

12-1230

No.

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

TOYOTA MOTOR CORPORATION and
TOYOTA MOTOR SALES, U.S.A., INC.,
Petitioners,
v.

MICHAEL CHOI, ALEXSANDRA DEL REAL, AND
MICHAEL SCHOLTEN, on behalf of themselves
and all others similarly situated,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The parties to a contract agreed to arbitrate any claim or dispute arising out of the contract, including disputes over the arbitrability of the claim itself. Plaintiffs sued a non-signatory to the contract, and that non-signatory defendant sought to compel arbitration to determine whether the plaintiffs' claims are arbitrable.

The question presented in this case is whether the non-signatory defendant can compel arbitration of the arbitrability of the plaintiffs' claims.

**PARTIES TO THE PROCEEDING
AND RULE 29.6 STATEMENT**

The caption contains the names of all the parties to the proceeding below.

Pursuant to this Court's Rule 29.6, undersigned counsel state that Toyota Motor Corporation has no parent corporation and that no other publicly held corporation owns 10% or more of its stock. Toyota Motor Sales, U.S.A., Inc. is a wholly owned subsidiary of Toyota Motor North America, Inc., which is directly or indirectly a wholly owned subsidiary of Toyota Motor Corporation.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–25a) is published at 705 F.3d 1122 (9th Cir. 2013). The district court’s order (Pet. App. 26a–60a) is published at 828 F. Supp. 2d 1150 (C.D. Cal. 2011).

JURISDICTION

The judgment of the court of appeals was entered on January 30, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, are reproduced in the Appendix (at 125a–127a).

STATEMENT

This case presents an important and recurring question concerning the role of a district court under the Federal Arbitration Act (FAA). This Court has held that courts *must order arbitration of disputes that have been delegated to an arbitrator—even disagreements concerning the arbitrability of the dispute itself*. See, e.g., *Rent-A-Center, W., Inc. v. Jackson*, 130 S. Ct. 2772, 2778–79 (2010). Yet the Ninth Circuit’s holding requires that courts, not arbitrators, must determine certain arbitrability disputes involving non-signatories to an agreement, even when the agreement clearly and unmistakably delegates *all* arbitrability issues to an arbitrator.

The Ninth Circuit’s refusal to order arbitration directly conflicts with the decisions of two other circuits, *both of which require arbitration of such arbitrability disputes*. See *Contec Corp. v. Remote Solution Co.*, 338 F.3d 205, 209–11 (2d Cir. 2005); *Apollo*

Computer, Inc. v. Berg, 886 F.2d 469, 472–74 (1st Cir. 1989). It also contravenes this Court’s decisions regarding the limited role of courts under the FAA, and undermines the strong federal policy in favor of arbitration. See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745–46, 1748–49 (2011).

1. Plaintiffs purchased Toyota vehicles from various Toyota dealerships. Pet. App. 111a–112a, 116a–117a, 120a–121a. These purchases were not made from Toyota directly, because Toyota is barred by the law of every state from selling vehicles directly to consumers. Pet. App. 3a–4a; see Cal. Veh. Code § 11713.3 (with only temporary exceptions, “[i]t is unlawful ... for a manufacturer, ... directly or indirectly ... [t]o compete with a dealer[,] ... own[] or operat[e] a dealership ... [or] sell[] motor vehicles at retail”); Tex. Occ. Code § 2301.476.

Plaintiffs allege that the anti-lock brake system (ABS) in their vehicles is defective. Pet. App. 4a, 32a. Plaintiffs do not contend that the alleged defect ever caused them any physical injury; rather, they claim that they paid too much for their vehicles as a result of the defect. Pet. App. 98a, 104a, 106a.

