

No. 12-1230

IN THE
Supreme Court of the United States

TOYOTA MOTOR CORPORATION, *ET AL.*,

Petitioners,

v.

MICHAEL CHOI, *ET AL.*, 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

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the court of appeals err in holding that, under the arbitration agreement at issue in this case, a court rather than an arbitrator should decide whether respondents were obligated by California principles of equitable estoppel to arbitrate with petitioner Toyota, which is not a party to or designated beneficiary of the arbitration agreement?

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INTRODUCTION

Respondents are named plaintiffs who filed a class action against petitioner Toyota, asserting claims of unfair and deceptive practices, unfair competition, false advertising, and breach of implied warranty arising out of Toyota's marketing of 2010 Priuses with defects that caused the brakes to malfunction. Although the respondents are not parties to any arbitration agreement with Toyota or, indeed, any contract of any kind with Toyota, Toyota sought to compel them to arbitrate their claims. Toyota invoked arbitration clauses in respondents' purchase agreements with Toyota dealers, which call for arbitration of disputes between respondents and the *dealers*. Toyota contended that respondents were required under principles of equitable estoppel to arbitrate their claims against it as well. The court of appeals, applying general principles of California law concerning when someone can enforce a contract to which he is not a party, held that equitable estoppel principles did not entitle Toyota to invoke the dealers' contractual rights because respondents were not in any way seeking to enforce their contracts with the dealers in their action against Toyota. Pet. App. 15a-24a.

This Court held in *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624 (2009), that the circumstances under which nonparties may enforce an arbitration agreement against a party are determined by "traditional principles' of state law," such as "assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel." *Id.* at 631 (citation omitted). Recognizing that the lower courts' application of those traditional state-law principles to the particular facts of this case

would not present an issue meriting this Court's review, Toyota instead portrays this case as involving a significant "who decides" issue. Toyota contends that under clauses in the arbitration agreements delegating questions concerning their scope to the arbitrator, the lower courts should have compelled respondents to arbitrate with Toyota over the preliminary question of whether they were required to arbitrate with it at all.

Toyota's claim runs smack-dab into the most "fundamental principle" of this Court's arbitration jurisprudence: A party cannot be compelled to arbitrate with someone else over any issue unless he is contractually obligated to do so, as "arbitration is a matter of contract." *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772, 2776 (2010). *Rent-A-Center*, to be sure, holds that when a party *clearly and unmistakably* assents to arbitrate a question of "arbitrability," such as the validity or scope of the arbitration agreement itself, that agreement is enforceable under the Federal Arbitration Act. *Id.* at 2777-78 & n.1. At the same time, however, *Rent-A-Center* emphasizes that if the existence, validity, or enforceability of the agreement to arbitrate arbitrability is itself contested, it is up to the court to determine that issue before enforcing the supposed agreement. *See id.* at 2778. Moreover, the issues that a court must decide before compelling arbitration "always include whether the [arbitration] clause was agreed to." *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 130 S. Ct. 2847, 2856 (2010).

The decision of the lower court here is fully consistent with these principles. Addressing the specific contractual language at issue, the court of appeals found that respondents did not clearly and unmistakably

ably agree to arbitrate the question whether third parties such as Toyota could invoke the arbitration clauses in the purchase contracts with the dealers. That fact-bound issue of contract interpretation does not merit review. Moreover, the court below held that respondents had no contract-based obligation to arbitrate *anything* with Toyota. Before the court could refer any issue to arbitration—even an “arbitrability” issue—it necessarily had to decide that antecedent question, which in turn required it to decide Toyota’s claim that respondents were bound to arbitrate with it under principles of equitable estoppel.

Contrary to Toyota’s assertion, the circuits are not in disagreement about any issue presented by this case. Toyota points to no appellate decision involving the specific language relied on by the Ninth Circuit in finding that there was no unmistakable agreement to delegate the equitable estoppel issue to an arbitrator. Nor, indeed, does Toyota identify *any* appellate decision holding that the question whether a plaintiff must arbitrate with a third party under equitable estoppel principles can be referred to an arbitrator without an antecedent decision by the court that the plaintiff is bound by some principles of contract law to arbitrate with the third party.

Neither of the two appellate decisions emphasized by Toyota involved equitable estoppel at all: They involved enforcement of arbitration agreements by, respectively, an assignee and a corporate successor to the contracts. 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). Moreover, in both those cases, the courts assured themselves that “a sufficient relationship existed” between the party

and the non-signatory “to permit [the non-signatory] to compel arbitration.” *Id.* at 209; *see also Apollo*, 886 F.2d at 473 (requiring a “*prima facie* showing” of an agreement binding the party to arbitrate). Neither decision supports Toyota’s argument that a court must compel arbitration without first finding a sufficient contract-law basis for binding the parties to arbitrate with each other.

