No. 98-1960

IN THE
Supreme Court of the United States

CORTEZ BYRD CHIPS, INC.,
Petitioner,

v.

BILL HARBERT CONSTRUCTION COMPANY,
A DIVISION OF BILL HARBERT INTERNATIONAL, INC.,
Respondent.

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

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BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether an action to vacate an arbitration award may be brought in the district in which the events in the underlying dispute occurred.

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BRIEF FOR PETITIONER

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The opinion of the United States Court of Appeals for the Eleventh Circuit (Pet. App. 1a) is reported at 169 F.3d 693. The opinion of the district court denying petitioner's motion to transfer (Pet. App. 8a), the opinions confirming the arbitration award (Pet. App. 5a, 11a), and the judgment (Pet. App. 18a) are unreported.

JURISDICTION

The Eleventh Circuit entered its decision on March 9, 1999. The petition for a writ of certiorari was filed on June 7, 1999, and granted on September 10, 1999. J.A. 3, 64. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The general venue statute, 28 U.S.C. § 1391, provides in pertinent part:

> (a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant is subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought.
>
> (b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part

of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

(c) For purposes of venue under this chapter, a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced. . . .

Section 9 of the Federal Arbitration Act provides in pertinent part:

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. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district in which such award was made.

9 U.S.C. § 9. Section 10 of the Act provides in pertinent part:

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 . . . .

Id. § 10(a). Sections 9, 10 and 11 of the Act are reprinted in their entirety at 19a-21a.

STATEMENT

On February 12, 1925, Congress enacted what has popularly become known as the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-307. "[R]eversing centuries of judicial hostility to arbitration agreements," *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510 (1974), the FAA announces that any written agreement to arbitrate involving interstate or foreign commerce "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; *see also Southland Corp. v. Keating*, 465 U.S. 1, 2 (1984) (holding that the FAA "creates a body of federal substantive law . . . applicable in both state and federal courts"). The Act also provides procedural devices for the enforcement of arbitration agreements. *See* 9 U.S.C. § 3 (stays pending arbitration); *id.* § 4 (orders to compel arbitration). In keeping with the FAA's "statutory policy of rapid and unobstructed enforcement of arbitration agreements," *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 23 (1983), these procedures are summary in nature and are initiated by motion rather than complaint. *See* 9 U.S.C. § 6; *see also id.* § 4 (providing for summary trials on the existence of arbitration agreements).

Although arbitration awards, unlike agreements to arbitrate, were specifically enforced at common law, *see Burchell v. Marsh*, 58 U.S. (17 How.) 344, 349 (1854); *see generally* 1 Ian R. MacNeil *et al.*, *Federal Arbitration Law* § 4.3.2.1 (1999), the FAA also deals with the enforcement of arbitration awards. Section 9 provides for applications to confirm arbitration awards, and Sections 10 and 11 provide for applications to vacate, modify, or correct such awards. These applications are also made by motion, *see* 9 U.S.C. §§ 9, 12, and any ruling on such an application "may be enforced as if it had been rendered in an action in the court in which it is entered." *Id.* § 13.

This case concerns the special venue provisions in Sections 9, 10, and 11 of the FAA. Under Section 9, if the parties to an arbitration agreement specify a court in which to enter resulting awards, a party may apply to the specified court for an order confirming the award. *See* 9 U.S.C. § 9. Where no court is

specified, Section 9 provides that "such application may be made to the United States court in and for the district within which such award was made." *Id.* Sections 10 and 11 similarly provide that "the United States court in and for the district wherein the award was made may make an order [vacating, modifying, or correcting] the award upon the application of any party to the arbitration." *Id.* §§ 10-11. The issue before this Court is whether these special venue provisions are exclusive in nature and therefore preclude use of the general venue statute in connection with applications to confirm, vacate, or modify arbitration awards.

The Contract Dispute—Petitioner Cortez Byrd Chips, Inc. is a Mississippi corporation with its principal place of business in Brookhaven, Mississippi, where it produces wood chips for use in the paper-making industry. J.A. 4, 10. Respondent Bill Harbert Construction Company is an unincorporated division of an Alabama corporation that is in the commercial construction business and has its principal place of business in Birmingham, Alabama. J.A. 4, 9. On October 16, 1995, petitioner hired respondent to install a prefabricated chip mill in Brookhaven. J.A. 5, 10, 28-30.

In connection with this engagement, the parties executed a standard construction contract. J.A. 5, 11, 41-63. The contract, which is governed by Mississippi law (J.A. 60), provided that petitioner would pay respondent $1,357,000, "subject to additions and deductions as provided in the Contract Document," for installation of the chip mill. J.A. 43. Article 13 of the contract provided that any additions, deletions, or modifications to the project "shall be authorized by written Change Order signed by the Owner, Contractor and Architect, or by written Construction Change Directive signed by the Owner and Architects." J.A. 54. The contract further stated that the price "shall be changed only by Change Order." J.A. 54.

After the chip mill was installed, respondent sought an upward adjustment in the contract price. J.A. 11. Petitioner refused to pay because, among other things, no written change order had been executed as required by Article 13 of the contract. J.A. 11-12. Although petitioner eventually paid respondent an extra $200,000 above the contract price in hopes of resolving their dispute, respondent was unsatisfied and sought arbitration. *Id.* The contract required that any disputes between the parties "be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect." J.A. 52; *see also* J.A. 60 (providing that any arbitration award may be enforced "in accordance with applicable law in any court having jurisdiction thereof").

The Arbitration—The parties chose arbitrators from Alabama, Tennessee, and Texas, and the American Arbitration Association elected to hold hearings in Birmingham, Alabama, where respondent is located. J.A. 11; Pet. App. 9a. During these hearings, counsel for respondent admitted that written change orders were not executed. J.A. 12.[1] Nevertheless, on December 19, 1997, the arbitration panel awarded respondent an upward adjustment of $488,500 based upon a fictitious "Total Change Order No. 1." J.A. 12-13, 62-63.

The Proceedings Below—On January 13, 1998, petitioner filed a complaint in the United States District Court for the Southern District of Mississippi, the district where it resides and the chip mill was installed, seeking an order vacating the

[1] Although respondent has denied that any admission was made during the arbitration hearings, *see* Pet. Opp. at 1 n.1, the transcripts of the hearings belie that representation. In any event, because the trial court entered judgment without permitting petitioner to submit any evidence, *see infra* p. 7, petitioner's allegation that an admission was made (J.A. 12) must be taken as true at this stage. *See, e.g., Walker Process Equip., Inc. v. Food Mach. & Chem. Co.*, 382 U.S. 172, 174-75 (1965); *see generally Conley v. Gibson*, 355 U.S. 41, 45 (1957).

arbitration award. J.A. 21-26. Approximately one week later, respondent filed a "Complaint to Enforce Arbitration Award" in the United States District Court for the Northern District of Alabama, where the arbitration was held and respondent resides. J.A. 4-7. Petitioner responded in the Alabama action with an answer and a counterclaim seeking to vacate the award. J.A. 8-16.

The central question addressed by the trial court was venue. Because the Mississippi action was filed before the Alabama action, petitioner moved to dismiss, transfer, or stay the Alabama action based upon the first-filed doctrine. J.A. 17-20; *see generally* 17 Linda S. Mullenix & Georgene M. Vairo, *Moore's Federal Practice* § 111.13 [1][o] [ii] (1999). On April 24, 1997, Judge J. Foy Guin, Jr. of the Northern District of Alabama denied that motion.