Despite a highly successful recall campaign, in which Toyota updated the braking system software to resolve the issue with the ABS (Pet. App. 6a), plaintiffs filed this action against Toyota (not its dealerships) under California’s false advertising and unfair competition laws alleging that Toyota did not disclose the alleged defect on a timely basis, but instead falsely advertised the vehicles as safe and reliable. Pet. App. 4a, 27a; see Cal. Civ. Code § 1750 *et seq.*; Cal. Bus. & Prof. Code §§ 17200, 17500 *et seq.* Plaintiffs also assert claims for breach of the implied warranty of merchantability and breach of contract.

To remedy their claims, plaintiffs seek, among other forms of relief, to rescind their purchase agreements, even though Toyota is not a signatory to those agreements. Pet. App. 109a.

2. In connection with their vehicle purchases, plaintiffs entered into written purchase agreements with the dealerships. The purchase agreements contain an arbitration clause, which states:

Any claim or dispute, whether in contract, tort, statute or otherwise (including the [i]nterpretation and scope of this Arbitration Clause, and the arbitrability of the claim or dispute), between you and us or our employees, agents, successors or assigns which arises out of or relates to your credit application, purchase or condition of this vehicle, this contract or any resulting transaction or relationship (including any such relationship with third parties who do not sign this contract) shall, at your or our election, be resolved by neutral, binding arbitration and not by a court action.

Pet. App. 112a–113a, 117a–118a.¹ The purchase agreements also provide that any claim or dispute must be arbitrated on an individual, rather than classwide, basis. Pet. App. 112a–114a, 117a–119a, 121a–124a. Under this Court’s precedents, there is no question that these arbitration agreements are

¹ Another iteration of the purchase agreement provides: “This Arbitration Clause applies, regardless of whether the claims or disputes arise in contract, tort, statute or otherwise. It also applies to any claim or dispute about the interpretation and scope of this Arbitration Clause. It also applies to any claim or dispute about whether a claim or dispute should be determined by arbitration.” Pet. App. 121a–122a.

valid and enforceable. See *Concepcion*, 131 S. Ct. at 1750–53.

3. Toyota moved to compel arbitration pursuant to the arbitration agreements in plaintiffs' purchase agreements. Although Toyota was not a signatory to the purchase agreements, Toyota argued that it could compel arbitration under the doctrine of equitable estoppel, which "precludes a party from claiming the benefits of a contract while simultaneously attempting to avoid the burdens that contract imposes." *Mundi v. Union Sec. Life Ins. Co.*, 555 F.3d 1042, 1045 (9th Cir. 2009) (citation omitted); accord *Am. Bankers Ins. Grp., Inc. v. Long*, 453 F.3d 623, 627 (4th Cir. 2006); *Hughes Masonry Co. v. Greater Clark Cnty. Sch. Bldg. Corp.*, 659 F.2d 836, 839 (7th Cir. 1981).

And because the purchase agreements reserve all questions regarding the "arbitrability of the claims" or "whether a claim or dispute should be determined by arbitration" to the arbitrator, Toyota moved to compel arbitration of the question whether plaintiffs were equitably estopped from circumventing the arbitration agreements in their purchase agreements. Pet. App. 112a, 117a, 122a.

4. The district court denied Toyota's motion to compel arbitration, holding that Toyota lacked "standing to compel arbitration because it [wa]s not a signatory or party to the arbitration agreements." Pet. App. 27a.

The Ninth Circuit affirmed, concluding that "[t]he strong public policy in favor of arbitration does not extend to those who are not parties to an arbitration agreement." Pet. App. 9a. As a result, "the contractual right to compel arbitration 'may not be invoked by one who is not a party to the agreement

and does not otherwise possess the right to compel arbitration." *Id.*

As applied to plaintiffs, the Ninth Circuit held that "the arbitration agreements do not contain clear and unmistakable evidence that Plaintiffs and Toyota agreed to arbitrate arbitrability." Pet. App. 10a–11a. Even though the agreements specifically applied to disputes involving "any [transaction or] relationship with third parties who do not sign this contract" (Pet. App. 113a, 117a), the court held that plaintiffs "agreed to arbitrate arbitrability in a dispute [only] with the Dealerships," because "the terms of the arbitration clauses are expressly limited to Plaintiffs and the Dealerships." Pet. App. 10a–11a.²