STATEMENT

This action arises from a defect in the anti-lock brake system (ABS) of model-year 2010 Priuses manufactured by Toyota, as well as similar vehicles sold under the Lexus brand. The defect made the vehicles prone to increased stopping time and distance, particularly when brakes were applied on rough or uneven surfaces. Respondents allege that Toyota was aware of the defect as early as July 2009 and falsely advertised that the vehicles were safe and reliable while failing to disclose the existence of the defect. *See* Pet. App. 4a. Although Toyota represents that the defect was the subject of “a highly successful recall campaign, in which Toyota updated the braking system software to resolve the issue with the ABS” (Pet. 3), respondents’ allegation that the February 2010 recall did not successfully resolve the issue (*see* Pet. App. 27a) must be taken as true at this stage of the case. Indeed, only days ago, Toyota initiated a further recall of 87,000 of the same model-year 2010 vehicles in the United States to correct braking failures when the brakes were applied on rough or uneven surfaces.¹

¹ Christopher Jensen, *Toyota to Recall 2010 Prius and Lexus Hybrids*, N.Y. Times (June 5, 2013), <http://wheels.blogs.nytimes.com/2013/06/05/toyota-to-recall-2010-prius-and-lexus-hybrids/>.

In February 2010, respondents filed separate class actions against Toyota in the Central District of California and the Northern District of Texas; another 2010 Prius purchaser, Jessica Kramer, who is not a respondent here, also filed a class action in the Central District of California.² The actions asserted state-law claims based on Toyota's marketing of the vehicles through misrepresentations concerning their safety, as well as claims of breach of implied warranties of merchantability, and contended that the named plaintiffs and those similarly situated had suffered economic injury because the value of the vehicles was impaired by the defects. The actions did not name Toyota dealers or seek any relief against them.

The cases were initially transferred to a Multidistrict Litigation (MDL) in the Central District of California concerning claims of unintended acceleration of Toyota Priuses. Because the cases did not involve unintended acceleration, they were transferred again to another judge in the Central District of California for coordination as a separate MDL (together with other cases involving additional model years or vehicles that were not subject to the 2010 recall). The cases involving the recalled 2010 Priuses eventually were consolidated into a single action, in which respondents and Kramer filed an amended complaint in April 2011 asserting claims under California's Consumer Legal Remedies Act, Unfair Competition Law, and False Advertising Law, as well as for breach of the implied warranty of merchantability (or in the alternative

² The procedural history summarized here is set forth in detail in the district court's opinion, at Pet. App. 32a-38a.

breach of contracts of which the plaintiffs were third-party beneficiaries).

These proceedings involved extensive status and case management conferences resulting in stipulated case management and protective orders. In the course of those proceedings, in which Toyota was required to set forth its anticipated defenses, Toyota never contended that the claims were subject to arbitration. Following the filing of the amended complaint, the parties met and conferred concerning possible challenges to the complaint by Toyota in order to eliminate unnecessary motions practice. Again, Toyota said nothing about arbitration.

On June 16, 2011, Toyota moved to dismiss the amended complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim on which relief could be granted, again making no mention of the possibility that any of the claims were subject to arbitration. After full briefing, the motion was denied by the district court in a 16-page published opinion issued on September 12, 2011. *In re Toyota Motor Corp. Hybrid Brake Mktg., Sales, Practices & Prods. Liab. Litig.*, 890 F. Supp. 2d 1210 (C.D. Cal.). The court held that the claims were not mooted by the recall and that the recall did not require dismissal of the class claims; that respondents had standing; that respondents had stated claims under the California statutes as well as under a theory of breach of implied warranty; and that the action was not barred by the doctrine of primary jurisdiction because of the pendency of an investigation by the National Highway Traffic Safety Administration.

Only after its motion to dismiss was denied did Toyota seek to have the claims arbitrated. Toyota

eventually moved to compel arbitration of the claims of the named class representatives other than Kramer. Toyota did not invoke any arbitration agreements that the respondents had entered into with it, as there concededly were no such agreements, but instead invoked provisions in respondents' purchase agreements with Toyota dealers, which called for arbitration of disputes between respondents and the dealers. Toyota did not seek to compel arbitration with Kramer because her purchase agreement had no arbitration clause.

The purchase agreements set forth terms concerning payment for and delivery of the vehicles, disclaimed warranties, and did not form any part of the basis of the claims asserted by respondents. The arbitration clauses, which are selectively quoted in Toyota's Petition (at 3), are more fully quoted in the opinions of the district court (Pet. App. 29a-32a) and court of appeals (Pet. App. 4a-6a). Importantly, the arbitration agreements with the dealers provided that "you" (the buyer) or "we" (the dealer) could initiate arbitration, and that claims between "you and us" were subject to arbitration. Toyota, while conceding that it was not a party to or named in the agreements, argued that respondents nonetheless were bound to arbitrate with it under the doctrine of equitable estoppel, which provides that a party seeking the benefit of a contract in litigation with a third party may be held to other terms of the contract by the third party. Toyota further contended that because the agreements provided that an arbitrator (in a dispute between "you and us") could decide questions of arbitrability and the scope of the arbitration clause, the preliminary question whether respondents were bound by equitable estop-

pel to arbitrate with it also had to be submitted to arbitration.