Judge Guin did not dispute that the first-filed doctrine normally requires federal district courts to consolidate proceedings before the first court seized of the issue. Instead, he found the doctrine inapplicable because "[t]he PLACE of arbitration determines the jurisdiction of the court" under Section 9 of the FAA, Pet. App. 10a, and he held that the Northern District of Alabama had "*exclusive* authority to adjudicate the action to vacate, modify, or correct the award" because the arbitration hearings were conducted in that district. *Id.* Although petitioner pointed out that the Fifth Circuit had recently held that venue under the FAA was not exclusive in *Sutter Corp. v. P & P Industries, Inc.*, 125 F.3d 914 (5th Cir. 1997), the district court ruled that it was bound by an earlier Fifth Circuit decision, *City of Naples v. Prepakt Concrete Co.*, 490 F.2d 182 (5th Cir.), *cert. denied*, 419 U.S. 843 (1974), which was rendered before the creation of the Eleventh Circuit, Pet. App. 9a-10a, even though in *Sutter* the Fifth Circuit had specifically distinguished its prior decision in *City of Naples*. Pet. App. 3.

On May 18, 1998, respondent filed a "renewed" motion to confirm the arbitration award and a supporting memorandum of law. J.A. 1. Respondent styled this motion a "renewed" motion on the theory that its complaint had really been a motion to confirm; respondent likewise asserted that the counterclaim in petitioner's answer had really been a motion to vacate. The trial court agreed and granted respondent's motion on May 20, 1998. Pet. App. 12a-13a. Petitioner had not, however, filed a memoranda of law with its original pleadings, and it had no opportunity to file a memorandum in response to the "renewed" motion in the two days between the filing of that motion and the judge's ruling. *Id.* Nevertheless, the trial court found that the motions to vacate and confirm had "been fully briefed" and that the record was "absent a valid ground for *vacatur* or modification." *Id.*; *see also id.* at 16a-17a nn.1-2 (deeming respondent's complaint to be a motion to confirm and petitioner's answer a motion to vacate).[2]

On appeal the Eleventh Circuit also focused on the issue of venue. Although petitioner argued that the Southern District of Mississippi was a proper venue for its application to vacate under the general venue statute and that the trial court should therefore have transferred the case there under the first-filed doctrine, the court of appeals held that the Northern District of Alabama, as the district in which the arbitration award was made, had exclusive venue under Sections 9 and 10 of the FAA over applications to vacate or confirm that award. Pet. App.

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[2] Had petitioner been permitted to file a memorandum and present its case, it would have shown that the arbitration award arbitrarily disregarded the terms of the contract and therefore did not draw its essence from the contract at issue in this case. Although arbitrators have considerable discretion, they do not have authority either to create documents out of thin air or ignore conditions imposed by the contracts before them. *See, e.g., Coast Trading Co. v. Pacific Molasses Co.*, 681 F.2d 1195, 1198 (9th Cir. 1982); *see generally United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

2a-4a. The court did not, however, explain how it derived this conclusion from the language of Sections 9 and 10. Instead, much like the trial court, the Eleventh Circuit simply stated that "it appears to us that [*City of Naples*] controls this panel's decision." *Id.* at 3a.

SUMMARY OF ARGUMENT

1. This case is governed by the plain language of the Federal Arbitration Act, 9 U.S.C. §§ 1-307. Nothing in the Act's special venue provisions precludes applications to confirm, vacate, or modify arbitration awards from being filed in venues otherwise authorized by the general venue statute. Those provisions merely state that, absent an agreement, applications to confirm, vacate, or modify arbitration awards "may" be brought in the district in which the award was made. *See* 9 U.S.C. §§ 9-11. In ordinary English, the word "may" is a permissive term. Moreover, where Congress has intended special venue provisions to preclude the use of the general venue statute, it has traditionally used explicitly restrictive language and stated that suits "must" or "may only" be brought in certain venues. That practice and the use of such restrictive language elsewhere in Section 9 and in other provisions of the FAA belie any suggestion that Congress was departing from ordinary usage in the FAA's special venue provisions.

The structure of the FAA also demonstrates that the Act's special venue provisions complement rather than supplant the general venue statute. First, the restrictive and exclusionary interpretation adopted by the court of appeals below would create an irrational and unintended distinction between ordinary arbitrations and those covered by amend-ments implementing foreign conventions on arbitration because the latter are subject to indisputably broad venue provisions, *see* 9 U.S.C. §§ 204, 207, which Congress did not intend to expand venue. Second, the interpretation adopted below suggests that the FAA as originally enacted had no provision for enforcing awards in arbitrations conducted abroad. Arbitration, however, plays an

indispensable role in international business, and, as the original terms of the FAA amply demonstrate, Congress always intended the Act to apply to international arbitrations.

A restrictive and exclusionary interpretation of the FAA's special venue provisions also defies common sense. Those provisions were enacted in response to the narrow venue rules prevailing in 1925, which did not permit applications to confirm or vacate arbitration awards to be brought in the district in which the award was made or even in the district in which the parties had agreed to bring such applications. Because such districts are presumably convenient places to bring applications to vacate or confirm an arbitration award, Congress had good reason to enact special venue provisions extending venue to those districts. There is, however, no apparent reason why Congress would also have intended to prevent such applications in districts where the defendant resides or in any other district authorized under the general venue statute.

2. In addition to contradicting the plain language of the FAA, the structure of the FAA, and common sense, the decision below also conflicts with this Court's decision in *Pure Oil Company v. Suarez*, 384 U.S. 494 (1966), and the historical treatment of special venue provisions. Historically, Congress has used special venue provisions to expand the choice of fora in special classes of cases beyond the traditionally limited scope of the general venue statute. In light of this practice, and the well-settled principle that federal statutes should not be interpreted to conflict unnecessarily absent a clearly expressed congressional intention to the contrary, courts have presumed that special venue statutes are supplemented by the general venue statute. Indeed, in *Suarez* this Court applied that presumption to a case that is indistinguishable from this one. Moreover, respondent cannot satisfy the burden imposed by *Suarez* of proving that Congress intended to preclude application of the general venue statute

because both the legislative history and the purposes of the FAA show that Congress had no such intent.

3. The vast majority of courts and commentators have concluded that the FAA's special venue provisions are not exclusive and do not preclude reliance upon the general venue statute. Of the ten courts of appeals to consider whether the FAA precludes application of the general venue statute to applications to confirm or vacate an award, seven have concluded that the Act does not, and district courts in two additional circuits have agreed. By contrast, counting the decision below, only three circuits have taken the opposite view. Moreover, these courts have failed to offer any justification, textual or otherwise, for their decidedly minority view.

ARGUMENT

It is not disputed that petitioner was authorized under the general venue statute, 28 U.S.C. § 1391, to sue respondent in the Southern District of Mississippi. Because the dispute underlying this case occurred in that district, and the respondent corporation transacted business there, venue was plainly proper under the statute. *See* 28 U.S.C. § 1391(a), (c). Nor is it disputed that petitioner filed suit in the Southern District of Mississippi before respondent filed this case in the Northern District of Alabama. Because the court below refused to transfer the Alabama action to the Southern District of Mississippi on the ground that the latter district was not a proper venue under the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-307, the question before the Court is whether the FAA's special venue provisions preclude use of the general venue statute in applications to vacate or confirm arbitration awards. As the plain language of the FAA and the general presumption applicable to special venue provisions demonstrate, the answer is no: those provisions do not exclude the general venue statute, but are instead supplemented by it.