REASONS FOR GRANTING THE PETITION

Congress enacted the Federal Arbitration Act "[t]o overcome judicial resistance to arbitration[.]" *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006); accord *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). Section 2 of the Act "embodies the national policy favoring arbitration and places arbitration agreements on equal footing with all other contracts: 'A written provision ... to settle by arbitration a controversy thereafter arising out of such contract ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at

² On the merits of the arbitrability issue, the Ninth Circuit held that plaintiffs were not equitably estopped from avoiding arbitration. Pet. App. 12a–24a. Although plaintiffs' "claim 'sounds in contract,'" and is therefore interconnected with the purchase agreements, the court found that "the claim relies on Plaintiffs' status as third-party beneficiaries to contracts between Toyota and the Dealerships—i.e., service duties the Dealerships owe to Plaintiffs on behalf of Toyota—not the Purchase Agreements." Pet. App. 19a.

law or in equity for the revocation of any contract.” *Buckeye*, 546 U.S. at 443–44 (quoting 9 U.S.C. § 2).

Consistent with Congress’s intent to “move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible,” sections 3 and 4 of the FAA limited courts’ role to a “summary” hearing on a motion to compel. *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983), *superseded by statute on other grounds*, 9 U.S.C. § 16(b)(1). And where, as here, the arbitration agreement calls for an arbitrator to decide threshold questions of arbitrability, courts have an even more limited role—they must simply enforce the delegation provision and compel the arbitration of any threshold arbitrability questions. *See, e.g., Rent-A-Center*, 130 S. Ct. at 1778–79; *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 85 (2002) (most arbitrability questions “are for the arbitrators to decide”).

The issue in this case—whether plaintiffs are equitably estopped from avoiding arbitration of a dispute arising out of a contract containing an arbitration agreement—is a prototypical threshold question of “arbitrability.” *Howsam*, 537 U.S. at 83–85; *see Rent-A-Center*, 130 S. Ct. at 2777 (“whether the parties have agreed to arbitrate” is a classic “gateway” question[] of ‘arbitrability’”); *Contec*, 398 F.3d at 209–10 (equitable estoppel is a “question of arbitrability”). The Ninth Circuit nevertheless refused to compel arbitration of this arbitrability dispute simply because Toyota is not a signatory to the arbitration agreement.

That decision conflicts with decisions by the First and Second Circuits, contravenes this Court’s decisions interpreting the FAA, and undermines the

strong federal policy in favor of arbitration. The issue implicates the balance of authority between courts and arbitrators on a broad array of issues involving non-signatories. This Court should grant review to resolve this important and recurring inter-circuit conflict.

I. THE NINTH CIRCUIT’S REFUSAL TO COMPEL ARBITRATION CONFLICTS WITH TWO OTHER CIRCUITS

The Ninth Circuit’s decision that Toyota, as a non-signatory to the purchase agreements, is categorically barred from enforcing the arbitration agreement squarely conflicts with the decisions of the First and Second Circuits. By refusing to enforce the clear and unmistakable terms of the arbitration agreement, the court of appeals went far beyond its proper role and expanded the issues that courts must address before compelling arbitration.

The First Circuit held in *Apollo* that the question whether non-signatory defendants could compel arbitration was for the arbitrator to decide because “the parties contracted to submit issues of arbitrability to the arbitrator.” 886 F.2d at 472. Even though the party moving to compel arbitration was not a signatory to the agreement, the contract’s language controlled, and all arbitrability issues were reserved for the arbitrator. *Id.* at 473.

