No. 12-1230

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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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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.

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INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of the Petitioners.[1]

PLF was founded 40 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide. Among other things, PLF's Free Enterprise Project defends the freedom of contract, including the right of parties to agree by contract to the process for resolving disputes that might arise between them. To that end, PLF has participated as amicus curiae in many important cases involving the Federal Arbitration Act and contractual arbitration in general, including *Oxford Health Plans v. Sutter*, S. Ct. docket no. 12-135, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *Rent-A-Center, W., Inc. v. Jackson*, 130 S. Ct. 2772 (2010); *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010); *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008); and *Preston v. Ferrer*, 552 U.S. 346 (2008). PLF believes its public policy

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any 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, its members, or its counsel made a monetary contribution to its preparation or submission.

experience will assist this Court in its consideration of the petition in this case.

REASONS FOR GRANTING THE PETITION

Prius and Lexus car buyers sued Toyota under several theories, including California's Unfair Competition Law, for alleged economic loss because the anti-lock braking system in their cars was not as reliable as advertised. Each car buyer's purchase contract provided that all disputes, including disputes against third parties and matters of arbitrability, would be arbitrated. Toyota moved to compel arbitration and the Ninth Circuit Court of Appeals refused solely on the ground that Toyota had not signed the car purchase contract (which it is prohibited to do under state law). Additionally, the Ninth Circuit refused to submit the arbitrability question to the arbitrator for decision, holding instead that only the court could decide whether the matter was arbitrable. *Kramer v. Toyota Motor Corp.*, 705 F.3d 1122, 1124-25 (9th Cir. 2013); Petition for Writ of Certiorari at 2-3.

The question presented in the petition is whether the plaintiffs' agreement to arbitrate disputes related to the purchase of their cars includes the gateway issue of arbitrability, when the specific issue of arbitrability is whether a non-signatory party can compel arbitration. This Court held in *Rent-A-Center*, 130 S. Ct. at 2778-79, that parties may indeed agree to arbitral resolution of gateway issues. The question presented in this case is whether the substance of the gateway issue matters; that is, whether the rules differ when a plaintiff seeks to avoid arbitration because he alleges the contract or arbitration provision is

unconscionable, or because the party seeking to compel arbitration lacks capacity to invoke the contract.

The arbitrator may or may not decide that Toyota can compel arbitration of the plaintiffs' substantive claims, but the plaintiffs clearly and unmistakably agreed to arbitrate arbitrability, including as to third parties. *Kramer*, 705 F.3d at 1124-25. The Ninth Circuit's failure to hold the plaintiffs to that agreement violates the Federal Arbitration Act and conflicts with decisions of this Court and other Circuit Courts. Finally, this matter is of great importance given the increasing use of arbitration to resolve disputes both domestically and in matters involving international trade.

The petition for a writ of certiorari should be granted.

I

THE DECISION BELOW CONFLICTS WITH CASES THAT HOLD PARTIES TO THEIR AGREEMENTS TO ARBITRATE GATEWAY ISSUES

When arbitration agreements "clearly and unmistakably" include provisions submitting arbitrability questions to the arbitrators, courts must allow the arbitrators to answer those questions. *Rent-A-Center*, 130 S. Ct. at 2777; *see also Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 85 (2002) (procedural questions which grow out of the dispute and bear on its final disposition are presumptively for an arbitrator to decide, such as "whether a condition precedent to arbitrability has been fulfilled"). But the matter is complicated when the gateway issue to be decided involves a non-signatory because courts

conflict as to whether the key agreement is between the *parties* to the dispute, or the parties to the *arbitration agreement* itself.

The Second Circuit Court of Appeal focuses on the relationship between each party and the arbitration agreement. In *Smith/Enron Cogeneration Ltd. P'ship Inc. v. Smith Cogeneration Int'l, Inc.* [SCI], 198 F.3d 88 (2d Cir. 1999), a joint venture to build a power plant in the Dominican Republic, the Second Circuit held that the non-signatory could compel arbitration on the "group of companies" doctrine, a variation of an estoppel argument:

> Unquestionably, there were a number of enforceable contracts between SCI . . . and various Enron entities, each of which contained an agreement to arbitrate. The assignment of rights . . . from one set of affiliates to another set of affiliates does not negate the prior existence of a contract to arbitrate between the parties . . . . The question before us is not whether SCI and the Enron petitioners entered into an agreement to arbitrate—they did (and more than once)—but whether subsequent events deprived all of the Enron petitioners of the right to compel SCI to live up to that agreement.