I. THE PLAIN LANGUAGE AND STRUCTURE OF THE FAA DEMONSTRATE THAT THE ACT'S SPECIAL VENUE PROVISIONS DO NOT PRECLUDE USE OF THE GENERAL VENUE STATUTE.

It is well-settled that in interpreting a statute, one must "look first to its language, giving the words used their ordinary meaning." *Moskal v. United States*, 498 U.S. 103, 108 (1990) (quotations and citations omitted). Moreover, "when a statute speaks with clarity to an issue, judicial inquiry into the statute's meaning, in all but the most extraordinary circumstances, is finished." *Metropolitan Stevedoring Co. v. Rambo*, 515 U.S. 291, 295 (1995) (quotation omitted). Here, the plain language and structure of the FAA's special venue provisions demonstrate that those provisions are not exclusive and therefore did not preclude petitioner from filing suit in the Southern District of Mississippi pursuant to the general venue statute.

1. The special venue provisions at issue here are contained in Sections 9, 10, and 11 of the Federal Arbitration Act. Section 9 provides in pertinent part:

> 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. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made.

9 U.S.C. § 9. The venue provisions of Sections 10 and 11 are similar: they state that "the United States court in and for the district wherein the award was made may make an order

[vacating, modifying, or correcting] the award upon the application of any party to the arbitration." *Id.* §§ 10-11 (emphasis added).

Where there is no agreement on the forum for applications to confirm, vacate, or modify, these special venue provisions permit such applications to be filed in the district in which the arbitration award was made even if that district would not otherwise be a proper venue. They do not, however, require parties to file applications in the district in which the award was made, and they do not preclude reliance upon the general venue statute. To the contrary, the FAA's special venue provisions simply state that an application to confirm "*may* be made to the United States court in and for the district within which such award was made" and that that court "*may* make an order" to vacate, modify or correct upon application. *Id.* §§ 9-11 (emphasis added).

In ordinary English, the word "may" is a "permissive term." *Barlow v. Collins*, 397 U.S. 159, 166 (1970). In a context such as this one, it is "used to express possibility, opportunity, or permission." *The Random House Dictionary of the English Language* 886 (Unabridged ed. 1973); *see also The American Heritage Dictionary of the English Language* 1112 (3d ed. 1992) (defining "may" to mean "[t]o be allowed or permitted to"); *Encarta World English Dictionary* 1117 (1999) (noting that may "indicates permission"); *Webster's Third New International Dictionary* 1396 (1986) (defining "may" to mean to "have permission to"). Accordingly, when the word "may" is used in a statute, it "usually implies some degree of discretion." *United States v. Rogers*, 461 U.S. 677, 706 (1983); *see also Apex Plumbing Supply, Inc. v. U.S. Supply Co., Inc.*, 142 F.3d 188, 192 (4th Cir.) (noting that the word "normally confers a discretionary power, not a mandatory power"), *cert. denied*, 119 S. Ct. 178 (1998).

While it is true that statutes using the word "may" have on occasion been interpreted to be mandatory, *see, e.g.*, *Rogers*,

461 U.S. at 706; *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222 (1957), it is clear from the context in which that language is used that the word is not being employed in such an unusual sense in the FAA's special venue provisions. For example, Section 9 states that notice of an application to confirm "shall" be served upon the adverse party and that courts "must" grant an order confirming the award unless the award is vacated, modified, or corrected under Sections 10 or 11. *See* 9 U.S.C. § 9. Other sections of the FAA contain similarly mandatory language. *See, e.g.*, *id.* § 2 (providing that written arbitration agreements "*shall* be valid, irrevocable, and enforceable") (emphasis added); *id.* § 12 ("Notice of a motion to vacate, modify, or correct an award *must* be served . . . within three months after the award is filed or delivered.") (emphasis added).[3] When the word "may" is so employed "in special contradistinction" to mandatory terms such as "shall" or "must," the inference is clear and unmistakable: the word is being used in its ordinary, permissive sense. *United States ex rel. Siegel v. Thoman*, 156 U.S. 353, 359 (1895); *see also Anderson v. Yungkau*, 329 U.S. 482, 485 (1947) (observing that, when a provision "uses both 'may' and 'shall,' the normal inference is that each is used in its usual sense—the one act being permissive and the other mandatory").

Moreover, as a number of courts of appeals have recognized, "when Congress intends for one specific district court to be the exclusive forum for a certain matter, it uses unambiguous language to express its intention." *P & P Indus.*,

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[3] *See also* 9 U.S.C. § 3 (stating when stays "shall" be issued); *id.* § 4 (stating that "the court *shall* make an order directing the parties to proceed to arbitration") (emphasis added); *id.* § 6 (providing that applications "shall" be made and heard as motions); *id.* § 13 (providing that parties moving for an order "shall" file certain papers at the time the order is filed).

Inc. v. Sutter Corp., 179 F.3d 861, 869 (10th Cir. 1999).[4] For example, the Miller Act, 40 U.S.C. § 270a *et seq.*, provides that certain suits "*shall* be brought . . . in the United States District Court for any district in which the contract was to be performed an executed *and not elsewhere*." 40 U.S.C. § 270b(b) (emphasis added). The Clean Air Act, 42 U.S.C. § 7401 *et seq.*, provides that citizen suits relating to pollution from a stationary source "may be brought *only* in the judicial district in which such source is located." 42 U.S.C. § 7604(c)(1) (emphasis added). Other statutes contain similarly restrictive language,[5] and still others provide that civil actions "must be brought" in a particular district.[6]

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[4] *See also Apex*, 142 F.3d at 192-93 (noting that Congress has usually employed "explicit language" when it intends a special venue provision to be exclusive); *In re VMS Secs. Litig.*, 21 F.3d 139, 144 (7th Cir. 1994) (same); *Smiga v. Dean Witter Reynolds, Inc.*, 766 F.2d 698, 706 (2d Cir. 1985) (same), *cert. denied*, 475 U.S. 1067 (1986).

[5] *See, e.g.*, 28 U.S.C. § 1398(a) (providing that civil actions relating to orders of the Surface Transportation Board "*shall* be brought *only* in a judicial district in which any of the parties bringing the action resides or has its principal office") (emphasis added); *id.* § 1402(b) (providing that certain civil actions against the United States defendant "may be prosecuted *only* in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred") (emphasis added); 30 U.S.C. § 1270(f) (providing that persons injured by violations of the Surface Mining Reclamation and Enforcement Act "may bring an action for damages . . . *only* in the judicial district in which the surface coal mining operation complained of is located") (emphasis added); 33 U.S.C. § 1365(c)(1) (providing that citizen suits under the Water Pollution Control Act relating to discharge sources "may be brought under this section *only* in the judicial district in which such source is located") (emphasis added).