The court explained that in the written arbitration agreement, the signatory parties “agreed that all disputes arising out of or in connection with their contract would be settled by binding arbitration,” including disputes about “the existence and validity of a *prima facie* agreement to arbitrate.” *Apollo*, 886 F.2d at 473. Thus, the signatory plaintiff opposing arbitration “agreed to be bound” by an agreement

that “clearly and unmistakably allowed the arbitrator to determine her own jurisdiction,” meaning that the arbitrator alone “should decide whether a valid arbitration agreement exists” between the signatory plaintiff and non-signatory defendants. *Id.* at 473–74.

Likewise, the Second Circuit in *Contec*, in expressly adopting the First Circuit’s analysis, held that under the FAA, “neither we nor the district court must reach the question whether [the signatory] is estopped from avoiding arbitration with [the non-signatory] because ... arbitration of the issue of arbitrability is appropriate.” 398 F.3d at 209–10. Even though the party moving to compel arbitration was not a signatory to the arbitration agreement, the Second Circuit held that the non-signatory could enforce the arbitrability provision in the agreement, thus reserving for the arbitrator the question whether the defendant could properly compel arbitration of the plaintiff’s claims. *Id.* at 208–09.

The court began by asking whether there was “clear and unmistakable evidence from the arbitration agreement” that the signatory “intended that the question of arbitrability shall be decided by the arbitrator.” *Contec*, 398 F.3d at 208–09 (citing *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)). Finding that the agreement delegated all questions regarding the “existence, scope, or validity” of the arbitration agreement to the arbitrator, the court rejected the signatory’s argument that it could not “be compelled to arbitrate with a stranger to the [a]greement because the contractual language is effective only between the contracting parties.” *Id.* at 209.

The Second Circuit further explained that controlling federal policy embodied in the FAA requires enforcement of agreements according to their terms. *Contec*, 398 F.3d at 208. And where the signatory “agreed to be bound” by provisions that “clearly and unmistakably allow the arbitrator to determine her own jurisdiction” over an agreement to arbitrate “whose continued existence and validity is being questioned,” the signatory could not simply “disown its agreed-to obligation to arbitrate *all* disputes, including the question of arbitrability.” *Id.* at 211.³ The court concluded that the arbitrator alone must decide the arbitrability issue, “even if, in the end, an arbitrator were to determine that the dispute itself is

³ Recognizing that “just because a signatory has agreed to arbitrate issues of arbitrability with another party does not mean that it must arbitrate with *any* non-signatory,” the First and Second Circuits made preliminary “relational sufficiency” findings to determine “whether the parties have a sufficient relationship to each other and to the rights created under the agreement” before compelling arbitration of arbitrability issues involving non-signatories. *Contec*, 398 F.3d at 209 (emphasis added); see *Apollo*, 886 F.2d at 473. Both courts made clear, however, that the *merits* of the arbitrability question must be decided by the arbitrator, pursuant to the parties’ delegation provisions. *Contec*, 398 F.3d at 209 (“a sufficient relationship existed between *Contec* [and the signatory] to compel arbitration even if, in the end, an arbitrator were to determine that the dispute itself is not arbitrable”); *Apollo*, 886 F.2d at 473–74 (“The arbitrator should decide whether a valid arbitration agreement exists between [the parties]. Consequently, without expressing any opinion on the merits of the issues raised by *Apollo*, we affirm.”). Plaintiffs have never disputed that Toyota and its dealers have a sufficient relationship to satisfy this standard; indeed, they rely on that relationship in asserting claims for breach of warranty against Toyota. See Pet. App. 107a–108a.

not arbitrable because [the non-signatory] cannot claim rights under the [contract].” *Id.* at 209.⁴

The Ninth Circuit’s holding that Toyota, as a non-signatory to the arbitration agreement, is categorically barred from enforcing the delegation clause against a signatory to the agreement squarely conflicts with these decisions of the First and Second Circuits.

