No. 08-146

IN THE

Supreme Court of the United States

ARTHUR ANDERSEN L.L.P., ET AL.,

PETITIONERS,

v.

WAYNE CARLISLE, ET AL.,

RESPONDENTS.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICUS CURIAE* WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*[1]

The Washington Legal Foundation ("WLF") is a non-profit public interest law and policy center based in Washington, D.C. with supporters nationwide. WLF seeks to strengthen the free enterprise system and protect the economic and civil liberties of individuals and businesses. WLF has devoted substantial resources to promoting civil justice reform and freedom of contract. It has published numerous monographs and other educational materials on issues relating to alternative dispute resolution.

WLF believes that the decision of the United States Court of Appeals for the Sixth Circuit undermines the sound policies of the Federal Arbitration Act ("FAA" or "Act"). If left intact, the decision will impose substantial costs on numerous individuals and entities who voluntarily seek to resolve disputes through arbitration. In addition, the decision will impede and potentially deny a host of parties the ability to utilize alternative dispute resolution mechanisms when the governing law would otherwise entitle them to such procedures.

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief; letters of consent have been lodged with the Court.

These increased costs will ultimately be borne by consumers and society as a whole. WLF thus brings a broader perspective to the issues in this case than the parties. For the reasons set forth below, WLF urges the Court to reverse the decision of the Sixth Circuit.

SUMMARY OF THE ARGUMENT

In domestic and international commerce, countless parties depend upon the availability of arbitration as a means for controlling costs, streamlining processes, and lending certainty to contractual relationships. Congress and the federal courts have recognized the important public values inherent in arbitration and decidedly and affirmatively have acted to support these policies. The court of appeals erred and contravened these important pro-arbitration policies by imputing a non-existent requirement that only signatories to an agreement may invoke certain provisions of the FAA. The court's decision effectively creates two classes of parties to contractual relationships: those who had the good fortune of signing the document that contains the arbitration provision at issue and all other parties who may invoke the provision under state, federal or international law but who did not actually sign the agreement. Under the court of appeals's reasoning, entities and individuals in the latter group, such as Petitioners, have little ability to rely upon the Act or avail themselves of the strong federal policy supporting arbitration. Similarly, if a signatory seeks to compel a non-signatory to arbitrate, it would have no recourse under the Act.

As Petitioners have explained in their brief, the court of appeals erred by reading a de facto

standing requirement of signatory status into the FAA's appellate jurisdiction provision, Section 16, which does not exist in the statute. It further impermissibly reached the merits of the claim in the name of determining appellate jurisdiction. And, it countermanded the intent of Section 16, which was to give immediate appellate recourse to a party wrongfully denied the opportunity to arbitrate. The court of appeals also imputed a signatory requirement into Section 3 which would prevent non-signatories from enforcing arbitration agreements under Section 3 (and by implication Section 4). As a result, under the court's decision, parties who sign agreements with arbitration provisions and parties who can enforce or be bound to such agreements but have not signed are treated differently – the former receiving preferential treatment, added benefits under the FAA and expedited appellate review, while the latter are consigned to potential deprivation of the arbitration provisions to which they are entitled.

Neither the plain language of the Act nor the strong public policies that underlie it support this result. This Court should affirm the strong federal policy present in the FAA, hold that Section 16 and, if necessary, Section 3, is available to *any* party that is entitled invoke arbitration provisions existing under the agreement at issue, and reverse the court of appeals's decision.

ARGUMENT

I. THE SIXTH CIRCUIT ERRONEOUSLY CREATED TWO CLASSES OF LITIGANTS WHO ARE ENTITLED TO ARBITRATION.

The Sixth Circuit held that it lacked appellate jurisdiction under Section 16(a)(1) because the Petitioners were not signatories to the underlying arbitration agreement, and therefore, had failed to state a cognizable request for stay under Section 3 of the Act. Pet. App. 10a. Relying on *DSMC Inc. v. Convera Corp.*, 349 F.3d 679 (D.C. Cir. 2003), and *In re Universal Service Fund Telephone Billing Practice Litigation v. Sprint Communications Co., L.P.*, 428 F.3d 940 (10th Cir. 2005), the court concluded that Section 16(a)(1) conferred appellate jurisdiction only in the circumstance where the appellant brought a motion under Section 3 of the Act and that only signatories to the contract containing the arbitration provision could be parties to a dispute covered under Section 3 (and by implication Section 4) of the Act. Pet. App. 5a-11a. Petitioners' Brief amply explains why the court of appeals erred in this holding.