[6] *See, e.g.*, 49 U.S.C. § 20104(c) (providing that actions to compel issuance of emergency safety orders by the Secretary of Transportation "*must* be brought in the judicial district in which the emergency situation is alleged to exist, in which that employing carrier has its principal executive office, or for the District of Columbia") (emphasis added); *id.* § 30121(d) (noting that civil actions concerning motor vehicle standards "*must* be brought in the United States district court for a judicial district in the State in which the manufacturer is incorporated or the District of Columbia") (emphasis added).

In short, where Congress intends a special venue provision to be exclusive, it can—and normally does—make that intention clear in the language of the provision. Thus, the absence of any restrictive or exclusionary language in the special venue provisions in Sections 9, 10, and 11 of the FAA confirms that the permissive language of these provisions do not preclude use of the general venue statute in connection with applications to confirm, vacate, or modify arbitration awards.

2. In addition to being inconsistent with the plain language of the FAA's special venue provisions, the restrictive interpretation adopted by the court below conflicts with the structure of the Act.

First, this interpretation creates an irrational distinction between ordinary domestic and international arbitrations and those international arbitrations subject to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the 1975 InterAmerican Convention on International Commercial Arbitration. The legislation implementing those conventions provides parties applying to confirm awards subject to those conventions with an indisputably broad choice of venues.[7] Far from suggesting any

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[7] *See* 9 U.S.C. § 204 (providing for venue in any court with jurisdiction "in which save for the arbitration agreement an action or proceeding with respect to the controversy between the parties could be brought"); *id.* § 207 (stating that parties "may apply to any court having jurisdiction . . . for an order confirming the award against any other party to the arbitration"); *id.* § 302 (applying Sections 204 and 207 to cases under the Inter-American Convention).

reason why venue in cases subject to these conventions should be broader than in regular cases, the legislative history of the conventions' venue provisions states that "[t]he venue provisions in section 204 of the new chapter are substantially the same as those of the original act." S. Rep. No. 91-702, at 7 (1970). Thus, the decision below creates a distinction among arbitration cases that Congress plainly did not intend.

Second, the interpretation adopted by the decision below would create a gap in the venue available under the FAA. Under that interpretation, in the absence of an agreement, Section 9 would permit an application to confirm an arbitration award to be brought only in the "United States District Court in and for the district within which such an award was made." 9 U.S.C. § 9. If, however, that were the case, then the FAA as originally enacted would not have provided for the enforcement of any arbitrations conducted outside this country because there is no United States District Court in and for the districts of London, Paris, or any other foreign location in which such arbitrations might be held. As Congress does not "in general intend to create venue gaps," *Brunette Mach. Works, Ltd. v. Kockum Indus., Inc.*, 406 U.S. 706, 710 n.8 (1972), this Court has declared that "in construing venue statutes it is reasonable to prefer the construction that avoids leaving such a gap." *Id.*

Moreover, the gap that an exclusive interpretation would create is unreasonable. Arbitration plays an indispensable role in achieving the "orderliness and predictability essential to any international business transaction," *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516 (1974). Not surprisingly, when Congress passed the FAA in 1925, it contemplated that the original provisions of the Act would apply to international arbitrations. *See* 9 U.S.C. § 1 (defining maritime transactions to include "matters in foreign commerce" and "commerce" to include commere "between any . . . Territory and any State or foreign nation"). As a consequence, any interpretation of the

FAA's special venue provisions that would have prevented enforcement of foreign arbitration awards under the statute as originally enacted must be rejected. *See* IV MacNeil, *Federal Arbitration Law* § 44.9.1, at 44:61 to 44:62.

3. The suggestion that the FAA's special venue provisions preclude use of the general venue statute also defies common sense. When the FAA was enacted in 1925, the general venue statute was quite narrow: as a practical matter, it permitted parties to file only in the district in which the defendant resided. *See* 28 U.S.C. § 112(a) (1926 ed.) (providing that "no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant").[8] In addition, at the time that the FAA was passed, forum selection clauses were disfavored, and courts frequently "declined to enforce such clauses." *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 19 (1972). Consequently, prior to the enactment of the FAA's special venue provisions, parties could not have been sure that agreements specifying the court that would enter an arbitration award would be honored or that they could enforce an arbitration award in the district in which it was made unless the defendant in those proceedings happened to be a resident of that district. Since both districts are presumably convenient venues for applications to confirm, vacate, or modify arbitra-

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[8] In 1925, the general venue statute also contained a provision authorizing venue in diversity cases in "the district of the residence . . . of the plaintiff." 28 U.S.C. § 112(a) (1926 ed.); *see also Moses H. Cone*, 460 U.S. at 25 n.32 (noting that the FAA "does not create any independent federal question jurisdiction"). This provision had little practical significance, however, because under the restrictive rules prevailing prior to this Court's decision in *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945), personal jurisdiction could rarely be exercised over a defendant outside his or her residence. *See* Jack H. Friedenthal *et al.*, *Civil Procedure* 80-81 n.5 (3d ed. 1999); *see generally* 1 Robert C. Casad & William C. Richman, *Jurisdiction in Civil Actions* § 2-2 (3d ed. 1998).

tion awards, permitting applications to be brought in those districts makes good sense.

By contrast, there is no reason to make those districts the exclusive venues for applications to confirm, modify, or vacate for the simple reason that those districts are not always convenient places in which to litigate such applications. Sometimes, for example, the location of an arbitration is selected because it is convenient for the arbitrator.[9] At other times, parties that are geographically separated, in the spirit of compromise, choose a location that is a "rough midway point" between the parties.[10] There is no reason to think that in such circumstances Congress intended to require applications to confirm, vacate, or modify to be brought only where the arbitration was held. However, under the restrictive interpretation adopted in the decision below, that would be the case. *See* 28 U.S.C. § 1404(a) (permitting transfer of an action only to districts "where it might have been brought" initially); *see generally* 17 *Moore's Federal Practice* § 111.12.

Finally, it would have been quite surprising for Congress to preclude parties from employing the general venue statute when it enacted the FAA in 1925. As the primary purpose of

[9] *See, e.g., Delta Dental of Rhode Island v. Dental Serv. of Massachusetts, Inc.*, 918 F. Supp. 46, 49-50 (D.R.I. 1996) (noting that arbitration hearings were held in Connecticut "largely because it was a centrally convenient location for the three member arbitration panel who were from Rhode Island, New York and New Jersey"); *Denver & R. G. W. R. Co. v. Union Pacific R. Co.*, 868 F. Supp. 1244, 1246 (D. Kan. 1994) (noting the parties agreed to hold arbitration hearing in Missouri at the request of the arbitrator who resided in Tennessee), *aff'd*, 119 F.3d 847 (10th Cir. 1997).

[10] *See, e.g., Alexander Ins. Ltd. v. Executive Life Ins. Co. of New York*, No. 90 civ. 8268, 1991 WL 150224, at *1 n.1 (S.D.N.Y. July 29, 1991) (explaining why arbitration between parties located in Bermuda, New York and California was held in Omaha, Nebraska).

venue statutes is to "protect the defendant against the risk that a plaintiff will select an unfair or inconvenient place of trial," *Leroy v. Great Western United Corp*, 443 U.S. 173, 183-84 (1979) (emphasis omitted), "[t]he defendant's residence is the most common provision for venue." Fleming James, Jr. *et al.*, *Civil Procedure* § 2.23, at 97 (4th ed. 1992); *see also* Edson R. Sunderland, *Judicial Administration: Its Scope & Methods* 820 (1937) ("The place of the defendant's residence . . . is the most widely employed basis for venue in actions not related to tangible property."). In 1925, however, the defendant's residence was the only venue authorized by the general venue statute. *See supra* p.17. As a consequence, when Congress enacted the FAA in 1925, it could hardly have intended to preclude use of the general venue statute.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S OPINION IN *SUAREZ* AND THE PRESUMPTION THAT SPECIAL VENUE PROVISIONS ARE SUPPLEMENTED BY THE GENERAL VENUE STATUTE.