There is no dispute here that plaintiffs’ valid agreements require arbitration of not only their underlying claims, but also disputes over the arbitrability of those claims. Pet. App. 112a, 117a, 122a. The Ninth Circuit held, however, that in order for Toyota

⁴ Numerous district courts have similarly compelled arbitration of arbitrability issues such as equitable estoppel—including when requested by a non-signatory to the agreement. See, e.g., *Lismore v. Société Générale Energy Corp.*, 2012 WL 3577833, at *5–6 (S.D.N.Y. Aug. 17, 2012) (because the agreement “delegates to arbitrators the decision on arbitrability [the court] need not ‘reach the question’ of whether the plaintiff was ‘estopped from avoiding arbitration’ with a defendant who was not a signatory to the agreement”); *Laguna v. Coverall N. Am., Inc.*, 2011 WL 3176469, at *7 (S.D. Cal. July 26, 2011) (“where the arbitration agreement reserves questions of arbitrability for the arbitrator, the issue as to whether a non-signatory to the arbitration agreement can compel arbitration is a question regarding the validity of the arbitration agreement that is reserved for the arbitrator”); *Washington v. William Morris Endeavor Entm’t, LLC*, 2011 WL 3251504, at *8–9 (S.D.N.Y. July 20, 2011) (“I need not reach the issue of whether plaintiff is estopped from avoiding arbitration ... because, pursuant to the Delegation Provision, this is a matter for the arbitrator”); *Jones v. Regions Bank*, 719 F. Supp. 2d 711, 717 (S.D. Miss. 2010) (because the signatory “did ‘unmistakably intend’ to delegate resolution of arbitrability issues to the arbitrator [t]he resolution of these plausible [estoppel] arguments is left for the arbitrator”).

to enforce the delegation provision in the arbitration agreement, Toyota must be a *signatory* to the contract.⁵

The Ninth Circuit’s decision stands in stark contrast to *Apollo* and *Contec*, and creates a clear circuit split on the nature of the court’s role in enforcing a clearly valid arbitration agreement. In the First and Second Circuits, the court’s inquiry is limited to adjudicating whether the *agreements* indicate a clear and unmistakable intent to delegate questions of arbitrability to the arbitrator—even if the dispute involves a non-signatory. *Contec*, 398 F.3d at 208–09; *Apollo*, 886 F.2d at 473–74. In the Ninth Circuit, however, even where an agreement unmistakably delegates arbitrability questions such as equitable estoppel to an arbitrator, a party seeking to compel arbitration must prove not only that the arbitrability issue has been so delegated, but that the moving party signed the agreement.

⁵ The Ninth Circuit is not alone—other courts have similarly refused to enforce agreements that clearly delegate arbitrability issues to the arbitrator. See, e.g., *Meena Enters., Inc. v. Mail Boxes Etc., Inc.*, 2012 WL 4863695, at *3 n.4 (D. Md. Oct. 11, 2012) (“although the Franchise Agreements decree that ‘claims regarding the validity, scope, and enforceability’ of the arbitration clauses themselves must be decided *via* arbitration, threshold issues of contract formation—including equitable estoppel—are properly subject to judicial determination”); *Soto v. Am. Honda Motor Co.*, 2012 WL 4746969, at *3 (N.D. Cal. Oct. 3, 2012) (“[T]he [contract] grants the arbitrator the authority to decide the threshold issues of ... ‘the arbitrability of the claim or dispute.’ ... However, the threshold issue of whether the delegation clause is even applicable to a certain party must be decided by the Court.”); *QPro Inc. v. RTD Quality Servs. USA, Inc.*, 761 F. Supp. 2d 492, 497–98 (S.D. Tex. 2011) (same).