Amicus writes separately, however, to identify the pernicious effect that the rule adopted by the court of appeals would have upon a host of parties who are otherwise entitled to arbitration under state, federal, or international law but could be effectively denied that right under the court of appeals's decision.

State and federal courts have recognized a number of theories under which non-signatories can invoke or be bound to arbitration provisions including agency, incorporation by reference, alter ego, implied conduct, estoppel, third-party

beneficiary status, and successors in interest.[2] *See* Martin Domke, *Domke on Commercial Arbitration: The Law and Practice of Commercial Arbitration* Vol. 1, § 13 ("Domke") (2008). International law also provides that, in certain circumstances, non-signatories are bound by or can enforce arbitration provisions.[3] Yet each of these parties, entitled by law to arbitration, could

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[2] *Denney v. BDO Seidman, L.L.P.*, 412 F.3d 58, 70 (2d Cir. 2005) ("[S]ignatories to an arbitration agreement can be compelled to arbitrate their claims with a non-signatory where 'a careful review of the relationship among the parties, the contracts they signed . . . , and the issues that had arisen among them discloses that the issues the nonsignatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed.'") (quoting *JLM Indus., Inc. v. Stolt-Nielsen SA*, 387 F.3d 163, 177 (2d Cir. 2004); *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 416-17 (4th Cir. 2000) ("Well-established common law principles dictate that in an appropriate case a nonsignatory can enforce, or be bound by, an arbitration provision within a contract executed by other parties."); *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999) (developing two independent bases upon which non-signatories can compel arbitration with a signatory to the contract); *Grigson v. Creative Arts Agency, L.L.C.* 210 F.3d 524, 527 (5th Cir. 2000) (approving the "intertwined-claims" test formulated by the Eleventh Circuit and affirming the district court order compelling arbitration); *Hughes Masonry Co. v. Greater Clark County Sch. Bldg. Corp.*, 659 F.2d 836, 841 n.9 (7th Cir. 1981).

[3] *See Dow Chem. Group v. Isover-Saint-Gobain* (ICC Case No. 4131) (Dow Chemical) (1982) (France); *Y. S.A.L. v. Z Sarl* (ATF 129 III 727) 115/2003 (Switzerland); *see also* Contracts (Rights of Third Parties) Act 1999, Chapter 31 (U.K.). This Court has affirmed the application of the Act to transactions involving international commerce and trade. *See, e.g., Mitsubishi Motors Corp. v. Soler-Chrysler Plymouth, Inc.* 473 U.S. 614, 638-40 (1985).

not invoke the Act in aid of arbitration under the court of appeals's decision. As a result, a panoply of parties – acquirers, owners, parent and subsidiary companies, investors, affiliates, guarantors, lenders, customers, licensees, employees, officers, directors, agents, brokers, administrators, and trustees – could be consigned to years of litigation before the right to arbitrate is recognized. *See* Michael A. Rosenhouse, *Application of Equitable Estoppel by Nonsignatory to Compel Arbitration – Federal Cases*, 2006 A.L.R. Fed. 2d 18 (2006). For example, the appeals court's decision would bar minors from seeking recourse under the FAA because minors cannot contract in many jurisdictions due to issues of capacity and thus are not signatories. Nevertheless, minors are often entitled to invoke provisions in contracts for which they are third-party beneficiaries.[4] Non-signatories thus include both intended beneficiaries who can enforce the signatory's contract as well as parties against whom the signatory has alleged substantially interdependent and concerted misconduct.[5]

Not only would the court of appeals's decision frustrate the expectations of many third parties, it would equally affect parties to the contract. Under the court of appeals's reasoning and that used by the court in *DSMC Inc.*, a valid appeal requires

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[4] Domke, § 13.11.