In addition to being inconsistent with the language and structure of the FAA, the interpretation adopted by the decision below also conflicts with a principle that this Court and others have applied in interpreting special venue provisions: "special venue statutes are supplemented by [the] more liberal general venue statute, absent specific contrary indication." *Monument Builders v. American Cemetery Ass'n*, 891 F.2d 1473, 1477 (10th Cir. 1989); *see generally Pure Oil Co. v. Suarez*, 384 U.S. 202 (1966).[11]

[11] *See also* 17 *Moore's Federal Procedure* § 110.01[3][b], at 110-16 ("Generally, special venue statutes have been considered to be non-exclusive if the statute was originally intended to expand rather than contract venue."); 15 Charles Alan Wright *et al.*, *Federal Practice & Procedure* § 3803, at 10-11 (2d ed. 1986) (noting that "provisions in the general venue statute are read as supplementing the special statute in the

A. In Light of Their Historical Purpose, Special Venue Statutes Must be Interpreted to be Supplemented by the General Venue Statute Unless There Is Clear Evidence of a Contrary Congressional Intent.

The presumption that special venue provisions are supplemented by the general venue statute is based upon historical practice and supported by well-settled principles of statutory interpretation.

As then-Chief Judge Breyer observed, most special venue statutes were enacted "out of a desire to widen plaintiffs' venue choices." *Howe v. Goldcorp Invs., Ltd.*, 946 F.2d 944, 950 (1st Cir. 1991) (Breyer, C.J.). When the original general venue statute was enacted in 1789, unlike the current version, it did not authorize suits in the district in which "a substantial part of the events or omissions giving rise to the claim occurred" or contain a fallback provision where there is "no district in which the action may otherwise be brought." 28 U.S.C. § 1391(a), (b). Instead, the Judiciary Act of 1789 provided only that "no civil action shall be brought . . . against an inhabitant of the United States . . . in any other district than whereof he is an inhabitant, or in which he shall be found." 1 Stat. 73, 79.

A century later, Congress narrowed the general venue statute even further by removing the authorization for suit were the defendant was found. *See* Judiciary Act of 1887, ch. 373, 24 Stat 552-53 (prohibiting civil actions from being brought against a person "in any other district than that whereof he is an inhabitant"); *see also supra* p. 17 n.8. The statute then remained virtually the same until Congress expanded its scope in the 1940s and 1960s, in large part to reflect modern

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absence of contrary restrictive indications in the special statute"); 1 *Business & Commercial Litigation in Federal Courts* § 3.5, at 136-37 (Robert L. Haig ed. 1998) ("If the special venue statute is not expressly restrictive, the general venue statute may be used to supplement the special statute . . . .").

advances in transportation that permitted parties to litigate conveniently outside the districts of their residence. *See, e.g.*, *Denver & R. G. W. R. Co. v. Brotherhood of R.R. Trainmen*, 387 U.S. 556, 558 (1967) (noting that "for almost 80 years proper venue in federal-question cases was limited to the district of the defendant's residence"); *see generally* Charles Alan Wright, *Law of the Federal Courts* § 42, at 256-67 (5th ed. 1994) (describing the development of the general venue statute).

Prior to this mid-century expansion, special venue provisions were used to expand the choice of fora in specific classes of cases beyond the scope of the general venue statute. *See, e.g.*, Wright, *Law of Federal Courts* § 42, at 267 ("Usually, though not invariably, [special venue] statutes broaden the choice of venue made by the general venue statutes."); John B. Oakley, *Prospectus for the American Law Institute's Federal Judicial Code Revision Project*, 31 U.C. Davis L. Rev. 855, 952 (1998) (noting that most special venue statues were enacted to "broaden what were once the far more narrow venue options stipulated by former subsections 1391(a) and (b)"). Although the traditionally narrow scope of the general venue statute protected defendants from being forced to litigate in distant and inconvenient fora, it also "frequently precluded suit in the most convenient district" for the parties, which was often the district in which the parties interacted and the underlying events occurred. Wright, *Law of the Federal Courts* § 42, at 259; *see also B. & O. R. Co. v. Kepner*, 314 U.S. 44, 49 (1941) (noting the "injustice to an injured employee of compelling him to go to the possibly far distant place of habitation of the defendant carrier"). Accordingly, special venue statutes routinely provided for venue in districts outside the residence of the defendant.

For example, when Congress passed the Clayton Act, 15 U.S.C. § 12 *et seq.*, in 1914, it enacted a special venue provision permitting private antitrust plaintiffs to bring suit wherever

the defendant "resides or is found or has an agent." 15 U.S.C. § 15; *see also id.* § 22 (authorizing antitrust suits against a corporation "not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business"). Similarly, when Congress created private rights of action in the Securities Act of 1933, *id.* § 77a *et seq.*, and the Securities Exchange Act of 1934, *id.* § 78a *et seq.*, it included special venue provisions authorizing suits "in the district in which the defendant is found or is an inhabitant or transacts business, or in the district where the offer or sale took place, if the defendant participated therein." *Id.* §§ 77v(a), 78aa. The Federal Employers' Liability Act, 45 U.S.C. §§ 51-60, which was enacted in 1908, contains a similar provision. *See* 45 U.S.C. § 56 (providing that suits "may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of the action arose, or in which the defendant shall be doing business at the time of commencing such action"). Other special venue provisions similarly authorize suits to be brought outside the district of the defendant's residence.[12]

[12] *See, e.g.*, 7 U.S.C. § 25(c) ("Any action brought under [the Commodity Exchange Act] may be brought in any judicial district wherein the defendant is found, resides, or transacts business, or the judicial district wherein any act or transaction constituting the violation occurs."); 15 U.S.C. § 1640(e) (providing that suits under the Truth in Lending Act "may be brought in any United States district court, or in any other court of competent jurisdiction"); *id.* § 1222 (providing that automobile dealers "may bring suit against any automobile manufacturer engaged in commerce, in any district court of the United States in the district in which said manufacturer resides, or is found, or has an agent" for failing to act in good faith in franchising); *id.* § 2805(a) (providing that a franchisee may sue a franchisor under the Petroleum Marketing Practices Act "in any judicial district in which the principal place of business of such franchisor is located or in which such franchisee is doing business"); 18 U.S.C. § 1965 (providing that civil claims against defendant under RICO "may be instituted in the district court of the United States for any district in which such person reaides, is found, has an agent, or transacts his affairs"); 43 U.S.C. § 1349(b)(1) (providing that suits under the Outer Continental Shelf Lands Act "may be instituted in the judicial district in which any defendant resides or may be found, or in the judicial district of the State nearest the place the cause of action arose").

