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

REPLY BRIEF OF PETITIONERS

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for writ of certiorari remains accurate.

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The question presented by Toyota's petition is straightforward: In a dispute arising out of an agreement that delegates all arbitrability questions to an arbitrator, *who should decide* questions of arbitrability raised by a non-signatory—the court or an arbitrator? Resolving that threshold question of the proper decisionmaker does not require a "fact-bound" inquiry into the arbitrability question itself, as plaintiffs contend. Opp'n 3, 14. Regardless of whether plaintiffs are contractually obligated to arbitrate the underlying dispute, the Ninth Circuit erred by arrogating that issue to the courts rather than entrusting it to the arbitrator. That error "destroy[ed] the prospect of speedy resolution that arbitration ... was meant to secure." *Am. Express Co.* v. *Italian Colors Rest.*, No. 12-133, 2013 WL 3064410, at *7 (U.S. June 20, 2013). The court of appeals disregarded this Court's Federal Arbitration Act jurisprudence, contravened the strong federal policy in favor of arbitration, and created a split with two other Circuits. This Court should grant review to resolve this important conflict.

I. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH TWO OTHER CIRCUITS

When plaintiffs purchased their Toyota vehicles, they signed purchase agreements in which they agreed that *all* arbitrability issues would be adjudicated by an arbitrator. Pet. App. 112a–113a, 117a–118a, 121a–122a. Plaintiffs do not dispute this. After plaintiffs sued Toyota to rescind their purchase agreements and recoup the consideration they paid under those agreements, Toyota moved to compel arbitration—including arbitration of the question whether plaintiffs were equitably estopped from

avoiding arbitration against Toyota. Because the agreement delegated arbitrability issues to the arbitrator, under this Court's arbitration jurisprudence, Toyota's motion to compel should have been granted. *See Rent-A-Center, W., Inc.* v. *Jackson*, 130 S. Ct. 2772, 2777–78 & n.1 (2010).

Two circuits permit non-signatories to compel arbitration of threshold arbitrability issues. *See Apollo Computer, Inc.* v. *Berg*, 886 F.2d 469 (1st Cir. 1989); *Contec Corp.* v. *Remote Solution Co.*, 398 F.3d 205 (2d Cir. 2005). Plaintiffs also do not dispute this.

Plaintiffs seek to reframe the issue as a dispute over the "validity" of the arbitration agreement they signed (*e.g.*, Opp'n 2, 14), but that is not the question presented. Plaintiffs' arbitration agreements included valid delegation clauses reserving all questions of arbitrability to an arbitrator, and plaintiffs do not dispute that equitable estoppel is a prototypical "arbitrability" question. Pet. 6, 10 n.4. The only dispute is whether Toyota, as a non-signatory, may enforce that valid agreement.

On the question actually presented—whether a non-signatory defendant can compel arbitration of the *arbitrability* of the plaintiffs' claims—the Ninth Circuit is in direct conflict with the First and Second Circuits. In *Contec* and *Apollo*, a non-signatory defendant moved to compel arbitration pursuant to delegation clauses signed by the signatory plaintiffs that unambiguously delegated arbitrability questions to the arbitrator. *Contec*, 398 F.3d at 207–09; *Apollo*, 886 F.2d at 472–74. Both courts held that even though the defendant was not a signatory to the arbitration agreement, the question whether the defendant could compel arbitration was an "arbitrability" question that was reserved for the arbitrator.

Indeed, *Contec* rejected the same argument plaintiffs continue to press: that they cannot "be compelled to arbitrate with a stranger to the [a]greement because the contractual language is effective only between the contracting parties." *Contec*, 398 F.3d at 209.

As Toyota explained in its petition (Pet. 9 n.3), *Contec* and *Apollo* 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." *Contec*, 398 F.3d at 209; *see Apollo*, 886 F.2d at 473 (requiring a "*prima facie* showing" of the "existence of … an agreement" providing for arbitration). But both courts made clear that the *merits* of the arbitrability question must be decided by the arbitrator, pursuant to the parties' agreements. *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."). And plaintiffs have never disputed (even in their opposition before this Court) that Toyota's relationship with its dealers satisfies any such "relational sufficiency" inquiry. Indeed, plaintiffs allege in their complaint that they had "sufficient direct dealings" with Toyota and its dealers to create "privity of contract." Pet. App. 19a, 107a–108a.

