY Sec. Corp. v. Bornstein*, 390 F.3d 1340, 1342 n.1 (11th Cir. 2004). On one side, the Fifth Circuit held that the question of whether an investor was covered by the arbitration agreement is

> a threshold question, and that 'the federal policy favoring arbitration does not apply . . . when a court is determining whether an agreement to arbitrate exists.'

MONY, 390 F.3d at 1342 n.1, citing *California Fina Group, Inc. v. Herrin*, 379 F.3d 311, 316 n.6 (5th Cir. 2004). However, the court recognized that the Fifth Circuit's position contrasted with its own:

> both the Eleventh and Fourth Circuits hold that because the NASD Code is a written agreement to arbitrate, the only dispute goes to the scope of that agreement and thus the general presumption applies.

Id. The circuit split, however, extends well beyond the Fifth Circuit.

2. Courts That Do Not Apply the Presumption

The First Circuit appears to have fashioned a doctrinal distinction between the application of the presumption to the questions of who may arbitrate and what may be arbitrated. In *Paul Revere Variable Annuity Ins. Co. v. Kirschhofer*, the court held that while "the presumption in favor of arbitration applies to the resolution of scope questions," it does not apply to "the issue of a party's *standing* to compel arbitration." 226 F.3d 15, 25 (1st Cir. 2000) (emphasis added). In the First Circuit's parlance, the presumption of arbitrability does not apply because the issue is one of standing, not one of scope. *Id*. ("Because the question of Variable's standing goes to whether Variable has a right to arbitrate *at all* vis-à-vis the managers, that question is not a scope question."). *See also McCarthy v. Azure*, 22 F.3d 351, 355 (1st Cir. 1994) (the presumption does not apply where "the identity of the parties who have agreed to arbitrate is unclear").

The Seventh Circuit also refused to apply the presumption in favor of arbitrability to the question of which parties can enforce the agreement. *Miller v. Flume*, 139 F.3d 1130, 1136 (7th Cir. 1998) (applying the presumption in favor of arbitrability only *after* determining that "the parties . . . were subject to an arbitration agreement of some scope, because they were respectively 'associated persons' of an NASD member and its 'customers'"); *see also Stone v. Doerge*, 328 F.3d 343, 346 (7th Cir. 2003) (similar analysis). The Eighth Circuit largely agrees with this analysis. *Fleet Boston Robertson Stephens, Inc. v. Innovex, Inc*., 264 F.3d 770, 773 (8th Cir. 2001) (noting that the presumption does not apply, and

deciding a "close call" on the definition of "customer" under the NASD Rules).

As noted above, Ohio can be classed with those jurisdictions that do not apply the presumption to questions of who may enforce an arbitration clause: "the principle favoring arbitration does not apply when there is a question as to whether the parties before the court are the same as the parties to the agreement to arbitrate." *West v. Household Life Ins. Co.*, 867 N.E.2d 868, 872 (Ohio Ct. App. 2007). Other states have refused to apply the presumption when deciding whether a party can enforce an arbitration clause. *Raiteri ex rel. Cox v. NHC Healthcare/ Knoxville, Inc.*, 2003 Tenn. App. LEXIS 957 (Dec. 30, 2003) (the presumption in favor of arbitration does not apply to question of whether a husband can bind his wife to an arbitration agreement); *In re Rolland*, 96 S.W.3d 339, 345 (Tex. Ct. App. 2001) (presumption did not apply to question of whether transfer of account also transferred the obligation to arbitrate).

3. The Third Circuit's Position

The Third Circuit recently recognized the confusion on this question within its own precedent: "the law as we have set it forth on the point in various cases is unclear." *Century Indem. Co. v. Certain Underwriters at Lloyd's*, 584 F.3d 513, 527 (3d Cir. 2009); *see, e.g.*, *Trippe Mfg. Co. v. Niles Audio Corp.*, 401 F.3d 529, 532 (3d Cir. 2005) ("When determining both the existence and the scope of an arbitration agreement, there is a presumption in favor of arbitrability."). The Third Circuit recognizes that the presumption of arbitrability applies only to the question of "whether the merits-based dispute in question falls within the scope of that valid agreement" and not to

"whether there is a valid agreement to arbitrate between the parties." *Century*, 584 F.3d at 527.