On December 20, 2011, the district court denied Toyota's motion to compel arbitration. The court held that the equitable estoppel issue was for it, not an arbitrator, to decide, and that respondents were not required by equitable estoppel to arbitrate their claims against Toyota because the claims were not intertwined with the terms of the purchase agreements and did not rely on the content of the purchase agreements for their success. Pet. App. 45a-53a. As an alternative ground for its decision, the court held that Toyota had waived arbitration by taking actions inconsistent with its asserted right to arbitrate, with resulting prejudice to the respondents. The court pointed to Toyota's lengthy delay in asserting its supposed right to arbitrate while participating in nearly two years of litigation; its submission of the merits of the case to the court in its motion to dismiss; and its invocation of the subpoena powers of the court in an effort to obtain third-party discovery concerning respondents. Pet. App. 53a-60a. "In effect," the court summed up, "Toyota hedged its bet on a certain litigation strategy in this Court, tested its chances in having Plaintiffs' claims dismissed, and after having failed, now attempts to change course and try its hand in another forum. The Court disapproves of such forum shopping, as the Court is not a wading pool in which a party may test the waters before a swim." Pet. App. 57a.³

³ Nearly simultaneously, the court denied Toyota's motion to compel arbitration in another case in the MDL, on much the same grounds. *See In re Toyota Motor Corp. Hybrid Brake Mktg.*,
(Footnote continued)

Toyota appealed, and the court of appeals affirmed the district court's equitable estoppel ruling without reaching the issue of waiver. The court rejected Toyota's contention that the arbitration agreements delegated to an arbitrator the question whether a third party could invoke arbitration on equitable estoppel grounds. Pointing out that, under *Rent-A-Center*, a delegation of arbitrability issues to an arbitrator must be clear and unmistakable, the court analyzed the language of the agreements and found no clear and unmistakable delegation of the question whether a third party could invoke arbitration under the agreements:

While Plaintiffs may have agreed to arbitrate arbitrability in a dispute with the Dealerships, the terms of the arbitration clauses are expressly limited to Plaintiffs and the Dealerships. For example, Scholten's arbitration clause states that "[e]ither you or we may choose to have any dispute between you and us decided by arbitration." The language of the contracts thus evidences Plaintiffs' intent to arbitrate arbitrability with the Dealerships and no one else. The Dealerships are not a party to this action. Given the absence of clear and unmistakable evidence that Plaintiffs agreed to arbitrate arbitrability with non-signatories, the district court had the authority

Sales, Practices & Prods. Liab. Litig., 828 F. Supp. 2d 1150 (C.D. Cal. 2011). Toyota's statement of opinions below misidentifies that reported opinion (from which Toyota did not appeal) as the opinion in this case, *see* Pet. 1, but the correct, unreported opinion is reproduced in Toyota's appendix. Pet. App. 26a-60a.

to decide whether the instant dispute is arbitrable.

Pet. App. 11a (footnote and citation omitted).

Turning to the merits of the question of equitable estoppel, the court began by noting that the parties did not dispute that, under *Arthur Andersen*, California law governed the question. Pet App. 13a & n.4. The court explained that, under California law, equitable estoppel required a showing that (1) the signatory either relied on the contract in asserting claims against the non-signatory or asserted claims intertwined with the contract, or (2) the signatory alleged concerted misconduct by the non-signatory and a signatory to the contract, and the alleged misconduct was founded in or intimately connected with the contract. Pet. App. 13a-14a.

Applying these standards, the court found that Toyota had failed to demonstrate that respondents were equitably estopped from declining to arbitrate. Analyzing each of respondents' claims, the court determined that respondents did not in any way "rely on the terms of the written agreement in asserting ... claims' against the nonsignatory." Pet. App. 15a (citations omitted). Because respondents' claims arose from Toyota's marketing practices and its implied warranties (which did not require privity of contract), and did not depend in any way on the terms of the purchase contracts with the dealers, the court held that the claims were not intertwined with or intimately connected with the purchase agreements. Pet. App. 17a-24a. The court explained that although the claims did rely upon the existence of a vehicle purchase *transaction* (or, for some class members, a lease transaction), they were completely unrelated to the

purchase *agreements*. Pet. App. 17a-18a. The court further explained that although the relief sought by respondents included revocation of their purchases of the vehicles, the *claims* that supported this requested relief did not rely in any way on the terms or existence of the purchase agreements. Pet. App. 19a-20a. Nor did respondents allege concerted misconduct between Toyota and the dealers that was connected with the dealers' obligations under the purchase agreements. Pet. App. 21a-23a.