Id. at 95. The court thus focused on *SCI's* agreement to arbitrate, much as Toyota's petition in this case focuses on the *plaintiffs'* agreement to arbitrate.

The Fifth Circuit employed a similar approach, focusing on the equity of holding a plaintiff who fully agreed to arbitrate disputes to his word, in *Grigson v.*

Creative Artists Agency, LLC, 210 F.3d 524 (5th Cir. 2000), *cert. denied*, 531 U.S. 1013 (2000). There, the court held that the plaintiff must arbitrate its claims against defendant non-signatories because "to not apply this intertwined-claims basis to compel arbitration would fly in the face of fairness." *Id.* at 528. The First Circuit also noted that there is a marked difference between the fairness of allowing a non-signatory to force a signatory to arbitrate and the converse situation of a signatory forcing a non-signatory to arbitrate. *InterGen N.V. v. Grina*, 344 F.3d 134, 143, 145-46 (1st Cir. 2003) ("[C]ourts should be extremely cautious about forcing arbitration in 'situations in which the identity of the parties who have agreed to arbitrate is unclear.'") (citation omitted).

However, other courts have focused on the relationship of the parties to each other, rather than the relationship of the parties to the contract. In *Roe v. Ladymon*, 318 S.W.3d 502, 514 (Tex. App. 2010), the Texas Court of Appeals agreed that "non-signatories to an arbitration agreement can be bound to arbitrate under principles of contract and agency law," but *because the issue of arbitrability involved non-signatories*, the court refused to compel arbitration of the gateway issue of arbitrability. In *Truck Ins. Exchange v. Palmer J. Swanson, Inc.*, 124 Nev. 629, 632 (2008), the Nevada Supreme Court considered whether a non-signatory client could compel a Nevada law firm to participate in arbitration under the client's agreement with a related California law firm. The Nevada high court held that the trial court properly denied the motion to compel because the Nevada firm was not the alter ego of the California firm, nor did it directly benefit from the contract with the California

firm. Despite the relationship between the two firms and the client, the non-signatory client could not rely on the existing real-world relationships to overcome the fact that it had not signed an agreement with the Nevada firm. *See also State ex rel. United Asphalt Suppliers, Inc. v. Sanders*, 204 W. Va. 23, 27-28 (1998) ("Despite the recognized exception to the rule requiring express assent to require arbitration, there is equally '[p]ersuasive authority . . . that a . . . court is not required to compel arbitration between parties who have not agreed to such arbitration.'")(citation omitted).

The courts that permit non-signatories to compel signatory parties to arbitration do so with an apparent understanding that the parties who contract to resolve disputes through arbitration should be expected to have some "awareness of the wider substantive background of their bilateral arbitration arrangements." Stavros Brekoulakis, *The Relevance of the Interests of Third Parties in Arbitration: Taking a Closer Look at the Elephant in the Room*, 113 Penn. St. L. Rev. 1165, 1186 (2009); *see also Hirschfeld Productions, Inc. v. Mirvish*, 88 N.Y.2d 1054, 1056 (1996) (public policy to "prevent circumvention of arbitration agreements" supports holding allowing agents the benefits of arbitration agreements signed by their principals). As the Minnesota Supreme Court explained in *Onvoy, Inc. v. SHAL, LLC*, 669 N.W.2d 344, 356 (Minn. 2003), non-signatory employees and agents of a signatory may compel arbitration "because to do otherwise would be to subvert the intent of the signatories."

As this Court has noted, "[a]n agreement implied in fact is 'founded upon a meeting of minds, which,

although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding.'" *Hercules, Inc. v. United States*, 516 U.S. 417, 424 (1996); *see also Thomson-CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773, 779 (2d Cir. 1995) (A court may allow a non-signatory to compel a signatory to arbitrate because the claims are "intimately founded in and intertwined with the underlying contract obligations" and "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."); Thus, when a non-signatory agent sought to compel arbitration of the plaintiff's claims against the agent for acts taken in his representative capacity pursuant to an arbitration agreement between the agent's principal and the plaintiff, the Sixth Circuit Court of Appeals held that the plaintiff could be compelled to arbitrate. To hold otherwise, the court explained, would allow a plaintiff who had signed an arbitration agreement to avoid "the practical consequences of [the] agreement . . . by naming nonsignatory parties as [defendants] in his complaint." *Arnold v. Arnold Corp.–Printed Commc'ns for Bus.*, 920 F.2d 1269, 1281 (6th Cir. 1990) (citation omitted).