The presumption that special venue statutes are supplemented by the general venue statute reflects the historical function served by special venue provisions. Since Congress normally uses special venue provisions to expand venue beyond the traditionally limited scope of the general venue statute, it presumably intends the parties benefitting from that expansion to benefit as well from the general venue statute. Accordingly, in the absence of some special reason to think that Congress was acting unorthodoxly, special venue provisions should be presumed to follow Congress' normal practice and to permit supplementary venue under the general venue statute.

This presumption is supported by a well-settled principle of statutory interpretation. As this Court has repeatedly recognized, "[w]hen two statutes are capable of co-existence . . ., it is the duty of the courts, absent a clearly expressed congressional intention, to regard each as effective." *Vimar Seguros Reaseguros v. M/V Sky Reefer*, 515 U.S. 528, 533 (1995) (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)). Indeed, this principle applies with especial force here. Although Title 28 contains only a dozen or so special venue provisions, *see* 28 U.S.C. §§ 1394-1403, 1408-10, there are over 300 other such provisions elsewhere in the U.S. Code. *See* Richard H. Fallon, Jr. *et al.*, *Hart & Wechsler's The Federal Courts and the Federal System* 1594 (4th ed. 1996) (discussing American Law Institute, *Study of the Division of Jurisdiction between State and Federal Courts* 498-501 (1969)). There is, however, no reason to think that Congress has taken upon itself the gargantuan task of reviewing each and every one of these provisions every time it adjusts the general

venue statute. Furthermore, if most special venue provisions were permitted to preempt the general venue statute, the general venue statute would be subject to a patchwork of arcane and antiquated exceptions. Thus, the principle that federal statutes are (in the absence of clear evidence of a congressional intention to the contrary) to be interpreted to be in harmony with each other should be applied vigorously to special venue provisions.

B. Under this Court's Decision in *Suarez*, the Presumption that Special Venue Provisions Are Supplemented by the General Venue Statute Must Be Applied Here.

This Court applied the presumption that special venue statutes are supplemented by the general venue statute in *Pure Oil Co. v. Suarez*, 384 U.S. 202. Because this case is indistinguishable from *Suarez*, that presumption applies here as well.

In *Suarez*, a seaman sued his employer in Florida district court for injuries suffered on a boat owned and operated by the employer. *See* 384 U.S. at 202-04. Because the employer was a corporation and performed a substantial amount of business in Florida, venue was proper under the 1948 amendment of the general venue statute. *See id.* at 204; *see also* Act of June 25, 1948, ch. 646 § 1391, 62 Stat. 935 (adding the predecessor of 28 U.S.C. § 1391(c)). The employer nonetheless claimed that venue was improper under the special venue provision in the Jones Act, 46 U.S.C. § 688 *et seq.*, which states that "[j]urisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located." 46 U.S.C. § 688. Since corporate residence at the time the Jones Act was passed in 1915 meant state of incorporation, and the employer was neither incorporated in Florida nor had his principal office there, the employer argued that the Jones Act's special venue provision rendered Florida an improper venue. *See Suarez*, 384 U.S. at 203-04.

A unanimous Court rejected this argument. This Court recognized that the Jones Act, as the more specific statute, ultimately controlled. *See Suarez*, 384 U.S. at 203; *see also* 28 U.S.C. § 1391(a) & (b) (providing that the general venue statute applies "except as otherwise provided by law"). It concluded, however, that there was no conflict between the Jones Act's special venue provisions and the general venue statute. This Court's analysis proceeded in three steps. First, this Court found that the 1948 amendment expanding the general venue statute was intended to apply to previously-enacted special venue provisions. *See id.* at 204-05. Although nothing in either the text of the general venue statute or its legislative history touched on the "intended effect of § 1391(c) on special venue provisions," this Court concluded that the amendment was intended to apply to special venue provisions as well because of "the liberalizing purpose underlying its enactment." *Id.*

Second, this Court looked to whether the venue provisions of the Jones Act were intended to be restrictive or exclusionary. Because the Jones Act's special venue provision provided a "more generous choice of forum than would have been available at that time under the general venue statute," this Court concluded that the Jones Act was "intended to liberalize venue" as well. *Id.* at 205, 207.

Third, in light these conclusions, this Court presumed that the Jones Act's special venue provisions were supplemented by the statute and looked to see whether there was any "contrary restrictive indications." *Suarez*, 384 U.S. at 205. Although the special venue provision in question stated where venue "shall be," 46 U.S.C. § 688, the Court found no restrictive indication in this language or elsewhere. Instead, observing that the Jones Act was "not primarily directed at venue" and that its special venue provisions were not discussed in either the committee reports or in the floor debates, this Court found that Congress had no restrictive or exclusionary intent in enacting the Jones

Act's special venue provision and that in fact the "basic intent of the Congress is best furthered by carrying the broader residence definition of § 1391(c) into the Jones Act." *Suarez*, 384 U.S. at 205, 207.

The first two steps in *Suarez*'s analysis are plainly satisfied here. First, like the 1948 amendment expanding the general venue statute's definition of corporate residence, the 1966 amendment to the general venue statute adding transactional venue had the "purpose and effect of liberalizing venue." 17 *Moore's Federal Practice* § 110.01[1], at 110-12. Indeed, when the Judicial Conference proposed making transactional venue generally available, it said the amendment would "further liberalize the venue provisions by authorizing any civil action to be brought in the district where the claim arose." Letter from Warren Olney III to John W. McCormack, January 29, 1965, *reprinted in* S. Rep. No. 89-1752 (1966), *reprinted in* 1966 U.S.C.C.A.N. 3694.

Second, the special venue provisions in the FAA were intended to liberalize venue. As noted above, when these provisions were enacted in 1925, the general venue statute provided only for residential venue, and American courts frequently refused to enforce forum-selection clauses. *See supra* p. 17. By authorizing applications to confirm an arbitration award in the districts specified in such clauses and in "the United States court in and for the district within which such award was made" when there is no such clause, 9 U.S.C. §§ 9-11, the FAA's special venue provisions served a clearly liberalizing purpose.

Consequently, under *Suarez*, the special venue provisions in the FAA must be presumed to be supplemented by the general venue statute. Moreover, as demonstrated in the next section, which addresses the third step in the *Suarez* analysis, respondent cannot overcome this presumption.

C. The Legislative History and Purpose of the FAA Establish that Congress Did Not Intend the FAA's Special Venue Provisions to Preclude Application of the General Venue Statute.

Respondent cannot even begin to meet the burden imposed by *Suarez* to show that Congress had a restrictive intent in passing the FAA's special venue provisions because there is no evidence that Congress intended those provisions to prevent parties applying to confirm or vacate arbitration awards from using the general venue statute. To the contrary, the legislative history and purpose of the FAA establish that Congress had no such intent.

The best evidence of Congress' intent is, of course, "the statutory text adopted by both Houses of Congress and submitted to the President." *West Virginia Univ. Hosps. Inc. v. Casey*, 499 U.S. 83, 98-99 (1991); *see also Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.") (citations omitted). As demonstrated above, that text belies any suggestion that the FAA's special venue provisions were intended to preclude application of the general venue statute. *See supra* pp. 11-17. Instead, the plain language of the FAA's special venue provisions and the structure of the Act show that Congress did not intend those provisions to be exclusive. Indeed, in contrast to the language of the special venue provision considered in *Suarez*, the relevant language in the FAA provisions is entirely permissive. *See supra* pp. 12-13.