The court summed up its holding on estoppel by observing that this case is not one where the respondents seek to invoke the benefits of an agreement while avoiding its burdens. "Thus, the inequities that the doctrine of equitable estoppel is designed to address are not present." Pet. App. 24a. Having rejected Toyota's assertion that it had a right to invoke the arbitration clauses in the purchase agreements, the court declined to consider the district court's waiver ruling.

REASONS FOR DENYING THE WRIT

I. The Question of Whether the Courts Below Should Have Permitted an Arbitrator to Decide If Respondents Were Obligated to Arbitrate with Toyota Does Not Merit Review.

A. The Court of Appeals Correctly Applied Settled Principles to the Particular Facts of This Case.

The bedrock principle animating this Court's decisions construing the Federal Arbitration Act (FAA) is that "arbitration is a matter of contract." *Rent-A-Center*, 130 S. Ct. at 2776. Only if a person is obligated to arbitrate under general principles of state con-

tract law can he or she be compelled to arbitrate under the FAA: The FAA “does not require parties to arbitrate when they have not agreed to do so.” *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989); *accord Granite Rock*, 130 S. Ct. at 2859.

Specifically, section 2 of the FAA provides that agreements to arbitrate are enforceable except as provided by generally applicable principles of state contract law. 9 U.S.C. § 2; *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745-46 (2011); *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). Sections 3 and 4 of the FAA, in turn, provide that courts may stay litigation and compel arbitration when a party is contractually bound to arbitrate under an agreement made enforceable by section 2. 9 U.S.C. §§ 3 & 4; *Arthur Andersen*, 556 U.S. at 630. “[S]tate law,’ therefore, is applicable to determine which contracts are binding under § 2 and enforceable under § 3 ‘if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally.’” *Id.* at 630-31.

Thus, when a court is asked to compel a plaintiff who has filed a lawsuit in court to arbitrate instead, the court must at the outset apply state contract-law principles to determine whether a contractual obligation to arbitrate exists. As this Court explained in *Arthur Andersen*, when the litigant seeking to compel arbitration is not itself a party to the claimed arbitration agreement it seeks to enforce, the court’s determination will turn on the application of “‘traditional principles’ of state law” such as “assumption, piercing the corporate veil, alter ego, incorporation by refer-

ence, third-party beneficiary theories, waiver and estoppel.” *Id.* at 631 (citation omitted).

In this case, the lower courts undertook precisely the task called for by this Court’s precedents. Applying California contract law principles, whose applicability Toyota does not dispute, both the district court and the court of appeals held that respondents are not bound by the doctrine of equitable estoppel to arbitrate any issue with Toyota, which is concededly not a party to any of the arbitration agreements it invokes. Toyota does not claim that the court of appeals’ application of California law merits review, nor does it even argue that the court of appeals’ decision on the merits of the equitable estoppel issue was erroneous.

Toyota instead asserts that, under this Court’s decision in *Rent-A-Center*, the court of appeals should have held that the arbitration agreements at issue contained delegation clauses that provided that issues of arbitrability—including, according to Toyota, the question whether a non-party could invoke the agreements—must be decided by an arbitrator rather than by the court. *Rent-A-Center*, however, emphasized that an agreement to arbitrate arbitrability must, as this Court previously held in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944, (1995), be “clear and unmistakable.” *Rent-A-Center*, 130 S. Ct. at 2777, n.1. Here, the court of appeals applied this requirement, and held that the agreements at issue here did not clearly and unmistakably delegate the question whether a non-party could invoke the arbitration agreement to the arbitrator, because the relevant provisions applied only in an arbitration between “you” (the customer) and “us” (the dealer). *See* Pet. App. 10a-12a. Not only is this holding correct, but, even if

its correctness could reasonably be questioned, the fact-bound question whether the court of appeals correctly applied the “clear and unmistakable” standard to the specific language of these agreements does not merit this Court’s review.

More fundamentally, *Rent-A-Center* also emphasizes that even where there is a purported agreement to arbitrate arbitrability, a court may not enforce *that* claimed agreement without finding that it exists and is valid and enforceable. *See* 131 S. Ct. at 2778. In other words, before enforcing any arbitration agreement—even an agreement only to arbitrate arbitrability—a court must determine that the parties are bound by an agreement to arbitrate *something* with each other. After all, as Judge Easterbrook has explained, “as arbitration depends on a valid contract an argument that the contract does not exist can’t logically be resolved by the arbitrator.” *Sphere Drake Ins. Ltd. v. All Am. Ins. Co.*, 256 F.3d 587, 591 (7th Cir. 2001). Thus, as this Court put it in *Granite Rock*, issues a court must decide before compelling arbitration “always include” whether an applicable contractual obligation to arbitrate exists at all. 130 S. Ct. at 2856.⁴

