No. 18-1048

IN THE

Supreme Court of the United States

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

Petitioner,

v.

OUTOKUMPU STAINLESS USA, LLC, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF *AMICUS CURIAE* PUBLIC JUSTICE IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICUS CURIAE*

Public Justice, P.C. is a national public interest law firm that specializes in precedent-setting, socially significant civil litigation, with a focus on fighting corporate and governmental misconduct.[1] To further its goal of defending access to justice for workers, consumers, and others harmed by corporate wrongdoing, Public Justice has long conducted a special project devoted to fighting abuses of mandatory arbitration. Through this project, Public Justice has reviewed hundreds of state and federal cases involving enforcement of mandatory arbitration clauses by nonsignatories, and its attorneys have litigated several such cases themselves.

Over the years, Public Justice has observed with concern as the concept of equitable estoppel, as applied in cases involving arbitration agreements, has become increasingly unmoored from the traditional underpinnings of the common-law doctrine. Public Justice believes that the "close relationship" and "concerted misconduct" theories of estoppel discussed below, which the lower courts only apply in cases involving arbitration, are at odds with this Court's admonitions that the Federal Arbitration Act ("FAA") does not alter "background principles of state contract law," *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630 (2009), and that the FAA makes "arbitration agreements as enforceable as other contracts, but not

1. Pursuant to Rule 37.6, Amicus affirms that no counsel for any party authored this brief in whole or in part, and no person or entity other than Amicus, its members and its counsel has made a monetary contribution to support the brief's preparation or submission. Petitioner and Respondents have consented in writing to the filing of this brief.

more so." *Prima Paint v. Flood & Conklin Mfg. Co.*, 309 U.S. 385, 404 n.12 (1967).

The estoppel doctrines discussed in this brief are potent weapons that corporations can and do use to bind plaintiffs to arbitrate even when the plaintiffs have not entered any arbitration agreement with those corporations, and when the traditional elements of equitable estoppel are not present. Because the consumers and workers that Public Justice represents are often the people against whom these weapons are wielded, contrary to the intent of the contracting parties, the organization has an interest in seeing this Court clarify that arbitration-specific estoppel theories rooted in federal substantive law violate the FAA's equal treatment principle regarding arbitration agreements and other types of contracts.

SUMMARY OF ARGUMENT

The question this case presents is whether the New York Convention for the Recognition of Foreign Arbitral Awards ("Convention") allows a nonsignatory to compel arbitration based on the doctrine of equitable estoppel. Implicit in this question is whether Chapter 2 of the FAA, which implements the Convention in the United States, 9 U.S.C. § 201 et seq., is consistent with chapter 1 of the FAA, 9 U.S.C. § 1 et seq., with respect to nonsignatories' rights. Petitioner spends the majority of its brief on this question, and Amicus expects that Respondents' brief will have a similar focus.

But the question of whether Chapters 1 and 2 of the FAA provide the same rights to nonsignatories sidesteps an even more fundamental question: what is meant by

the "doctrine of equitable estoppel"? That foundational question should not linger in the shadows of this Court's opinion in this case; the Court should address it directly. As part of its explanation of whether, and why or why not, to extend a constellation of rights labeled "equitable estoppel" to a new class of nonsignatories—those seeking to enforce international arbitration agreements drafted and entered into by others—this Court should provide guidance on what, precisely, that disputed constellation of rights entails.

Such guidance is badly needed by lower federal courts and state courts alike. Several federal appellate courts have crafted estoppel doctrines that apply only to disputes where a plaintiff who is a signatory to an arbitration agreement brings claims against multiple defendants, some of whom are signatories to that agreement and some of whom are not. These arbitration-specific doctrines turn on factors like the closeness of the relationship between the signatory and nonsignatory defendants (the "close relationship" estoppel test) or whether the plaintiff has alleged concerted and interdependent misconduct between the signatory and nonsignatory defendants (the "concerted misconduct" estoppel test). These "alternative estoppel" doctrines have been embraced by numerous state courts as well, despite the fact that they bear little if any resemblance to the traditional elements of equitable estoppel under those states' common law.

Traditionally, equitable estoppel was a defense that prevented one party from taking unfair advantage of another by making false representations on which the other party detrimentally relied. This Court has itself held that "[a]n essential element of any estoppel is detrimental

reliance on the adverse party's misrepresentations." *Lyng v Payne*, 476 U.S. 926, 935 (1986). Yet the arbitration-specific "close relationship" and "concerted misconduct" tests require neither detrimental reliance by the nonsignatory seeking estoppel nor a misrepresentation by the plaintiff that the nonsignatory seeks to estop.