[5] Those consigned to "non-signatory" status by the appeals court could include parties who did not execute the agreement but are bound to its terms through assignment by the original signatory, such as a successor in interest following a merger.

signatories on both sides of the dispute.[6] Thus, even if the moving party is a signatory, the presence of a non-signatory as the non-moving party could defeat appellate jurisdiction. Given the number of state-law doctrines that can obligate non-signatories to arbitrate under a written agreement, and the FAA Section 2 requirement that interpretation of arbitration agreements should be guided by generally applicable contract law, *see* Pet. Br. at 4-5, 31-36, it is an unduly narrow interpretation that excludes such claims from the reach of the FAA.

In effect, the Sixth Circuit's decision would create two classes of litigants entitled to arbitration. For those who signed the agreement at issue and wish to invoke it against another signatory, assistance under the Act is substantial. The tools in both Section 3 and Section 4 would be available and, if arbitration is found to be warranted, the immediate reference would take place free from the potential of interlocutory appeal. *See* 9 U.S.C. §§ 3, 4, and 16 (b). For those parties entitled to arbitration but who are non-signatories, or those who are trying to enforce arbitration against a non-signatory, the road is more arduous, harkening back to the pre-Act regime where arbitration was disfavored. For the multitude of situations where this occurs, there would be no mandatory stay under Section 3, no

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[6] The court of appeals reached its decision by relying on the decision in *DSMC Inc.* wherein the court articulated a test for appellate jurisdiction which "ask[ed] whether the parties [to the suit] are signatories to a written agreement to arbitrate." *DSMC Inc.*, 349 F.3d at 683. Thus, not only must the appellant be a signatory to appeal under Section 16, the appellee must be as well.

order to compel under Section 4, and no expedited appeal under Section 16.

II. THIS COURT HAS SUGGESTED THAT NON-SIGNATORIES MAY BE ABLE TO UTILIZE SECTION 4 IF CONTRACT LAW SUPPORTS AN ENTITLEMENT TO ARBITRATION.

This Court has not directly reached the question of whether the FAA is available to non-signatories. In *Perry v. Thomas*, 482 U.S. 483 (1987), however, this Court did suggest that the protections of the Act could be available to non-signatories if applicable contract principles would support such an exercise. There, the plaintiff brought an action against his former employer and two former co-workers, alleging wrongdoing in conjunction with the sale of securities. The co-workers sought arbitration under Sections 2 and 4 of the Act, and the employer joined the request, citing a provision in the plaintiff's employment contract. 482 U.S. at 485.

The plaintiff argued that the co-workers, as non-signatories to his employment agreement, "lacked standing" to enforce the arbitration provision. *Id.* at 488. This Court declined to consider that argument on the merits because it had not been decided by the lower courts. *Id.* at 492. In remanding, the Court characterized the issue as a "straightforward issue of contract interpretation: whether the arbitration provision inures to the benefit of appellants and may be construed, in light of the circumstances surrounding the litigants' agreement, to cover the dispute that has arisen between them." *Id.*

If, as suggested by the Sixth Circuit, non-signatories could not invoke either Section 3 or Section 4, then the co-workers' request for an

order compelling arbitration under Section 4 in *Perry* would not have required a "straightforward issue of contract interpretation" but a short order denying the co-workers the ability to seek arbitration under Section 4. Nor would it have been a decision on "whether the arbitration provision inures to the benefit of appellants" but rather a threshold conclusion that irrespective of that entitlement to arbitration, Section 4 provides no remedy.

It suffices to say that this Court did not indicate that the non-signatory co-workers had no ability to utilize Section 4. In fact, the *Perry* decision gave some guidance as to which law to apply upon remand in considering this issue. *See id.* at 492, n.9. Although the Court did not conclude that the co-workers could pursue arbitration, it discussed how that decision would be made and, notably, the Court never suggested that the co-workers would not be entitled to a Section 4 remedy by virtue of their status as non-signatories.

III. THE TEXT AND HISTORY OF THE FAA, AS WELL AS THE STRONG FEDERAL PRO-ARBITRATION POLICY, SUPPORT PROTECTIONS FOR NON-SIGNATORIES UNDER THE ACT.

Under the Sixth Circuit's decision, disfavored parties would be cast into what one court has called a "worst case scenario" in which "vindication of the litigant's contractual right to arbitrate would come only after he had been forced to expend substantial time and expense fully litigating the matter in court, which is precisely what he sought to avoid in the first place by bargaining for the speedy and efficient dispute

resolution procedure that the arbitral forum offers." *Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207, 214 (3d Cir. 2007).