⁴ Citing *Sphere Drake*, this Court noted in *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 n.1 (2006), that issues about whether a contract to arbitrate ever existed are “different” from questions that go merely to its validity. With respect to the latter type of issue, an arbitration clause is severable from the remainder of the contract, and thus the clause’s *validity* may be challenged in court only on grounds specific to the arbitration clause. *See id.* at 445-46. But where the argument is that there is *no agreement* between the parties to arbitrate, a court must determine the issue even if the argument that the agreement does not exist (because, for instance, of lack of assent) is common to the arbitration agreement and the agreement as a

(Footnote continued)

Here, the issue decided by the court of appeals is of the type reserved to the courts by the Federal Arbitration Act as construed by this Court: whether respondents are subject to an agreement to arbitrate *anything* with Toyota. Toyota’s only argument that respondents were required under principles of contract law to arbitrate any issue with it—including “arbitrability”—was equitable estoppel. Thus, before compelling respondents to arbitrate even the question of arbitrability, the court of appeals necessarily first had to resolve whether respondents were bound by principles of equitable estoppel to arbitrate with Toyota. Under this Court’s precedents, the court’s holding that respondents have no contractually based obligation to arbitrate *anything* in this case with Toyota forecloses any argument that any question, even one such as equitable estoppel that may be denominated a question of “arbitrability,” should be referred to arbitration.

B. There Is No Intercircuit Conflict.

Toyota’s contention that this case implicates a conflict among the circuits is unfounded. Toyota cites no appellate decisions that addressed comparable contract language—providing that an arbitrator may consider the scope of an arbitration clause only in an arbitration between “you” and “us”—and found an unmistakable authorization for an arbitrator to determine whether a non-party may invoke arbitration. Nor does Toyota cite any appellate decision that allows an arbitrator to consider in the first instance whether a party to an agreement is bound to arbitrate

whole. *See Janiga v. Questar Capital Corp.*, 615 F.3d 735, 741-42 (7th Cir. 2010) (citing *Granite Rock*).

with a non-party under principles of equitable estoppel.

Instead, Toyota's claimed circuit split is based on two decisions that involve wholly different circumstances: *Contec Corp. v. Remote Solution Co.*, 398 F.3d 205 (2d Cir. 2005), and *Apollo Computer, Inc. v. Berg*, 886 F.2d 469 (1st Cir. 1989). Neither case involved an effort by a complete stranger to an arbitration agreement to force a party to the agreement to arbitrate, and neither delegated decision of an equitable estoppel claim to an arbitrator. In *Contec*, the party seeking arbitration was the *corporate successor* to the party that signed the contract, and in *Apollo* the non-signatory was an *assignee* of rights under the contract as a result of bankruptcy proceedings.

Moreover, as Toyota half-heartedly acknowledges (Pet. 9 n.3), in neither case did the courts hold that the arbitrator could consider whether the dispute was within the scope of the arbitration agreement in the first instance without a *judicial* determination that the party invoking arbitration was entitled to claim rights under the agreement. Rather, the First Circuit in *Apollo* compelled arbitration only after finding that the party seeking arbitration had made a "*prima facie* showing" that it was entitled to invoke the agreement. 886 F.2d at 473.

The Second Circuit in *Contec* likewise emphasized that it "must first determine whether the parties have a sufficient relationship to each other and to the rights created under the agreement" before it could compel arbitration. 398 F.3d at 209.⁵ Indeed, the court

⁵ By "the parties," the Second Circuit was referring to the party seeking to compel arbitration (i.e., the non-signatory) and
(Footnote continued)

noted that the required showing of “relational sufficiency” was similar to the showing needed to invoke equitable estoppel. *Id.* Thus, before compelling arbitration, the court undertook an inquiry similar in scope to the equitable estoppel inquiry of the Ninth Circuit in this case. Specifically, the Second Circuit itself determined that “there is or was an undisputed relationship between each corporate form” of the party invoking arbitration and the adverse party, and, critically, that “the parties ... continued to conduct themselves as subject to the 1999 Agreement regardless of change of corporate form.” *Id.*

Moreover, the court in *Contec* explicitly acknowledged the point 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.” *Id.* A subsequent panel of the Second Circuit, in a decision not mentioned by Toyota, has elaborated that “evidence of intent to have an arbitrator determine its jurisdiction with regard to disputes ‘referred by either Party’ ... does not clearly and unmistakably demonstrate their intent to have the arbitrator determine its jurisdiction with respect to any dispute raised by a *non-party*.” *Republic of Iraq v. BNP Paribas USA*, 472 Fed. Appx. 11, 13 (2d Cir. 2012). The court in *Republic of Iraq* went on to hold, in reasoning strikingly similar to that of the court of appeals below, that “[w]here, as here, the arbitration

the adverse party, not the parties to the original arbitration agreement. Thus, the “relationship” the court analyzed was that between Contec Corporation, the successor corporation that sought arbitration, and Remote Solution, the party resisting the motion to compel. *Id.*

clause does not clearly vest any right to invoke arbitration in a non-party such as Iraq, *a fortiori*, it does not afford Iraq the right to have arbitrators rather than a court determine the arbitrability of its dispute.” *Id.* The Ninth Circuit’s decision in this case that the arbitration agreements do not unmistakably delegate authority to an arbitrator to determine the arbitrability of disputes with third parties is entirely consistent with the Second Circuit’s interpretation of *Contec* (its own precedent) in *Republic of Iraq*.