These doctrines did not arise "to govern issues concerning the validity, revocability, and enforceability of contracts generally" but rather take their meaning "precisely from the fact that a contract to arbitrate is at issue." *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987). Thus the continued use of these doctrines, both in state and federal courts, is inconsistent with Chapter 1 of the FAA as applied to nonsignatories in *Arthur Andersen*. Nor would these doctrines present the proper standard for assessing any rights that nonsignatories to international arbitration agreements might have under Chapter 2 of the FAA. This Court should say so expressly now, before the confusion in the law grows any deeper.

ARGUMENT

In *Arthur Andersen LLP v. Carlisle*, this Court rejected the Sixth Circuit's categorical rule that nonsignatories to a written arbitration agreement could never seek enforcement of that agreement under the FAA. 556 U.S. at 630-31. Instead, it held, whether a particular nonsignatory could enforce or be bound by an arbitration agreement would be decided as a matter of "state law" that "arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." *Id.* *See also First Options of Chicago, Inc. v. Kaplan* 514 U.S. 938, 944 (1995) (courts resolve questions of arbitrability

under the FAA using "ordinary state-law principles that govern the formation of contracts). This Court then listed the "traditional principles of state law" that might enable a nonsignatory to claim rights under a contract, including equitable estoppel. *Arthur Andersen*, 556 U.S. at 631 (internal quotations omitted).

Equitable estoppel has a history longer than that of the United States, as Petitioner correctly observed in its opening brief. Pet. Br. at 15 (citing *Glus v. Brooklyn E. Dist. Terminal*, 359 U.S. 231, 232-34 (1959)). But the unique, arbitration-related theories of estoppel that Petitioner goes on to describe are of far more recent vintage. Pet. Br. at 15 (citing *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999)).

Unlike traditional concepts of equitable estoppel as discussed by this Court in cases like *Glus,* the more recent, arbitration-specific variants of the doctrine focus almost exclusively on the connections between multiple defendants. They place little or no emphasis on the actions of the plaintiff, except for considering the allegations made in the plaintiff's complaint. This focus on allegations against multiple defendants turns the doctrine of estoppel on its head, transforming it from a defense available only to a misled party into an offensive weapon available only to an alleged conspirator based on the nature of its alleged misconduct.

Courts have justified the illogical and sometimes inequitable results of these alternative estoppel theories on the basis of efficient dispute resolution: that where arbitrable claims against a signatory are closely related to claims against a nonsignatory, declining to resolve all

of the claims against both defendants in arbitration would lead to bifurcated proceedings in multiple forums. But this Court rejected a nearly identical efficiency argument in *Dean Witter Reynolds, Inc. v. Byrd*, where it held that Congress did not pass the FAA to ensure speedy and efficient dispute resolution but rather to ensure that arbitration agreements would be placed "upon the same footing as other contracts, where [they] belong[]." *Byrd*, 470 U.S. 213, 218-19 (1985) (quoting H.R.Rep. No. 96, 68th Cong., 1st Sess., 1 (1924)). The alternative estoppel theory enunciated in *MS Dealer*, and similar theories crafted by other lower courts that Petitioner does not discuss, are just as inconsistent with the FAA's "equal footing" principle as the Ninth Circuit's position in Byrd was. This Court should take this opportunity to reject them.

I. Equitable Estoppel Has Traditionally Required a False Statement, Deceptive Act, or Material Omission by One Party On Which Another Party Detrimentally Relied.

As traditionally conceived, equitable estoppel is a "defensive doctrine preventing one party from taking unfair advantage of another when, through false language or conduct, the person to be estopped has induced another person to act in a certain way, with the result that the other person has been injured in some way." Black's Law Dictionary (11th Ed. 2019). Proving the defense involves five elements: "(1) there was a false representation or concealment of material facts, (2) the representation was known to be false by the party making it, or the party was negligent in not knowing its falsity, (3) it was believed to be true by the person to whom it was made, (4) the party making the representation intended that it be acted on,

or the person acting on it was justified in assuming this intent, and (5) the party asserting estoppel acted on the representation in a way that will result in substantial prejudice unless the claim of estoppel succeeds." *Id. See also* Restatement (First) of Torts § 894 (June 2019 Update) (describing elements of equitable estoppel when used defensively); Restatement (Second) of Agency § 8B (June 2019 Update) (describing elements of equitable estoppel when it involves one party misrepresenting its authority to act on behalf of another).