The question in *Century*, however, did not clearly fall into either category. In that case, the district court held that a party could rely on the presumption when enforcing an arbitration agreement that was incorporated by reference into the signed agreement. *Id*. at 525. The Third Circuit seemed skeptical about applying the presumption, but did not make "a definitive conclusion on the breadth of the presumption in favor of arbitration, because even without applying the presumption in this case we conclude that the parties entered into a valid agreement to arbitrate." *Id*. at 527.

This Court should accept *certiorari*, resolve the split, and settle the confusion on the presumption. As shown in this case, the presumption of arbitrability can make a crucial difference for a signatory attempting to enforce an arbitration agreement against another signatory. Elimination of the presumption can allow signatories to avoid arbitration by suing a subsidiary corporation, an officer, or another entity that is either a non-signatory or is not mentioned in the arbitration clause. The presumption is a powerful weapon against such gamesmanship, and a necessary tool to ensuring that the policy favoring arbitration has meaning. This Court should hold that where there is no question that the arbitration agreement is valid, the presumption applies to the interpretation of the scope of the agreement regardless of which parties a plaintiff chooses to sue.

B. The Decision Below Disregards This Court's Instruction that Ambiguities in an Arbitration Agreement Should Be Construed in Favor of Arbitration

The decision below exemplifies the problems created when courts refuse to apply the presumption in favor of arbitration to a party's entitlement to arbitrate. By its terms, the Close Corporation Agreement's arbitration clause applies broadly to "any matter arising out of or relating to this Agreement" that "the Original Shareholders dispute." Therefore, in determining whether this arbitration clause covers the issues in this lawsuit, the relevant questions are (1) whether the matter arises out of or relates to the Close Corporation Agreement and (2) whether the issues are disputed by the Original Shareholders (*i.e.*, Respondent, Jared Davis, and David Davis). *Moses H. Cone*, 460 U.S. at 24-25; *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 130 S. Ct. 2847, slip op. at 11 (2010). The relation of Respondent's claims in this suit to the Close Corporation Agreement is amply demonstrated by the entry of a preliminary injunction that vitiates many rights and obligations created by that very agreement. The injunction eliminates the shareholders' rights to convene shareholder meetings, the payment of dividends, and certain powers of the board of directors to conduct borrowing as outlined in the Close Corporation Agreement.

And there is no question that Jared and David Davis – the Original Shareholders that together comprise a majority of CNG's board and are the principal officers of CNG – dispute Respondent's claims against CNG. In a related case in federal court, Respondent argued that Jared and David "control CNG" as they "are the controlling share-

holders, principal officers and two of the three Directors of CNG."[2] He argued that the federal court should stay its proceedings as to Jared and David because they would be bound by the state court's orders in this case: "Although [Jared and David] are technically not defendants in that case, they are bound by the terms of that order."[3] The federal court relied on those specific representations to stay that case in favor of the proceeding below: "While Jared and David, plaintiffs here, are not technically parties in [the state court] case, they are unquestionably interested parties who are actively participating in the litigation."[4]

Yet while Respondent obtained a stay in federal court by arguing that the "Original Shareholders" are involved in the state court litigation, the state trial court refused to compel arbitration because the dispute does not involve the "Original Shareholders." It is exactly this type of gamesmanship that the presumption of arbitrability is designed to prevent – CNG has been forced to litigate in court for nearly six years now when it bargained for arbitration.

The trial court's error was affirmed by the court of appeals, which held that the arbitration clause's "Original Shareholders" language barred CNG – a signatory to and the subject of the Close Corporation Agreement – from enforcing Respondent's obligation to arbitrate under that agreement. The court effectively recognized an ambiguity in the arbitration

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[2] Motion to Dismiss, Dkt # 29 at 3, 4, *Davis v. Davis*, 1:05-cv-00452 (S.D. Ohio) (hereinafter "*Davis II*").

[3] Reply in Support of Renewed Motion to Dismiss, Dkt #39 at 3, *Davis II*.

[4] Order, Dkt #32 at 5-6, Order, Dkt #42, *Davis II*.

clause as to whether anyone but an Original Shareholder could enforce the arbitration agreement because "[t]here was no mechanism in the agreement to allow anyone other than the Original Shareholders to participate." Pet. App. at 5a.