The decision in *Republic of Iraq* also emphasizes that the outcome in *Contec* turned critically on two circumstances: “(1) the ‘undisputed relationship between each corporate form of Contec and Remote Solution’ and (2) the parties[’] continued conduct of themselves as subject to the agreement regardless of change in corporate form.” *Id.* The court pointedly observed that “[i]n the absence of such circumstances here, *Contec Corp.* hardly compels the conclusion” that a party to an arbitration agreement must arbitrate arbitrability with a non-party. *Id.* Just as in *Republic of Iraq*, the circumstances that were decisive in *Contec* are absent here. Thus, any assertion that the outcome below cannot be squared with the way the Second Circuit would resolve a similar case is unfounded.

Even if there were some basis for Toyota’s reliance on *Apollo* and *Contec*, the decisions would hardly suggest a current division among the circuits that requires this Court’s intervention. *Apollo* was decided nearly 25 years ago, long before this Court issued most of the opinions that bear on the proper outcome here. *Contec*, though more recent, predated the Court’s most relevant decisions, *Buckeye*, *Arthur An-*

dersen, *Rent-A-Center*, and *Granite Rock*. And, as noted above, a much more recent Second Circuit decision suggests that that court takes a substantially narrower view of *Contec* than that asserted by Toyota.

Toyota cites a handful of district court decisions that it claims have resolved the issue its way, but even if a split in district court authority merited resolution by this Court, those decisions offer little or no support for Toyota's position.⁶ By contrast, several well-

⁶ Toyota misleadingly cites *Jones v. Regions Bank*, 719 F. Supp. 2d 711, 717 (S.D. Miss. 2010), by inserting the word "estoppel" in brackets in the midst of the "plausible arguments" that the court left for resolution by the arbitrator. But equitable estoppel was not in fact among the "plausible arguments" referred for decision by the arbitrator in *Jones*. The court itself decided that the non-signatories in that case could invoke an arbitration agreement both because it expressly covered claims against them as contractors of a party and because the plaintiff was seeking to enforce the contract containing the arbitration clause against them and so was bound to arbitrate under Mississippi principles of equitable estoppel. *Id.* at 717-18.

Likewise, in *Lismore v. Societe Generale Energy Corp.*, 2012 WL 3577833 (S.D.N.Y. Aug. 17, 2012), the district court, while citing *Contec*, went on to conduct its own full-blown analysis of equitable estoppel before compelling arbitration. *See id.* at *6-*8. In *Washington v. William Morris Endeavor Entertainment, LLC*, 2011 WL 3251504, *8-*9 (S.D.N.Y. July 20, 2011), the court independently determined that non-signatories could enforce an agreement to arbitrate arbitrability issues because the agreement explicitly covered claims against them as employees of a party. *Laguna v. Coverall North America, Inc.*, 2011 WL 3176469 (S.D. Cal. July 26 2011), is not even a decision compelling arbitration, but merely a magistrate judge's order resolving discovery disputes, which expresses certain tentative views about arbitrability but notes that the district judge will resolve that issue. *See id.* at *6-*7. Finally, the magistrate judge's unreported decision in *Cole v. John Wiley & Sons, Inc.*, 2012 WL 3133520

(Footnote continued)

reasoned district court decisions distinguish *Contec* and *Apollo* and reach the same result as the courts below. See, e.g., *Holzer v. Mondadori*, 2013 WL 1104269 (S.D.N.Y. March 14, 2013); *QPro Inc. v. RTD Quality Services USA, Inc.*, 761 F. Supp. 2d 492 (S.D. Tex. 2011) (Rosenthal, J.); *Douglas v. Trustmark Nat'l Bank*, 2012 WL 5400040 (S.D. Miss. Nov. 5, 2012); *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prods. Liab. Litig.*, 838 F. Supp. 2d 967 (C.D. Cal. 2012). Unless and until one of these cases, or another like them, produces an appellate decision in conflict with that of the court below, the issue should be allowed to continue to develop in the lower courts, especially given the consistency of these results with this Court's precedents.