If a signatory to an arbitration agreement can categorically foreclose arbitral resolution of the gateway issue of arbitrability, that signatory essentially exploits the conflict between commercial reality and the scope of the arbitration proceedings. Brekoulakis, *supra*, at 1182. Ultimately, only this Court can resolve whether the party's awareness of interlocking parties engaged in a single transaction, plus the fairness of holding that party to his

agreement, is sufficient to infer signatories' consent to arbitrate with non-signatories. For this reason, the petition should be granted.

II

THE ISSUE OF THIRD-PARTY PARTICIPATION IN ARBITRATION IS A MATTER OF VITAL IMPORTANCE

In this case, non-signatory Toyota seeks to compel arbitration to determine whether its equitable estoppel argument for compelling arbitration of the underlying substantive dispute is correct. The effect of the legal issue that this Court should consider, however, extends beyond the relatively narrow facts of this case. Non-signatories to arbitration agreements may compel arbitration under any one of several different state law theories.[2] *See Arthur Andersen LLP v. Carlisle*, 556

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[2] While residents, businesses, and courts of many states can look to state law for delineation of circumstances under which non-signatories may be bound to an arbitration (or any other contract), California law is particularly in a state of flux. Currently, there are four cases on the California Supreme Court docket that will determine how arbitration agreements are construed in the state. *See e.g.*, *Iskanian v. CLS Transportation*, Cal. S. Ct. docket no. S204032 (rev. granted Sept. 19, 2012) (whether *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), overruled *Gentry v. Sup. Ct.*, 42 Cal. 4th 443 (2007), as to whether employment agreements may contain arbitration agreements overriding statutory rights under state labor laws); *Sanchez v. Valencia Holding Co.*, Cal. S. Ct. docket no. S199119 (rev. granted Mar. 21, 2012) (whether the Federal Arbitration Act preempts state law rules invalidating mandatory arbitration provisions in an allegedly unconscionable consumer contract); *Rose v. Bank of America*, Cal. S. Ct. docket no. S199074 (rev. granted Mar. 14, 2012) (determining whether an Unfair Competition Law claim can be based on a federal statute where Congress repealed the (continued...)

U.S. 624, 631 (2009) (A nonparty to a contract may have the legal right to enforce its provisions "through assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel.") (citation omitted); *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110, 1122 (3d. Cir. 1993) ("Agency logic has been applied to bind non-signatory business entities to arbitration agreements").

For example, a non-signatory may enforce an arbitration clause against the signatory of a contract that is incorporated by reference into a second contract to which the non-signatory is a party. *Imp. Exp. Steel Corp. v. Miss. Valley Barge Line Co.*, 351 F.2d 503, 506 (2d Cir. 1965). A non-signatory insurance company may compel arbitration as a third-party beneficiary to New York Stock Exchange rules requiring arbitration of disputes between members and non-members. *Spear, Leeds & Kellogg v. Cent. Life Assurance Co.*, 85 F.3d 21, 22-23 (2d Cir. 1996), *cert. denied*, 519 U.S. 1040 (1996) (the non-signatory non-member was an alleged victim of the member's conduct and the dispute was related to the member's exchange activities). *But see Lawson v. Life of the South Ins. Co.*, 648 F.3d 1166, 1168-69 (11th Cir. 2011) (Applying Georgia law, car purchasers who signed loan agreement with car dealership that included an option to purchase life insurance could not be compelled to arbitrate class

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[2] (...continued)
statute's private right of action); *Sonic-Calabasas A, Inc. v. Moreno*, Cal. S. Ct. docket S174475 (rev. granted Sept. 9, 2009) (how *Concepcion*'s analysis affects a state requirement that labor claims otherwise subject to an arbitration agreement must proceed first through an administrative proceeding conducted by the Labor Commissioner).

claims against non-signatory insurer that asserted third-party beneficiary doctrine and equitable estoppel).

The issue also arises in the context of partnership agreements. A non-signatory agent of a signatory company that entered into a partnership agreement containing an arbitration clause may compel signatories to that agreement to arbitration. *Boston Telecomms. Group, Inc. v. Deloitte Touche Tohmatsu*, 278 F. Supp. 2d 1041, 1044 (N.D. Cal. 2003), *aff'd*, 249 Fed. Appx. 534, 539 (9th Cir. 2007). The district court in that case held that the combination of language in the clause covering a broad range of claims, plus a broad definition of the dispute subject matter as "partnership business," meant that the signatories intended to confer the benefit of arbitration upon non-signatories involved in the partnership business, including claims alleging fraud. *Id.* at 1048.