Rather than apply the presumption in favor of arbitration to this ambiguity, the court of appeals turned to a state-law doctrine to interpret the arbitration agreement as excluding CNG. Pet. App. at 5a-6a. The court relied on *Bank One N.A. v. Pic Photo Finish, Inc.*, 2006 Ohio 5308, P23 (Ohio Ct. App.) – a decision applying the interpretive doctrine of *expressio unius*. *Id*. at 5a n.4. Following this doctrine, the court assumed that the parties had meant to exclude CNG from arbitration "[b]y specifically naming only some of the parties to the agreement" in the arbitration clause. *Id*. at 5a. The state courts clearly erred by construing the parties' intentions generously *against* arbitration.

This Court has barred the use of such interpretive fallbacks to limit the scope of an arbitration agreement. While "as with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability." *Mitsubishi*, 473 U.S. at 626. As the Tenth Circuit has explained, "to acknowledge the ambiguity is to resolve the issue, because all ambiguities must be resolved in favor of arbitrability." *Armijo v. Prudential Ins. Co. of Am.*, 72 F.3d 793, 798 (10th Cir. 1995).

The broad arbitration provision in the Close Corporation Agreement does not expressly exclude claims by an Original Shareholder against CNG. It requires arbitration of any matter arising out of or relating to the Close Corporation Agreement; it is not confined to suits brought against Original Share-

holders. Because there was no extrinsic evidence of any purpose to exclude claims against CNG, the Ohio courts should have construed the parties' intentions in favor of arbitration and sent the suit to arbitration.

This case illustrates the fundamental inconsistency that results from refusing to apply the presumption to a party's ability to compel arbitration. This Court's precedent, including *Moses H. Cone* and *Granite Rock*, does not include an exception to the presumption for questions of who may enforce a valid arbitration agreement. Where there is no question that an enforceable arbitration agreement was signed between the parties, *there is no reason to limit the presumption when interpreting the arbitration agreement*. Like the First, Fifth, and Seventh Circuits, the Ohio courts in this case have engendered uncertainty about the efficacy of arbitration provisions where this Court has established a strong and clear policy otherwise. This will lead to more litigation of disputes that should be arbitrated and more disputes over the interpretation of arbitration clauses. This Court should grant *certiorari* and reverse the Ohio court's holding.

II. The Issue Presented Is Important, and This Case Presents a Good Vehicle for Resolving It – Especially In Light of This Court's Decision in *Granite Rock*

This case presents an excellent vehicle for resolving the question of whether the presumption favoring arbitration applies to question of who may enforce a valid arbitration agreement when a signatory moves to compel arbitration against another signatory. Unlike many other cases, there are no questions

about whether both parties signed an arbitration agreement, or the effects of a non-signatory, or concerns regarding assignment, transfer, or expiration of the obligation to arbitrate. Both CNG and Respondent are signatories and the relief *already* granted by the trial court is covered by the arbitration agreement.[5] The courts below recognized that the arbitration agreement created an ambiguity by not expressly including CNG. They refused to apply the presumption in favor of arbitration, and instead turned to a state law default doctrine to resolve the ambiguity. This Court should accept *certiorari* to clarify the presumption without interference from other state law issues or procedural complications.

This Court's recent decision in *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 130 S. Ct. 2847 (2010), presents another reason to grant *certiorari*. The decision below is out of step with *Granite Rock*, which held that courts should apply the presumption "where a validly formed and enforceable arbitration agreement is ambiguous about whether it covers the dispute at hand." 130 S. Ct. at 2850. This Court further explained the "presumption favoring arbitration" should be applied:

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[5] The trial court's alternate bases for denying arbitration (which were never discussed by the court of appeals) are of little consequence. Its finding that the suit could be resolved without reference to the Close Corporation Agreement (which contains the arbitration clause) is belied by its injunction in this case that impacts certain provisions of that agreement. Similarly, its finding that CNG waived its right to compel arbitration by not invoking the informal negotiation procedures in the arbitration clause makes no sense because it was *Respondent* who intentionally bypassed those procedures by initiating this suit against CNG.

> where it reflects . . . a judicial conclusion that arbitration of a particular dispute is what the parties intended because their express agreement to arbitrate was validly formed and (absent a provision clearly and validly committing such issues to an arbitrator) is legally enforceable and best construed to encompass the dispute.