The Federal Arbitration Act was enacted to provide *uniform* federal standards that should be applied consistently regardless of where a lawsuit is filed. In the absence of clear guidance from this Court, the Ninth circuit's decision will exacerbate the inconsistencies in the decisions of lower courts regarding whether a court or an arbitrator must decide arbitrability issues such as equitable estoppel. Compare, e.g., *Cole v. John Wiley & Sons, Inc.*, 2012 WL 3133520, at *14 (S.D.N.Y. Aug. 1, 2012) (holding that the issue of equitable estoppel "should be considered arbitrable"); *William Morris*, 2011 WL 3251504, at *8 (holding that equitable estoppel "is a matter for the arbitrator"); *Laguna*, 2011 WL 3176469, at *7 (holding that equitable estoppel "is a question ... reserved for the arbitrator"), with, e.g., *Soto*, 2012 WL 4746969, at *3 (holding that equitable estoppel "must be decided by the Court"); *Gray v. Suttell & Assocs.*, 2012 WL 1951657, at *2 (E.D. Wash. Mar. 19, 2012) (holding that equitable estoppel "is a question for this Court to decide"); *Meena Enters.*, 2012 WL 4863695, at *3 n.4 (holding that equitable estoppel is "properly subject to judicial determination"); *QPro*, 761 F. Supp. 2d at 497 (holding that equitable estoppel is "a matter for the court to decide"); *Ramasamy v. Essar Global, Ltd.*, 825 F. Supp. 2d 466, 469 (S.D.N.Y. 2011) (holding that equitable estoppel "is for the Court to determine").

This clear conflict among the lower courts warrants this Court's review.

II. THE DECISION BELOW CONTRAVENES THIS COURT'S INTERPRETATION OF THE FAA

The Ninth Circuit's approach also contravenes this Court's decisions regarding the limited role the Federal Arbitration Act reserves for district courts

and conflicts with this Court's decisions allowing parties to delegate the arbitrability of their claims to an arbitrator.

Section 4 of the FAA provides that a court "shall" order arbitration of a dispute "upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue." 9 U.S.C. § 4. Generally, this requires a court to satisfy itself of two things: that the arbitration agreement is valid and that the parties' dispute falls within its scope. See *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 130 S. Ct. 2847, 2856 (2010). And even these threshold determinations may be delegated to an arbitrator. See *Rent-A-Center*, 130 S. Ct. at 2777 ("We have recognized that parties can agree to arbitrate 'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy"); accord *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452 (2003).

The decision below, which requires a complex threshold determination by a court, undermines "Congress' clear intent ... to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Moses H. Cone*, 460 U.S. at 22. The FAA "call[s] for an expeditious and summary hearing, with only restricted inquiry into factual issues." *Id.* at 22-23. Yet the Ninth Circuit's approach insists that a court make the threshold determination regarding whether a party is equitably estopped from avoiding arbitration.

Such a determination is neither expeditious nor summary, but instead involves numerous complicated factual inquiries. The district court exhausted ten pages of its 25-page opinion analyzing the equitable

estoppel issue in this case, which included inquiries into the operative documents at issue in plaintiffs' claims, which claims are "intertwined" with the purchase agreements, which claims "rely ... on duties that flow from the Toyota dealerships to the buyer," whether plaintiffs' implied warranty claims hinge on their status as "third-party beneficiaries ... of Toyota's implied warranties," and whether there was substantial interrelated and concerted misconduct among Toyota and its dealers, such as "any collusion ... to conceal information from the Plaintiffs." Pet. App. 45a–53a. The Ninth Circuit's opinion—following the same analysis and resolving these (and more) disputed issues between the parties—also demonstrates that this was not a "summary" inquiry. See *Moses H. Cone*, 460 U.S. at 22–23.

The parties are now well into their second year of litigation on this threshold arbitrability question. The Ninth Circuit's rule therefore reintroduces "the costliness and delays of litigation" that the FAA sought to avoid. *Concepcion*, 131 S. Ct. at 1749 (quoting H.R. Rep. No. 68-96, at 2 (1924)).