Non-signatories seek to compel arbitration in employment law cases as well. For example, a non-signatory physician who sued a hospital and medical professional placement company for alleged labor law violations was bound by an arbitration clause between the hospital and the placement company. *Pearson v. Hilton Head Hospital*, 400 S.C. 281, 287 (2012) ("[A] party should not be allowed to avoid an arbitration agreement by naming nonsignatory parties in his complaint . . . because this would nullify the rule requiring arbitration.") (citation omitted).

The complicated and intertwining nature of business relations also means that non-signatories and signatories commonly interact in such industries as

reinsurance,[3] the construction industry[4] and software distribution agreements.[5] Given the broad range of these cases, it is no surprise that the question of how courts should consider the question of non-signatory parties who seek to compel arbitration has been referred to as "the source of much controversy." James M. Hosking, *The Third Party Non-Signatory's Ability to Compel International Commercial Arbitration: Doing Justice Without Destroying Consent*, 4 Pepp. Disp. Resol. L.J. 469, 478 (2004) (citation omitted).

These serious concerns are amplified by the pervasive use of arbitration contracts in the global economy. Third party issues are as likely to arise in the international commercial arena as in the domestic. For example, in *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GmBH*, 206 F.3d 411, 418 (4th Cir. 2000), the Fourth Circuit allowed a non-signatory to contract for international sale of goods nonetheless bound to participate in arbitration because it asserted

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[3] *See Mutual Ben. Life Ins. Co. v. Zimmerman*, 783 F. Supp. 853, 867 (D. N.J.), *aff'd*, 970 F.2d 899 (3d Cir. 1992) (intermediaries had no standing to compel arbitration of disputes arising under reinsurance pool management agreement); Stephen W. Schwab, et al., *Caught Between Rocks and Hard Places: The Plight of Reinsurance Intermediaries Under U.S. and English Law*, 16 Mich. J. Int'l. L. 485, 531 n.212 (1985).

[4] *See Choctaw Generation Ltd. P'ship v. Amer. Home Assur. Co.*, 271 F.3d 403, 406-07 (2d Cir. 2001) (surety contract that incorporates by reference an underlying construction contract containing an arbitration provision allows non-signatory surety to compel arbitration).

[5] *See Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1149-50 (7th Cir.), *cert. denied*, 522 U.S. 808 (1997) (non-signatory purchasers of software have been implicated in arbitration agreements between distributors and manufacturers).

rights arising out of the same contract that contained the arbitration provision. The *Int'l Paper* decision followed an earlier decision in that Circuit, *J.J. Ryan & Sons v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315 (4th Cir. 1988), in which the court affirmed an order compelling arbitration of a distributor's claims against a non-signatory parent corporation and French and German affiliates pursuant to several contracts, notwithstanding the absence of an arbitration clause in most of the contracts. The court held that all the contracts implemented the main distribution agreement, and "[w]ithout the ancillary agreements pertaining to the details of actual importation of the affiliates' products, the exclusive distribution agreement would be largely illusory." *Id.* at 319.[6] As exemplified by these cases, the "American arbitration model has reverberated in the international sector," magnifying the importance the issues now presented to the Court. *See* Thomas J. Stipanowich, *Arbitration: The "New Litigation,"* 2010 U. Ill. L. Rev. 1, 23.

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[6] *See also* Carolyn B. Lamm & Jocelyn A. Aqua, *Defining the Party-Who is a Proper Party in an International Arbitration Before the American Arbitration Association and Other International Institutions*, 34 Geo. Wash. Int'l L. Rev. 711, 729 (2003) ("[L]arge, complex investments may require successive agreements over time, some of which may not contain arbitration clauses. Questions often arise as to whether a dispute concerning successive or peripheral arrangements will bind or enable a non-signatory party to arbitrate claims that are inextricably intertwined with other claims a party is pursuing through arbitration.").

CONCLUSION

The plaintiffs in this case are attempting to avoid the arbitration agreement by which they voluntarily agreed to resolve disputes relating to their Toyota vehicles. The cases arises in California, invoking the state's notoriously broad Unfair Competition Law. The issue presented in this case has created conflicts among the Circuit Courts and state courts, and is of increasing interest as businesses develop new and ever-more-complicated partnerships and affiliations, often spanning the globe.

The petition for a writ of certiorari should be granted.

DATED: May, 2013.

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