130 S. Ct. at 2851.

The decision below meets all of these requirements, yet many jurisdictions, including Ohio and the First Circuit, would refuse to apply the presumption based on their superficial distinction between "issues" and "parties." The question of whether a signatory can enforce an arbitration agreement against another signatory is a question about the scope of that agreement – not about whether the parties have made a valid agreement to arbitrate. Where there is no question that the signatories have signed a binding agreement to arbitrate, any remaining questions about the signatories' entitlement to arbitration must fall under the presumption in favor of arbitration. This Court should accept *certiorari* and hold, under *Granite Rock*, that the presumption applies whenever there is a broadly worded, validly formed, and enforceable agreement and where claims brought against a signatory directly implicate that agreement.

This Court's recent grant of *certiorari* in *AT&T Mobility LLC v. Concepcion*, No. 09-893, gives an additional reason to accept (or perhaps to hold) this Petition. *Concepcion* involves the collision of the federal policy placing arbitration agreements on the same footing as other contracts with state doctrines of unconscionability. This case presents a related

issue, with the federal policy of resolving ambiguities in favor of arbitration in conflict with state doctrines of interpretation. The decision in *Concepcion* about the preemptive reach of the FAA may influence the outcome of this case since the presumption of arbitrability stems from the broader federal policy at issue in *Concepcion*.

In the alternative, this Court should grant *certiorari*, vacate the judgment below, and remand for further consideration in light of *Granite Rock* (or *Concepcion*). This would give the Ohio courts the opportunity to apply the correct rule of law.

CONCLUSION

For the foregoing reasons, Petitioner CNG Financial Corporation respectfully requests that this Court grant this petition for a writ of *certiorari*.

Respectfully submitted,

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August 24, 2010

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APPENDIX

THE SUPREME COURT OF OHIO

[Filed Jul 21 2010]

Case No. 2010-0409

ALLEN L. DAVIS

v.

CNG FINANCIAL CORPORATION

RECONSIDERATION ENTRY
Hamilton County

It is ordered by the Court that the motion for reconsideration in this case is denied.

(Hamilton County Court of Appeals No. C090182)

/s/ Eric Brown
Eric Brown
Chief Justice

THE SUPREME COURT OF OHIO

[Filed May 26 2010]

Case No. 2010-0409

ALLEN L. DAVIS

v.

CNG FINANCIAL CORPORATION

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case.

(Hamilton County Court of Appeals No. C090182)

/s/ Eric Brown
Eric Brown
Chief Justice

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

APPEAL NO. C-090182
TRIAL NOS. A-0501565
A-0809101

ALLEN L. DAVIS,
Plaintiff-Appellee,

vs.

CNG FINANCIAL CORPORATION,
Defendant-Appellant.

JUDGMENT ENTRY

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.[1]

Plaintiff-appellee Allen L. Davis entered into a Close Corporation Agreement ("the CCA") with defendant-appellant CNG Financial Corporation and his two sons. The CCA named Davis and his sons as the "Original Shareholders."

Among other provisions, the agreement contained an arbitration clause. The clause contained the following: "If the Original Shareholders dispute any matter arising out of or relating to this Agreement * * *, then each Original Shareholder shall designate a representative (a 'Committee Member,' or collec-

[1] See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

tively, the 'Committee'). The Committee shall meet at least once and attempt to resolve the dispute. * * * If the matter has not been resolved within 20 days of the first meeting of the Committee * * * by the unanimous decision of the Committee, the controversy will be settled by arbitration in accordance with the commercial rules of the American Arbitration Association then in effect. * * * Each arbitration may be conducted by one impartial arbitrator unanimously selected by the Committee or by three arbitrators if the Committee determines that this is necessary for any reason. If three arbitrators are used, then a majority of the members of the Committee shall select one arbitrator and the minority of the members of the Committee shall select one arbitrator from the panel. The two arbitrators selected shall mutually designate the third arbitrator from that panel. * * * All fees and costs of the arbitration other than any award of monetary damages and all fees and costs of the Corporation and the Committee, including reasonable attorneys' fees, travel and sustenance expenses of the Original Shareholders shall be paid by the non-prevailing party."

At the same time that the CCA was signed, Davis signed an Amended and Restated Option Agreement. Davis and CNG were the only two parties to that agreement.