Although estoppel, like all equitable doctrines, must be applied flexibly, the same key elements are always required: a false statement, misleading action or material omission by the party to be estopped (wrongful act), and a change in position by the party seeking estoppel based on believing the false statement or wrongful act to be true (detrimental reliance). These elements appear in the formulation of the doctrine as announced by the high courts of nearly every state. *See, e.g.*, *MB Indus., LLC v. CAN Ins. Co.*, 74 So.3d 1173, 1180 (La. 2011) ("equitable estoppel applies only where a party has made false or misleading representations of fact and the other party justifiably relied on the representation"); *Fundamental Portfolio Advisors, Inc. v. Tocqueville Asset Mgmt., L.P.*, 7 N.Y.3d 96, 107 (2006) (in absence of evidence of detrimental reliance, essential element lacking); *Celentano v. Oaks Condominium Ass'n*, 830 A.2d 164, 186 (Conn. 2003) (describing "two essential elements" of equitable estoppel under Connecticut law, including detrimental reliance); *Zitelli v. Dermatology Educ. & Research Found.*, 633 A.2d 134, 139 (Pa. 1993) ("There are two essential elements to estoppel; inducement and reliance."). And these same essential elements have characterized the

doctrine since its introduction into English law in the 18th century. T. Leigh Anenson, *The Triumph of Equity: Equitable Estoppel in Modern Litigation*, 27 Rev. Litig. 377, 386-87 (2008).

II. Estoppel as Applied by the Lower Courts in the Arbitration Context Involves None of the Doctrine's Traditional Elements.

A large number of cases in federal district and circuit courts have analyzed the question of when a nonsignatory to an arbitration agreement may use the doctrine of equitable estoppel to compel a signatory to that agreement to arbitrate. *See* Richard M. Alderman, *The Fair Debt Collection Practices Act Meets Arbitration: Non-parties and Arbitration*, 24 Loy. Consumer L. Rev. 586, 596 (2012) (describing equitable estoppel as "the most common argument used by non-parties as the basis for enforcing an arbitration provision."). For the most part, these cases have not required a showing of detrimental reliance by the party seeking estoppel. Michael A. Rosenhouse, *Annotation, Application of Equitable Estoppel to Compel Arbitration by or Against Nonsignatory--State Cases*, 22 A.L.R. 6th 387 (2007) (describing a "unique body" of caselaw that "federal courts have initiated" and "that is peculiarly applicable" in cases involving arbitration agreements, and noting that this "doctrine differs from traditional equitable estoppel in that it contains no requirement of justifiable reliance").

At first glance, this arbitration-specific line of cases appears to maintain a link to equitable estoppel's conceptual underpinnings by preventing the estopped party from taking inconsistent positions with respect to

the contract containing the arbitration clause. *See, e.g.*, *Hughes Masonry Co. v. Greater Clark Cnty. Sch. Bldg. Corp.*, 659 F.2d 836, 838-39 (7th Cir. 1981) (plaintiff cannot "rely on the contract when it works to [the plaintiff's] advantage, and repudiate it when it works to [the plaintiff's] disadvantage") (citations omitted). But all too often, courts employ this "estoppel" doctrine even where the connection between the plaintiff's claims and the contract containing the arbitration requirement is tenuous or nonexistent. *See Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 758 (11th Cir. 1993) (finding equitable estoppel where each of the plaintiff's claims merely "makes reference to" and "presumes the existence of" the licensing agreement containing the arbitration clause); *see also Brown v. Pacific Life Ins. Co.*, 462 U.S. 384, 399 (5th Cir. 2006) (allowing a nonsignatory to compel arbitration "when the signatory to the contract containing an arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract," even though the plaintiff's claims did not rely on the terms of that contract) (citing *Hill v. G E Power Systems, Inc.*, 282 F.3d 343, 349 (5th Cir. 2002)).

While still using the name "estoppel," these federally derived doctrines have largely abandoned any pretense of being rooted in equity. To the contrary, they are based on concepts of relatedness or similarity in the case of the close relationship test, and judicial efficiency in the case of the concerted misconduct test. *See Carroll v. Leboeuf, Lamb, Greene & MacRae, L.L.P.*, 374 F. Supp. 2d 375, 378 (S.D.N.Y. 2005) ("the doctrine [of arbitration-specific estoppel] appears to depend upon . . . considerations of adjudicative economy, not consent").

Neither of these tests embodies the sort of "traditional principles of state law" that would allow nonsignatories to enforce contracts other than arbitration agreements. *Arthur Andersen*, 556 U.S. at 631. And this court has periodically reminded lower courts that they may not treat arbitration agreements differently from other types of contracts. *Kindred Nursing Ctrs. Ltd. P'Ship v. Clark*, 137 S. Ct. 1421, 1426 (2017) (referring to the FAA's "equal-treatment principle"). This principle should apply with equal force to nonsignatories and equitable estoppel.