By Toyota's own account, the issue it asks this Court to address is the subject of only two federal appellate decisions aside from the decision below, and both are distinguishable and dated. Such circumstances hardly suggest the sort of issue that requires intervention by this Court. If, as Toyota argues, the issue is frequently recurring (notwithstanding the paucity of appellate decisions addressing it to date), and if a court of appeals can be persuaded that the arguments Toyota makes here are sustainable in the

(S.D.N.Y. Aug. 1, 2012), is distinguishable: In that case, there was an arbitrable dispute between parties to the agreement, and hence a clear basis for compelling the plaintiff to participate in an arbitration, the scope of which could be determined by the arbitrator to include a non-signatory as well. The magistrate judge also noted that the facts in any event would support equitable estoppel and that the plaintiff did not argue that the non-signatory's right to compel arbitration was any different from that of the signatory. *Id.* at *14.

face of *Buckeye*, *Arthur Andersen*, *Rent-A-Center* and *Granite Rock*, then a conflict may arise in the future. But until it does, there is no reason for this Court to review the Ninth Circuit's application of settled principles.

II. This Court Should Not Consider Toyota's Equitable Estoppel Arguments Because Toyota Waived Arbitration by Submitting the Merits of This Action to the Court.

Even if the issue proffered by Toyota otherwise might merit review, this case would not be the appropriate one in which to resolve it because there is an equally powerful alternative reason for denying Toyota's request for arbitration in this case that the district court found but the court of appeals did not reach: Toyota waived any right it might otherwise have had to arbitrate this case by delaying its attempt to compel arbitration and itself requesting that the court resolve the case on the merits.

As the district court painstakingly recounted, Pet. App. 32a-38a, 56a-57a, Toyota did not move to compel arbitration in this case until more than 19 months had passed since it was first filed in February 2010. During that time, extensive proceedings occupying substantial amounts of time of the parties and the court had been occupied in the management and coordination of the cases, without any indication by Toyota that it intended to seek arbitration.

Toyota's after-the-fact explanation for this delay was that under the California Supreme Court's decision in *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005), the class-action bans in the dealers' arbitration agreements would have rendered them unenforceable and made any effort to compel arbitra-

tion “futile.” But as the district court pointed out, *Discover Bank*’s applicability to this case was hardly clear given that the claims did not involve disputes over “small amounts of money.” Pet. App. 55a n.17. Moreover, Toyota did not seek to compel arbitration after this Court’s grant of certiorari in *AT&T Mobility LLC v. Concepcion*, 130 S. Ct. 3322 (2010), indicated that the vitality of *Discover Bank* was threatened, nor even when this Court issued its opinion in *Concepcion* overruling *Discover Bank* on April 27, 2011. See 131 S. Ct. at 1753.

Instead, almost two months after this Court issued its decision in *Concepcion*, Toyota asked the district court to *decide the case on the merits* by filing a motion to dismiss respondents’ claims under Federal Rule of Civil Procedure 12(b)(6) for failure to state claim on which relief may be granted. Only after the district court denied that motion did Toyota (after another month had passed and Toyota in the meantime had invoked the district court’s subpoena power to seek third party discovery concerning respondents’ claims) seek to compel arbitration.

As the district court found, such gamesmanship reflects exactly the circumstances in which courts regularly find that a litigant has waived any right it might otherwise have to compel arbitration. See, e.g., *Hoffman Constr. Co. of Or. v. Active Erectors & Installers, Inc.*, 969 F.2d 796, 798 (9th Cir. 1992); *Engalla v. Permanente Med. Grp., Inc.*, 938 P.3d 903, 923 (Cal. 1997) (stating that waiver may be found when “the party seeking to compel arbitration has previously taken steps inconsistent with an intent to invoke arbitration” or when it “has unreasonably delayed in undertaking the procedure”). Indeed, seeking a judicial

resolution of claims on the merits and turning to arbitration only when that attempt is unsuccessful, as Toyota did here, is generally viewed as the clearest example of conduct amounting to a waiver of the right to arbitrate. *See, e.g., Lewis v. Fletcher Jones Motor Cars, Inc.*, 140 Cal. Rptr. 3d 206, 217-20 (Cal. App. 2012); *Adolph v. Coastal Auto Sales, Inc.*, 110 Cal. Rptr. 3d 104, 110-11 (Cal. App. 2010).

Thus, even were this Court to conclude (contrary to the teachings of its own precedents) that a court could have sent this case to arbitration without first applying equitable estoppel principles to decide whether respondents were subject to an agreement to arbitrate *anything* with Toyota, the Court would still either have to consider waiver as an alternative ground for affirmance or remand for consideration of waiver by the court of appeals. In the former case, the Court might not even reach the question Toyota claims merits review, and in either case, the most likely result would be that Toyota's request to compel arbitration would be denied. Should the Court be inclined to consider the issue proffered by Toyota at some point, it should await a case where the issue will actually be outcome-determinative.