There is no indication in the legislative history of the FAA that Congress intended to restrict venue or define the exact extent of venue in confirmation and vacatur applications. Instead, like the legislative history considered in *Suarez*, the FAA's legislative history shows that "no particular attention was directed to" the FAA's special venue provisions and that those provisions were "apparently never discussed in

committee reports or on the floor of either House." *Suarez*, 384 U.S. at 207. Nor, for that matter, was there any discussion of the venue provisions in the committee hearings on the proposed legislation.[13] In fact, there was no real debate or discussion of the FAA at all: the original statute was "drafted by a committee of the American Bar Association," H.R. Rep. No. 68-96, at 1 (1924), and it was passed with only minor amendments and debate. S. Rep. No. 68-536, at 1-2 (1924); *see generally* Ian R. MacNeil, *American Arbitration Law: Reformation, Nationalization and Internationalization* 107-09 (1992) (describing the FAA as "rubber-stamped legislation").

The legislative history does reveal one important fact: the FAA "follows the lines of the New York arbitration law enacted in 1920." S. Rep. No. 68-536 at 3; *accord Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing Before a Subcomm. of the Senate Comm. on the Judiciary*, 67th Cong., 4th Sess. at 3 (1923). This fact is significant because the 1920 New York arbitration statute did not contain any restrictions on venue. To the contrary, the New York statute provided that, in the absence of an agreement on venue, "the judgment [on an arbitration award] may be entered in any county." N.Y. Civil Practice Act § 1449, *reprinted in Clevenger's New York Practice* 615 (1922).

Although, the New York statute also contained provisions for the confirmation, modification, and vacatur of arbitration awards that closely resemble Sections 9, 10, and 11 of the

[13] *See Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 before the Subcomms. of the Comms. on the Judiciary*, 68th Cong., 1st Sess. (1924); *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing before a Subcomm. of the Senate Comm. on the Judiciary*, 67th Cong., 4th Sess. (1923).

FAA,[14] those provisions do not refer to the district in which the arbitration award was made. Instead, the New York statute states only that parties to an arbitration "may apply to the court specified in the submission [or agreement to arbitration] for an order confirming the award," N.Y. Civil Practice Act § 1456, *reprinted in Clevenger's New York Practice* 617, and that the "court specified in the submission must make an order" vacating, modifying, or correcting an award when the appropriate circumstances are present. *Id.* §§ 1457-58, *reprinted in Clevenger's New York Practice* 617-18. As the New York legislature obviously did not intend to prohibit applications to confirm, modify, or vacate in the absence of an agreement on venue, the venue provisions in the New York arbitration statute were clearly not intended to be exclusive. Since Congress presumably had the same intent when it patterned the FAA after the New York statute,[15] the legislative

[14] *Compare* N.Y. Civil Practice Act § 1456 ("At any time within one year after the award is made, . . . any party to the submission [to arbitration] may apply to the court specified in the submission 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 the next two sections."), *reprinted in Clevenger's New York Practice* 617 *with* 9 U.S.C. § 9 (providing that, if there is an agreement on venue, "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"); *compare* N.Y. Civil Practice Act § 1457 (providing that "the court specified in the submission must make an order vacating the award, upon the application of either party to the submission"), *reprinted in Clevenger's New York Practice* 617 *with* 9 U.S.C. § 10 (providing that "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").

[15] *See, e.g., Shannon v. United States*, 512 U.S. 573, 580-81 (1994) (noting the general rule that "adoption of the wording of a statute from another legislative jurisdiction carries with it" the legislative intent of that jurisdiction); *Metropolitan R.R. Co. v. Moore*, 121 U.S. 558, 571-72

history suggests that Congress did not intend Sections 9, 10, and 11 of the FAA to be exclusive.

This conclusion is consistent with, if not compelled by, the policies underlying the FAA. As this Court has recognized, the FAA announces a "statutory policy of rapid and unobstructed enforcement of arbitration agreements." *Moses H. Cone*, 460 U.S. at 23. The restrictive interpretation adopted by the court below would frustrate that policy by imposing a "pointless and wasteful burden on the supposedly summary and speedy procedures prescribed by the [FAA.]" *Id.* at 27.

First, that interpretation would complicate the arbitration process. As it now stands, parties often have difficulty agreeing where to hold arbitrations.[16] Making the location of the arbitration dictate the venue for future litigation would make it even more difficult to do so, because, as demonstrated above, there is often good reason to hold arbitrations in locations that are *not* convenient for future litigation. *See supra* p. 18. Moreover, if the location of the arbitration were to dictate the location of any ensuing litigation, the stakes of any decision to locate the arbitration hearings would be considerably higher, and the already frequently contentious disputes over this issue would inevitably become more intense and intractable.

Second, the interpretation adopted below would make applications to confirm or vacate arbitration awards more complicated and expensive. For example, when a case in federal court is stayed pending arbitration of one of the issues in that case, *see* 9 U.S.C. § 3, the arbitration is often conducted

(1887) (applying rule to a New York statute).

[16] *Cf.* American Arbitration Association, *Commercial Dispute Resolution Procedures* Rule 11 <http://www.adr.org/rules/ commercial/commercial_ rules. html> (visited 10/24/99) (providing that the AAA will designate the location of arbitrations when agreement cannot be reached).

in another district.[17] If the FAA's special venue provisions were read to require that (absent an agreement) applications to vacate or confirm be filed in the district in which the award was made, an application to confirm the arbitration award could not always be brought in the district in which the stayed litigation was pending. However, as this Court observed more than fifty years ago, it is not "open to question that, where the court has authority under the statute . . . to make an order for arbitration, the court also has authority to confirm the award or to set it aside for irregularity, fraud, *ultra vires* or other defect." *Marine Transit Co. v. Dreyfus*, 284 U.S. 263, 275-76 (1932) (footnote omitted).

Similarly, where there is a forum-selection agreement, the interpretation adopted by the court below would not always permit applications to confirm and vacate an award to be brought in the same district. Under Section 9, an application to confirm may be filed in the district specified by the parties, or, if there is no agreement, in the district in which the award was made. *See* 9 U.S.C. § 9. Section 10, however, provides only for orders to vacate by the district in which the award was made. *See id.* § 10. Consequently, if these provisions were

[17] *See, e.g., Sutter Corp. v. P & P Indus., Inc.*, 125 F.3d 914, 916 (5th Cir. 1997) (suit stayed in the Western District of Oklahoma; arbitration held in Dallas); *IDS Life Ins. Co. v. SunAmerica Securities, Inc.*, Nos. 95C 1204, 95 C 1212, 97 C 7857, 1999 WL 116220, at *2 , *4 (N.D. Ill. Feb. 26, 1999) (action stayed in Chicago; arbitration conducted in New York); *International Lithography Corp. v. Curro*, No. 96-7446, 1997 WL 633571, at *1 (E.D. Pa. Oct. 6, 1997) (action stayed in Pennsylvania; arbitration conducted in New Jersey); *United States ex. rel. Skip Kirchdorfer, Inc. v. Aegis/Zublin Joint Venture*, 869 F. Supp. 387, 390 (E.D. Va. 1994) (action stayed in Virginia; arbitration conducted in New York); *Elgart v. Sono-Tek Corp.*, No. 88-7539, 1989 WL 136280, at *1-*2 (E.D. Pa. Nov. 9, 1989) (action stayed in Pennsylvania; arbitration conducted in New York); *NII Metals Serv., Inc. v. ICM Steel Corp.*, 514 F. Supp. 164, 165 (N.D. Ill. 1981) (action stayed in Illinois; arbitration conducted in New York).

read to be exclusive, an application to vacate an arbitration award could not be heard in the same district as the corresponding application to confirm where the court specified by agreement was not in the district in which the award was made. However, as one treatise has recognized, "[i]t would be a singularly ill reading of the FAA for venue requirements ever to make it impossible for confirmation and vacation or modification proceedings to occur in the same court." IV MacNeil, *Federal Arbitration Law* § 38.4.1.3, at 38:51 to 38:52.