When Davis later exercised his cashless option under the Option Agreement, CNG determined that the transaction would be treated as compensatory income to Davis. Taking issue with this determination, Davis filed a complaint against CNG seeking declaratory and other relief. Shortly after the suit was filed, CNG sought to have the case removed to federal court. The federal court declined to take the

case. Two days after the case was returned to the common pleas court, CNG sought to stay the proceedings pending arbitration. The trial court denied that motion.

In one assignment of error, CNG argues that the trial court improperly denied its motion to stay the case pending arbitration. To establish that a case is subject to arbitration, the party seeking it must establish that the parties contractually agreed to arbitrate the dispute.[2] The question whether a dispute is subject to arbitration is a legal one.[3]

In this case, the parties to the CCA did not agree to arbitrate the dispute. Even though CNG was a party to the CCA, the only parties listed in the arbitration provision were Davis and his sons. There was no mechanism in the agreement to allow anyone other than the Original Shareholders to participate. By specifically naming only some of the parties to the agreement, the parties implied their desire to exclude all others not named.[4] The doctrine expressio unius est exclusio alterius "justif[ies] the inference that items not mentioned were excluded by deliberate choice, not inadvertence."[5]

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[2] *Acad. of Med. v. Aetna Health, Inc*., 108 Ohio St.3d 185, 2006-Ohio-657, 842 N.E.2d 488, at ¶11, citing *Council of Smaller Enterprises v. Gates, McDonald & Co*., 80 Ohio St.3d 661, 1998- Ohio-172, 687 N.E.2d 1352.

[3] *Saunders v. Mortensen*, 101 Ohio St.3d 86, 2004-Ohio-24, 801 N.E.2d 452, at ¶9.

[4] *Bank One, N.A. v. Pic Photo Finish, Inc*., 2nd Dist. No. 1665, 2006-Ohio-5308, at ¶23.

[5] *Barnhart v. Peabody Coal Co*. (2003), 537 U.S. 149, 168, 123 S.Ct. 748.

CNG argues that its participation in arbitration was contemplated because the arbitration clause said that "all fees and costs of the Corporation * * * are to be paid by the non-prevailing party." But this does not require us to reach the conclusion that CNG is entitled to arbitrate. There are many ways in which a dispute among the Original Shareholders could generate costs for CNG—record production, employee time, etc.—that would have to be reimbursed by the losing party.

CNG also argues that the "real" dispute in this case is between Davis and his sons, and that Davis should not be allowed to avoid arbitration by not naming them in the complaint. But the suit involves the Option Agreement, and the only parties to that agreement are Davis and CNG. We do not see how Davis could have sued his children over a document to which they were not parties. We also note that CNG did not argue below that Davis had failed to join necessary parties.

Since there is no provision in the agreement that would allow CNG to participate in arbitration, the trial court properly denied the motion to stay the proceedings. We reject CNG's sole assignment of error and affirm the trial court's judgment.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HILDEBRANDT, P.J., DINKELACKER and MALLORY, JJ.

To the Clerk:

Enter upon the Journal of the Court on January 20, 2010 per order of the Court _____ .

Presiding Judge

COURT OF COMMON PLEAS
CIVIL DIVISION
HAMILTON COUNTY, OHIO

[Entered Mar 06 2009]

Case No: A-0501565
(Judge Nadel)

ALLEN L. DAVIS
Plaintiff

vs.

CNG FINANCIAL CORPORATION
Defendant

MEMORANDUM OF DECISION AND ORDER

This matter is before the Court pursuant to the motion of defendant, CNG Financial Corporation ('CNG') to compel arbitration and stay proceedings. The Court held a hearing and has considered the pleadings, the various materials submitted, and arguments of counsel.

Based upon the above, the Court finds as follows:

(1) The Close Corporation Agreement's Section 5.12 only applies to disputes among the original shareholders. CNG is not an original shareholder.

(2) CNG has waived any right to compel arbitration by failing to invoke the prerequisites specified in the arbitration clause of the parties' Close Corporation Agreement.

(3) The Court can resolve the pending declaratory judgment issues without reference to the Close Corporation Agreement.

IT IS THEREFORE ORDERED as follows:

(1) The motion of defendant CNG Financial Corporation to compel arbitration is hereby denied.

(2) This case is set for Pretrial Conference on March 24, 2009 at 1:30 p.m.

/s/ Norbert A. Nadel
Norbert A. Nadel, Judge
Date: 3/6/09

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