These missed opportunities for efficient arbitration are particularly severe here, because the arbitration agreements include class action waivers. Pet. App. 112a–114a, 117a–119a, 121a–124a. *Concepcion* confirmed that class action waivers are both enforceable and consistent with the FAA's goals of supporting "lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." 131 S. Ct. at 1748–49, 1751–52. Plaintiffs' claims here—which involve no physical injuries and seek recovery for purely economic loss—are perfectly suited for resolution on an individual basis through the arbitration mechanism plaintiffs agreed to in their purchase agreements.

The Ninth Circuit's decision thus allows plaintiffs an end run around this Court's decision in *Concepcion*. The Court there specifically rejected the "great variety" of "devices and formulas" that courts had used to prevent arbitration. 131 S. Ct. at 1747. The Ninth Circuit's bar on arbitration of arbitrability issues related to non-signatories is precisely such a "device," and warrants this Court's review.

III. THE COURT SHOULD GRANT REVIEW TO RESOLVE THIS IMPORTANT AND RECURRING QUESTION

The circuit conflict over the enforcement of delegation provisions in arbitration agreements by non-signatories is an important and recurring question. This issue arises in virtually every industry under a wide variety of circumstances.

As this Court has recognized, traditional principles of state law allow a contract to be enforced by non-signatories to the contract through, among other things, "assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel." *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 631 (2009) (citation omitted). The equitable estoppel doctrine at issue here is invoked to compel arbitration of disputes between, for example, licensors and sub-licensees (see *PRM Energy Sys., Inc. v. Primenergy, L.L.C.*, 592 F.3d 830, 833–36 (8th Cir. 2010)); customers and contractors or sub-contractors (see *Hughes Masonry*, 659 F.2d at 837–38); borrowers and loan servicers (see *Sherer v. Green Tree Servicing LLC*, 548 F.3d 379, 380–82 (5th Cir. 2008) (per curiam)); and clients and their attorneys, accountants, or financial advisers, *Carlisle*, 556 U.S. at 626–27.

Enforcement of agreements to arbitrate by non-signatories is particularly common in regulated industries where manufacturers are either prohibited or substantially limited in their ability to contract with consumers. State franchise and dealership laws prohibit direct sales to consumers by, for instance, auto manufacturers (*see, e.g.,* Cal. Veh. Code § 11713.3)⁶ and wine producers, *see* Maureen K. Ohlhausen & Gregory P. Luib, *Moving Sideways: Post-Granholm Developments in Wine Direct Shipping and Their Implications for Competition*, 75 Antitrust L.J. 505 (2008) (noting that in the wake of *Granholm v. Heald*, 544 U.S. 460 (2005), many States have placed new restrictions on direct wine sales).

The Ninth Circuit's decision raises substantial concerns for these and other situations in which nonparties seek to enforce arbitration agreements, such as when a receiver or bankruptcy trustee attempts to enforce a contract on behalf of the debtor who signed the contract (*see Javitch v. First Union Sec., Inc.*, 315 F.3d 619, 625–29 (6th Cir. 2003)); when a contract signatory seeks to pierce the corporate veil and sue a non-signatory (*see Bidas S.A.P.I.C. v. Gov't of Turkm.*, 345 F.3d 347, 359–60 (5th Cir. 2003)); and when a corporate successor attempts to enforce a contract it has assumed, *see Contec*, 398 F.3d at 207. The Ninth Circuit's rule would effectively preclude any of the non-signatories in these situations from arbitrating even the arbitrability

⁶ *See also, e.g.,* Ariz. Rev. Stat. Ann. § 28-4460; Mich. Comp. Laws § 445.1574; N.J. Stat. Ann. § 56:10-27; N.C. Gen. Stat. § 20-305; Or. Rev. Stat. § 650.130; 63 Pa. Stat. Ann. § 818.12; Tex. Occ. Code § 2301.476; Utah Code Ann. § 13-14-201; Wyo. Stat. Ann. § 31-16-108.

of the claims, simply because they did not sign the arbitration agreement.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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