A. The "close relationship" estoppel test departs from the common-law roots of equitable estoppel when it focuses exclusively on the closeness of the defendants and the similarity of the claims against them.

Several circuit courts have adopted an "alternative estoppel" theory under which "a nonsignatory [may] force a signatory into arbitration . . . when the relationship of the persons, wrongs and issues involved is a close one." *CD Partners, LLC v. Grizzle*, 424 F.3d 795, 799 (8th Cir. 2005). Specifically, as framed by the Second Circuit, this "close relationship" test requires 1) that the subject matter of the dispute with the nonsignatory defendant be "factually intertwined" with the subject matter of the dispute with the signatory defendant, and 2) that the relationship between the signatory and nonsignatory defendants be sufficiently close to "justify sending [the] entire dispute to arbitration." *Ragone v. Atl. Video at Manhattan Ctr.*, 595 F.3d 115, 127-28 (2d Cir. 2010) (citing *Sokol Holdings, Inc. v. BMB Munai, Inc.*, 542 F.3d 354, 359 (2d Cir. 2008)). State courts have adopted similar versions of this "close relationship" test. *See Fries v. Greg G. Wright & Sons,*

LLC, 120 N.E.3d 426, 444 (Ohio App. 2018) ("arbitration may be compelled by a nonsignatory against a signatory due to the close relationship between the entities involved, as well as the relationship of the alleged wrongs to the nonsignatory's obligations and duties in the contract") (citations and internal quotations omitted); *Saltzman v. Thomas Jefferson Univ. Hosps., Inc.*, 166 A.3d 465, 470 n.2 (Pa. 2017) (a nonsignatory may enforce an arbitration agreement where there is an "obvious and close nexus" between the nonsignatory and "either the contract itself or the contracting parties").

Although most of these formulations make some reference to the contract containing the arbitration clause, such a connection is not always required. *See, e.g.*, *Noye v. Johnson & Johnson Servs., Inc.*, 765 Fed. Appx. 742, 746-47 (3d Cir. 2019) (construing Pennsylvania law and holding that a close relationship among the parties is sufficient to establish estoppel, even if there is no connection between the claims and the contract); *Diaz v. Michigan Logistics Inc.*, 161 F. Supp. 3d 375, 382 (E.D.N.Y. 2016) (applying equitable estoppel simply because the plaintiff's claims against the two defendants were similar, making the "subject matter" of the disputes "factually intertwined," without any discussion of whether the claims relied on or even referenced the contract). As applied by these courts, the "close relationship" estoppel test allows any combination of overlapping parties, overlapping claims or overlapping contractual obligations to render the nonsignatory sufficiently related to arbitrable disputes to be pulled into the arbitration clause's orbit.

These cases make no allusion to inconsistent conduct by the party being estopped, let alone that the nonsignatory

seeking estoppel relied on such inconsistency to its detriment. In short, the "close relationship" estoppel test has only the barest passing resemblance to traditional equitable estoppel, a state of affairs that even courts that embrace the doctrine tacitly recognize. *See Fries*, 120 N.E.3d at 444 (describing the "close relationship" test and then, in a separate sentence, stating that "a nonsignatory to an arbitration agreement may [also] be bound by the arbitration agreement under a variety of ordinary contractual and agency related legal theories, including but not limited to estoppel").

B. The "concerted misconduct" test is even further removed from traditional equitable estoppel in focusing on the allegations against the defendants rather than the plaintiff's wrongful acts.

The Eleventh Circuit made this decoupling of claims from contract explicit in what has been called the "seminal case" involving arbitration-specific estoppel, *MS Dealer v. Franklin*, 177 F.3d 942 (11th Cir. 1999). Christopher Driskill, Note, *A Dangerous Doctrine: The Case Against Using Concerted-Misconduct Estoppel to Compel Arbitration*, 60 Ala. L. Rev. 443, 445 (2009). The court in *MS Dealer* held that a nonsignatory could compel arbitration in two different circumstances: 1) "when the signatory to a written agreement containing an arbitration clause must rely on the terms of the written agreement in asserting its claims against the nonsignatory" and 2) "when the signatory to the contract containing the arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the

contract." *MS Dealer*, 177 F.3d at 947 (citations, internal quotations and alterations omitted).