As Petitioners have explained, Pet. Br. at 17-18, 38-39, neither Section 16 nor Section 3 has any language that explicitly or implicitly requires both appellant and appellee (in the case of Section 16) or the moving and non-moving party (in the case of Section 3) to be signatories to the underlying contract. The plain language of each statute makes no such differentiation, and implying such a standing qualification is contrary to the broad public policy supporting arbitration provisions as an alternative mechanism to litigation. *See E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (reading the Act to "manifest a liberal federal policy favoring arbitration agreements.") (quotation omitted); *Ehleiter*, 482 F.3d at 214 ("In no uncertain terms, Section 16 makes clear than any order favoring litigation over arbitration is immediately appealable and any order favoring arbitration over litigation is not. By prohibiting interlocutory appeals of orders favoring arbitration, Section 16 relieves the party entitled to arbitrate of the burden of continuing to litigate the issue while the arbitration process is on-going, and it entitles that party to proceed immediately to arbitration without the delay that would be occasioned by an appeal of the District Court's order to arbitrate.") (citations and internal quotation marks omitted).

There is no doubt that the Act in general and the pro-arbitration mechanisms found in Section 3, Section 4, and Section 16, in particular, advance the strong federal public policy of favoring arbitration over litigation where a written agreement so provides. If a rule denies a class of

parties the ability to use these federal tools in aid of arbitration, then the rule necessarily conflicts with the federal policy. The Sixth Circuit's decision does exactly that. It categorically denies a host of commercial and individual parties the ability to utilize the Act to support valid claims of arbitrability under state, federal, and international law.

The rule announced by the court of appeals would assign non-signatories to a class of litigants that would not be able to seek stays under Section 3, to file motions to compel under Section 4, to file immediate appeal under Section 16(a), or to seek protection from appeal under Section 16(b), despite the fact that these parties are entitled to obtain arbitration under the written agreement at issue. Nor is there is anything in the legislative history or commentary that accompanies the Act that suggests it should be construed narrowly or its benefits denied to third parties to an agreement that would otherwise be entitled to arbitration. In fact, if Section 16 and the Act are to advance the federal policy, the court of appeals should have reached the opposite result. Parties consigned to years of federal litigation may well choose to settle rather than endure the litigation burdens they were contractually entitled to avoid. A straightforward interpretation of Section 3 and Section 16 that does not discriminate on the basis of signatory status, on the other hand, reaffirms the important federal policy and accords equal treatment to all those who, under well-established contract law, have a basis for seeking arbitration.

It also fosters the prompt and efficient resolution of such claims.[7]

The smooth functioning of commerce and contractual relations requires the fulfillment of settled expectations regarding relationships and the way disputes will be resolved. Many non-signatories depend on arbitration provisions for the efficient administration of commercial and personal relationships. Adoption of the rule advocated by the Sixth Circuit would relegate a host of parties entitled to arbitration under applicable law into a litigation limbo where established rights to arbitrate are potentially vindicated only after a lengthy and costly litigation is completed. Indeed, the specter of duplicative processes may cause many to abandon contractual rights to arbitration.[8] Amicus respectfully requests this Court to reaffirm the strong pro-arbitration policy, hold that Section 16 confers appellate jurisdiction even where non-signatories are involved, and if necessary, hold

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[7] One case demonstrates the prompt resolution that can occur when non-signatories are permitted to assert arbitration claims. In *Ross v. American Express Co.*, 478 F.3d 96, 99 (2d Cir. 2007), the court of appeals held that it had jurisdiction over the appeal from denial of a non-signatory's request to arbitrate, but in relatively quick order held that the claim for arbitration was without merit. *See Ross v. American Express Co.*, 547 F.3d 137, 148 (2d Cir. 2008). In contrast, under the Sixth Circuit's approach, it would be years before a non-signatory party could obtain post-trial appellate review of a district court denial of an arbitration claim, no matter how meritorious.

[8] Given that one of the purposes of arbitration is to avoid litigation altogether, it is hollow comfort to affirm the ability to arbitrate after a case has been litigated in the trial court to its conclusion.

that Section 3 and Section 4 of the Act are not limited to disputes between signatories.

CONCLUSION

Amicus respectfully requests the Court to reverse the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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