Moreover, resolving the who-decides-equitable-estoppel issue in Toyota's favor would also require a remand for consideration of whether the arbitration agreements in this case are unconscionable. In opposing Toyota's motion to compel arbitration, respondents argued that the agreements are unconscionable under California law because they are adhesion contracts and their provisions concerning what claims must be arbitrated and what claims need not be, as well as when and under what conditions an arbitra-

tor's decision may be appealed, are unreasonably one-sided in favor of Toyota dealers. Given their holdings that Toyota could not compel arbitration on other grounds, the lower courts did not have to consider this issue. But because the arbitration clauses do not appear to purport to delegate to an arbitrator issues of their own *validity*, as opposed to their interpretation and scope (*see, e.g.*, Pet. App. 31a), a court would be required to address the unconscionability issue before compelling arbitration. And California courts have held dealership arbitration agreements with indistinguishable terms (in particular, terms excusing dealers from arbitrating repossession claims while requiring buyers to arbitrate all their claims, as well as appeal provisions that unduly favor dealers) to be unconscionable and hence unenforceable. *See, e.g., Vargas v. Sai Monrovia B, Inc.*, 2013 WL 2419044, __ Cal. Rptr. 3d __ (Cal. App. June 4, 2013).

III. Toyota's Policy Arguments Are Meritless.

Toyota argues that the court of appeals' opinion allows litigants to evade this Court's decision in *Concepcion*, which held that a class-action prohibition in an arbitration agreement was enforceable. The issue presented here, however, has nothing to do with *Concepcion*. *Concepcion* does not express some free-floating preference for arbitration over class actions. It rests instead on the premise that "[t]he 'principal purpose' of the FAA is to 'ensure[e] that private arbitration agreements are enforced according to their terms.'" *Concepcion*, 131 S. Ct. at 1748. As the Court stressed in *Concepcion*, one of the corollaries of this principle is that an arbitration agreement may "limit *with whom* a party will arbitrate its disputes." *Id.* at 1749.

Thus, when plaintiffs pursue a class action against a party with whom they have no contractual obligation to arbitrate, they are not making an “end run around this Court’s decision in *Concepcion*.” Pet. 15. Rather, in those circumstances, *Concepcion*’s reasoning has no applicability. Only when there is a basis for binding a party to arbitrate with another under an agreement—an issue that this Court has emphasized is determined by state law, see *Arthur Andersen*, 556 U.S. at 630-31—are *Concepcion*’s concerns implicated. And nothing in *Concepcion* suggests that a court can refer an issue to arbitration without finding that a party who wishes to litigate it instead is subject to a contract-based obligation to arbitrate with the opposing party.

Moreover, even if Toyota were correct that the equitable estoppel issue is subject to determination by an arbitrator, that result would not necessarily make Toyota’s class-action ban enforceable in this case. Rather, if an arbitrator correctly applied California principles of equitable estoppel, as did the courts below, the arbitrator, too, would conclude that the claims here are not subject to arbitration, and hence that respondents could proceed with a judicial class action. In addition, Toyota does not contend that all of the class representatives or class members in this case are subject to arbitration agreements, as some of them were not parties to purchase agreements that required arbitration with the dealers from whom they bought their Priuses. Regardless of the outcome of this case, those plaintiffs will continue to pursue class relief. Thus, contrary to Toyota’s suggestion, the determination of the issue presented by this case—who decides the question of equitable estoppel—will not

determine whether Toyota must defend a judicial class action.

Toyota's complaint that the decision below is somehow unfair because Toyota does not have the opportunity to enter into contracts with vehicle purchasers into which it can insert arbitration agreements (Pet. 16) is beside the point. Of course, many tort claims involve defendants with whom the plaintiffs have no contractual relationship and hence no arbitration agreements. Even if it were the case that arbitration of such cases would be speedier and more efficient—a dubious proposition here given that arbitration would proceed on an individual basis while litigation allows the coordination of separately filed actions and the possibility of class proceedings—nothing in the FAA authorizes courts to compel arbitration based on a preference for avoiding “the costliness and delays of litigation,” Pet 14 (quoting *Concepcion*, 131 S. Ct. at 1749), in the absence of a “written agreement in ... a contract evidencing a transaction involving commerce” that satisfies general state-law standards of enforceability. 9 U.S.C. § 2. Toyota's implicit suggestion that a contractual obligation to arbitrate is somehow an outmoded and dispensable obstacle to arbitration is an objection to the fundamental underpinnings of the FAA itself.

Finally, Toyota's suggestion that the court of appeals has erected some insuperable obstacle to arbitration by non-signatories that will prevent arbitration in a wide variety of cases where arbitration is sought on such theories as equitable estoppel, third-party beneficiary, incorporation in subcontracts, assumption, assignment, corporate succession, and corporate veil-piercing is false. In the instances Toyota

cites (Pet. 15-16), *courts* made the determination that these general principles of law allowed enforcement of a contract by a non-signatory. Nothing in the decision below calls into question the continued ability of courts to make such determinations. The decision in this case only illustrates that in some cases, a non-party will have no valid state-law basis for enforcing an agreement to arbitrate any issue (including arbitrability). In such circumstances, the FAA does not authorize a court to compel arbitration.

CONCLUSION

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

	Respectfully submitted,
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