III. THE VAST MAJORITY OF COURTS AND COMMENTATORS HAVE CONCLUDED THAT THE FAA'S SPECIAL VENUE PROVISIONS ARE SUPPLEMENTED BY THE GENERAL VENUE STATUTE

In light of the plain language and the structure of the FAA, as well as the presumption that special venue statutes are supplemented by the general venue statute and the lack of any evidence of any contrary congressional intent, it should come as no surprise that most courts and commentators have adopted a permissive interpretation of the FAA's special venue provisions.

To date, at least five courts of appeals have squarely held that the FAA's special venue provisions are supplemented by the general venue statute. *See P & P Indus., Inc. v. Sutter Corp.*, 179 F.3d 861, 868-70 (10th Cir. 1999); *Apex Plumbing Supply, Inc. v. U.S. Supply Co.*, 142 F.3d 188, 191-92 (4th Cir. 1998); *Sutter Corporation v. P & P. Industries, Inc*, 125 F.3d 914, 919-20 (5th Cir. 1997); *In re VMS Sec. Litig.*, 21 F.3d 139, 143-45 (7th Cir. 1994); *Smiga v. Dean Witter Reynolds, Inc.*, 766 F.2d 698, 706 (2d Cir. 1985). Two others have agreed that the FAA's provisions are permissive. *See LaPrade v. Kidder Peabody & Co., Inc*, 146 F.3d 899, 903 n.4 (D.C. Cir. 1998) (citing *Apex* and *Smiga* for proposition that the FAA "does not provide that the district court loses venue if the

arbitration proceeds in another judicial district"), *cert. denied*, 119 S. Ct. 804 (1999); *Nordin v. Nutri/System, Inc.*, 897 F.2d 339, 344 (8th Cir. 1990) (noting that the language of Section 9 is permissive). And district courts in still two more circuits have done so as well. *See, e.g., Delta Dental of Rhode Island v. Dental Serv. of Massachusetts, Inc.*, 918 F. Supp. 46, 48-49 (D.R.I. 1996); *Elgart v. Sono-Tek Corp.*, No. 88-7539, 1989 WL 136280, at *2 (E.D. Pa. Nov. 9, 1989); *Todd Shipyards Corp. v. Cunard Line, Ltd.*, 708 F. Supp. 1440, 1446 n.20, 1447 n.24 (D.N.J. 1989).

Legal commentators have likewise rejected the restrictive interpretation of the FAA's venue provisions adopted by the court below. *See* IV MacNeil, *Federal Arbitration Law* § 38.3.1.2, at 38:34 (stating that Section 9 is "permissive . . . and does not limit venue to the courts noted therein"); *id.* § 38.4.1 at 38:49 to 38:54 (rejecting a mandatory interpretation of Sections 10 and 11); 1 Gabriel M. Wilner, *Domke on Commercial Arbitration* § 35:02, at 35-3 (rev. ed. 1998) ("Venue under the FAA provision governing vacation of the award is permissive, and venue for vacatur or confirmation of the award is the same."); Gary B. Born, *International Commercial Arbitration in the United States* 668 (1994) (concluding that the decisions adopting a permissive interpretation of the FAA's special venue provisions "appear better reasoned than those" adopting a restrictive interpretation); Susan C. Rabasca, Note, *Venue for Motions to Confirm or Vacate Arbitration Awards under the Federal Arbitration Act*, 57 Fordham L. Rev. 653, 655 (1989) (concluding that "the permissive view best conforms with Congress' intent when it enacted the Federal Arbitration Act"); Michael G. Schwartz & Amy Yip-Kikugawa, *Sunshine Beauty Supplies, Inc. v. United States District Court: Mandatory Venue and Motions to Confirm or Vacate under the Federal Arbitration Act*, 32 U.S.F. L. Rev. 629, 649-52 (1998) (same); Laurence J. Zielke, *Arbitrating Miller Act Claims and Problems in Enforcing an Award under the Federal Arbitration Act*, 24 Public Contract

L.J. 401, 412 (1995) (concluding that "[t]he better rule of law is that the language is permissive rather than mandatory").

Moreover, as Chief Judge Posner recently recognized, although three courts of appeals including the court below have taken a contrary view, the decisions of those courts "contain no arguments for their interpretation." *Landar Co. v. MMP Invs. Inc.*, 107 F.3d 476, 481 (7th Cir.), *cert. denied*, 118 S. Ct. 55 (1997); *see also P & P. Indus.*, 179 F.3d at 869-70 (noting that "none of the minority opinions contain any detailed analysis of the issue; each of the minority opinions rests its conclusion solely on citations to ostensibly applicable precedent"). For example, the Ninth Circuit's decision in *United States ex. rel. Chicago Bridge & Iron Co. v. Ets-Hokin Corp.*, 397 F.2d 935 (9th Cir. 1968), simply quotes Section 10 and asserts, without any explanation, that the "District Court of Arizona . . . was without jurisdiction to set aside the arbitration award" because the arbitration award was made in California. 397 F.2d at 938-39. Similarly, in *City of Naples v. Prepakt Concrete Co.*, the case on which the court below relied, the Fifth Circuit simply stated that "in view of § 9's command, and for reasons of judicial restraint and comity, the District Judge should have declined to enjoin the confirmation proceeding in the Ohio District Court." 490 F.2d at 184; *see also Sutter*, 125 F.3d at 919 (holding that *City of Naples* did not determine whether the FAA's venue provisions are exclusive).

Other appellate decisions holding the FAA's special venue provisions to be exclusive simply rely, without analysis or explanation, on prior decisions. *See Sunshine Beauty Supplies, Inc. v. United States District Court*, 872 F.2d 310, 312 (9th Cir. 1989) (relying upon *Central Valley Typographical Union No. 46 v. McClatchy Newspapers*, 762 F.2d 741, 744 (9th Cir. 1985), and *Ets-Hokin*); *McClatchy*, 762 F.2d at 744 (relying upon *Ets-Hokin*); *Island Creek Coal Sales Co. v. City of Gainsville, Florida*, 729 F.2d 1046, 1050 (6th Cir. 1984) (relying, among other things, upon *City of Naples* and *Ets-Hokin*). In short, the decisions of these courts of appeals and the court below that the FAA's special venue provisions exclude application of the general venue statute do not—and, for the reasons stated above, cannot—offer any persuasive justification for their conclusion.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Eleventh Circuit should be vacated, and the case remanded to the court of appeals.

Respectfully submitted,

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