Plaintiffs' attempt to downplay the circuit conflict by citing an unpublished Second Circuit decision (*Republic of Iraq* v. *BNP Paribas USA*, 472 F. App'x 11 (2d Cir. 2012)) falls flat. The parties in *Republic of Iraq* did not even delegate "arbitrability" questions

to the arbitrator. *Id.* at 12–13. The case also arose under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, not the Federal Arbitration Act. *Id*. The case thus says nothing about the question presented here—in a case governed by the FAA, whether a valid delegation of arbitrability issues can be enforced by a non-signatory to the agreement.

Plaintiffs do not meaningfully dispute the importance of the question presented or its wide-reaching effects. Non-signatories seek to enforce arbitration agreements in nearly every industry under a wide variety of circumstances, and with exponential frequency given the complicated and intertwining nature of business relationships. *See* Pac. Legal Foundation Br. 8–12; Am. Honda Motor Co. Br. 11–16. The issue is of exceptional and immediate importance to the automobile industry, where manufacturers (which are prohibited by state law from contracting directly with consumers) must rely on equitable estoppel, third-party beneficiary, and agency theories to benefit from the efficiencies of arbitration. *See Arthur Anderson* v. *Carlisle*, 556 U.S. 624, 631 (2009).

The lower courts are divided, and this Court should grant review to ensure uniformity on this important question of federal arbitration law.

II. THIS CASE IS AN IDEAL VEHICLE FOR RESOLVING THE CIRCUIT SPLIT

The question presented was thoroughly addressed by the Ninth Circuit and the district court, and is squarely presented for this Court's review.

Plaintiffs raise two issues that they claim should preclude this Court's review. But one issue (unconscionability) was not ruled on by *either* court below,

and although the other (waiver) was decided by the district court, the Ninth Circuit did not consider it. Accordingly, these issues have "not been decided in the lower courts," are "not presented for [this Court] to decide," and should not preclude review. *Int'l Union of Elec., Radio & Mach. Workers, AFL-CIO, Local 790* v. *Robbins & Myers, Inc.*, 429 U.S. 229, 234 n.3 (1976); *see also Perry* v. *Thomas*, 482 U.S. 483, 492 (1987) ("an alternative ground for denying arbitration does not prevent us from reviewing the ground exclusively relied upon by the courts below").

In any event, Toyota did not waive its right to arbitration. Toyota moved to compel arbitration approximately five months after this Court decided *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740 (2011). Before *Concepcion*, Toyota did not have a right to arbitration, because the purchase agreements contained class waivers. *See*, *e.g.*, *Discover Bank* v. *Superior Court*, 36 Cal. 4th 148, 162–63 (2005); *Laster* v. *AT&T Mobility LLC*, 584 F.3d 849, 854–55 (9th Cir. 2009).

In the five months between *Concepcion* and Toyota's motion to compel, the only case activity was a pleadings challenge, filed shortly after *Concepcion* was decided, pursuant to the trial court's scheduling order. There was no discovery. Pet. App. 38a. Plaintiffs have not shown that they were in any way prejudiced by the short delay, and Toyota therefore cannot be deemed to have waived arbitration. *See Britton* v. *Co-op Banking Grp.*, 916 F.2d 1405, 1413 (9th Cir. 1990) ("spen[ding] time and resources in discovery activity and motions practice over a period of two years 'that would be rendered nugatory by a direction that arbitration now be had'" were insufficient to demonstrate prejudice); *Fisher* v. *A.G. Becker*

Paribas Inc., 791 F.2d 691, 697 (9th Cir. 1986) (similar).

Nor is plaintiffs' arbitration agreement unconscionable. Plaintiffs cite one unpublished California appellate decision (*Vargas* v. *Sai Monrovia B, Inc.*, 2013 WL 2419044 (Cal. Ct. App. June 4, 2013)), but neglect to mention that the case *Vargas* relied upon has been vacated and depublished by the California Supreme Court, *see Sanchez* v. *Valencia Holding Co.*, 201 Cal. App. 4th 74 (2011), *vacated and depublished pending appeal*, 272 P.3d 976 (Cal. 2012).

Toyota did not waive its right to arbitration, and plaintiffs' arbitration agreements are not unconscionable. The question whether Toyota can compel plaintiffs to arbitrate the arbitrability of their claims is cleanly presented for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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