The Eleventh Circuit itself subsequently abandoned *MS Dealer*'s second, "concerted misconduct" prong as an independent ground for allowing nonsignatories to compel arbitration, holding in another case three years later that the "purpose of the doctrine is to prevent a plaintiff from, in effect, trying to have his cake and eat it too" and that the "plaintiff's actual dependance on the underlying contract in making out the claim against the nonsignatory defendant is therefore always the *sine qua non* of an appropriate situation for applying equitable estoppel." *In re Humana Managed Care Litig.*, 285 F.3d 971, 976 (11th Cir. 2002), rev'd on other grounds, *PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401 (2003). But while the "concerted misconduct" estoppel test may no longer be a freestanding basis for compelling arbitration within the Eleventh Circuit, numerous federal and state courts continue to apply it. *See, e.g.*, *Brown*, 462 F.3d at 399 (affirming district court order compelling arbitration with nonsignatory because "the complaint asserts concerted misconduct by all parties"); *Adkins v. Labor Ready, Inc.*, 185 F. Supp. 2d 628, 641 (S.D. W. Va. 2001) (claims against nonsignatory defendants "inherently inseparable" from claims against signatory); *Tobel v. AXA Equitable Life Ins. Co.*, No. 298129, 2012 WL 555801, at *1, 2012 Mich. App. LEXIS 326, at *1 (Mich. Ct. App. 2012) (allegations of concerted misconduct among defendants permitted nonsignatories to enforce arbitration provision); *Autonation Fin. Servs. Corp. v. Arain*, 592 S.E.2d 96, 101 (Ga. App. 2003) (finding both of *MS Dealer*'s estoppel tests consistent with Georgia law).

Not all courts have embraced the "concerted misconduct" version of estoppel, and courts and commentators alike have noted the awkwardness of a doctrine premised on equity being used to empower parties whose only connection is that they are accused of colluding with one another. *See In re Merrill Lynch Co. FSB*, 235 S.W.3d 185, 194 (Tex. 2007) ("while conspirators consent to accomplish an unlawful act, that does not mean they impliedly consent to each other's arbitration agreements"); Richard Frankel, *The Arbitration Clause as Super Contract*, 91 Wash. U. L. Rev. 531, 586 n.229 (2014) ("There appears to be no contract-law analog for rewarding a party that behaves illegally by granting the party rights under the contract.").

Indeed, those courts that continue to apply "concerted misconduct" estoppel no longer even attempt to link it to equitable estoppel's traditional roots. Instead they justify use of the doctrine by referring to considerations of judicial economy, by invoking the federal policy favoring arbitration, or both. *See Carroll*, 374 F. Supp. 2d at 378 (interrelated claims doctrine "appears to depend upon the broad federal policy favoring arbitration"); *Douzinas v. Am. Bureau of Shipping, Inc.*, 888 A.2d 1146, 1153 (Del. Ch. 2006) ("to refuse to compel arbitration for claims against the [nonsignatory defendants] would render the arbitration between the signatories meaningless and thwart the state and federal policy in favor of arbitration"); *Shetty v. Palm Beach Radiation Oncology Assocs.-Sunderam K. Shetty, M.D., P.A.*, 915 So.2d 1233, 1235 Fla. 4th DCA 2005) (equitable estoppel appropriate where claims against nonsignatory were "inextricably linked" with claims already being arbitrated against a signatory). But while this Court has invoked the federal

policy favoring arbitration on many occasions, that policy has no bearing on the question of whether and under what circumstances nonsignatories may compel arbitration. *Arthur Andersen*, 556 U.S. at 630 n.5 ("Whatever the meaning of this vague prescription that courts must respect the federal policy favoring arbitration, it cannot possibly require the disregard of state law permitting arbitration by or against nonparties to the written arbitration agreement.").

Yet courts throughout the country continue to disregard state law regarding equitable estoppel in favor of arbitration-specific doctrines that "derive their meaning from the fact that an agreement to arbitrate is at issue." *AT & T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). Until this Court provides further guidance about what it meant in *Arthur Andersen*, confusion and inconsistency will continue to pervade this area of law. And innumerable consumers and workers who never misled any corporation to its detriment will still find themselves forced to defend against motions to compel arbitration brought by defendants who are not parties to any relevant arbitration agreement, based on misguided arbitration-specific "estoppel" doctrines that have no place in state common law.

CONCLUSION

This Court should reiterate that equitable estoppel will only permit a nonsignatory to enforce an arbitration agreement under the same circumstances that would permit a nonsignatory, under relevant state contract law principles, to enforce any other type of contract. Arbitration-specific estoppel tests violate the "equal-treatment principle" that undergirds this Court's FAA precedents. This Court should utilize the opportunity this case presents for a review of the intersection between arbitration and equitable estoppel to provide much-needed guidance to the lower courts in this unsettled area of law.

Respectfully submitted,

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