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

BRIEF OF AMERICAN HONDA MOTOR COMPANY, INC., AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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BRIEF OF AMERICAN HONDA MOTOR COMPANY, INC., SUPPORTING PETITIONERS

INTEREST OF THE *AMICUS CURIAE*

American Honda Motor Co., Inc. (AHM), is a nationwide automobile distributor with headquarters in California, and is a wholly owned distribution subsidiary of manufacturer Honda Motor Co., Ltd.[1] A network of retail dealers sells and leases Honda automobiles to consumers under contracts that contain arbitration agreements. Those arbitration agreements delegate to the arbitrator gateway questions of arbitrability.

In their retail installment-sales contracts, AHM's dealers elect to resolve consumers' disputes through arbitration rather than in court because of the advantages that arbitration offers in lower costs and greater speed and efficiency. AHM is not a signatory to these contracts between dealers and consumers. Accordingly, AHM is directly affected by, and has a strong interest in, the law governing whether a nonsignatory to an arbitration agreement can enforce the agreement according to all its terms—including any delegation provision. In particular, AHM has a significant interest in the sound, summary, and nationally uniform resolution of gateway questions of arbitrability.

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[1] Pursuant to this Court's Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person or entity other than *amicus* or its counsel made a monetary contribution to its preparation or submission. Pursuant to this Court's Rule 37.2(a), counsel of record for both parties received timely notice of the intent to file this brief. The parties' consents to the filing of this *amicus* brief have been filed with the Clerk's office.

INTRODUCTION AND SUMMARY OF ARGUMENT

Parties to arbitration agreements often agree to arbitrate not only their disputes on the merits, but also gateway questions of arbitrability. See *Rent-A-Center, West, Inc.* v. *Jackson*, 130 S. Ct. 2772 (2010). These gateway questions include "whether the parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy." *Green Tree Financial Corp.* v. *Bazzle*, 539 U.S. 444, 452 (2003) (plurality opinion). The Ninth Circuit in this case held that a nonsignatory could not enforce a provision delegating gateway questions to the arbitrator. Although petitioners (who wished to arbitrate) were not signatories to the delegation provision, respondents were. Thus, petitioners merely seek to hold respondents to their agreements to arbitrate disputes concerning their vehicles, and are not trying to compel arbitration with a party who never agreed to arbitrate.

The decision below is of exceptional importance to the automobile industry. Vehicle purchase and lease agreements often include arbitration provisions. According to estimates and surveys, more than "70 percent of retail installment sales contracts include arbitration provisions," and nearly three-fifths of dealers "ask consumers to agree to arbitration as a standard practice." Amy Wilson, *Arbitration angst*, Automotive News (Mar. 11, 2013), *available at* http://tinyurl.com/buymtdl. Many of these arbitration agreements delegate gateway questions of arbitrability to the arbitrator.

Because of state automobile-dealer laws, however, manufacturers and distributors cannot lawfully

sell vehicles directly to consumers. As a consequence, auto manufacturers and distributors are rarely if ever parties to the purchase agreements or in direct privity with the consumers. To obtain the benefits of arbitration to which they are entitled, therefore, manufacturers and distributors rely on agency, third-party-beneficiary status, equitable estoppel, or similar theories under traditional principles of state contract law. Cf. *Arthur Andersen LLP* v. *Carlisle*, 556 U.S. 624 (2009).

The court of appeals here refused to enforce a clear and unmistakable delegation provision to allow an automobile manufacturer to arbitrate questions of arbitrability in a dispute with a consumer—solely because the manufacturer was not a direct party to the agreement. As a result, the decision below risks categorically precluding a broad and significant segment of the automobile industry from arbitrating disputes about the scope and enforceability of one of the standard arbitration agreements used in the industry nationwide. The Ninth Circuit's rule therefore discriminates against an entire class of disputes about arbitrability, solely because the party invoking arbitration had not signed the agreement—even though the only party who would be compelled to arbitrate clearly agreed to do so, subject to an arbitrator's decision as to the agreement's scope.

The Ninth Circuit's rule thus has two pernicious consequences.

First, even when the signatory has agreed to delegate gateway questions to the arbitrator, both the signatory and the nonsignatory must undertake costly and lengthy litigation over those questions, forfeiting the very efficiencies of arbitration that the Federal Arbitration Act was intended to secure.

Second, plaintiffs in the Ninth Circuit have a new tool for avoiding their contractual obligations to arbitrate their disputes by taking claims that could be resolved in individual arbitration with dealers, and repackaging them as class actions against the manufacturer or distributor. Under the ruling here, plaintiffs can decide whether to arbitrate solely by choosing whom to sue, and where.

In contrast with the controlling law in the First and Second Circuits, the Ninth Circuit's decision in this case reflects the kind of judicial hostility to arbitration that the FAA was intended to preclude. And its departure from other circuits' precedent deleteriously affects the relationships between automotive manufacturers and dealers. The Court should grant certiorari, therefore, to resolve this recurring conflict over an issue of critical importance to the automotive industry.

ARGUMENT

A. The Ninth Circuit Has Unduly Restricted Arbitrators' Ability To Resolve Delegated Questions Of The Scope And Validity Of An Arbitration Agreement.

The "primary purpose" of the FAA is to "ensur[e] that private agreements to arbitrate are enforced according to their terms." *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Jr. University*, 489 U.S. 468, 479 (1989); see also *Rent-A-Center*, 130 S. Ct. at 2776; *Mastrobuono* v. *Shearson Lehman Hutton Inc.*, 514 U.S. 52, 57–58 (1995). In providing that arbitration agreements are "valid, irrevocable, and enforceable" (9 U.S.C. § 2), Congress sought to ensure that courts "place arbitration agreements on an equal footing with other

contracts." *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1745 (2011). The decision below limits the scope of arbitration agreements in a way that contravenes this overriding command of the FAA. The question in this case is whether the Ninth Circuit can lawfully restrict the enforcement of some terms in arbitration provisions in a way that systematically disfavors arbitration.

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. The court therefore must order arbitration so long as the arbitration agreement is valid and the parties' dispute falls within the agreement's scope. See *Granite Rock Co.* v. *Int'l Brotherhood of Teamsters*, 130 S. Ct. 2847, 2856 (2010). And the FAA recognizes that a nonsignatory to an otherwise-valid arbitration agreement may enforce the agreement's provisions through "traditional principles of state law," such as "assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver, and estoppel." *Carlisle*, 556 U.S. at 631 (internal quotation marks omitted).

The FAA also affords parties broad leeway to allocate issues to an arbitrator. This Court has held that although gateway arbitrability questions are presumptively for the court to decide, they may be entrusted to the arbitrator if the parties "clearly and unmistakably provide" for that assignment. *AT&T Technologies, Inc.* v. *Communications Workers of Am.*, 475 U.S. 643, 649 (1986); see also *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002). That is, so long as the signatories to an arbitration agreement express their agreement in clear and

unmistakable terms, they can delegate to the arbitrator gateway questions of "enforceability or applicability" (*Granite Rock*, 130 S. Ct. at 2858).

Parties to an arbitration agreement very often choose to exercise their right to arbitrate gateway questions about the validity and scope of the agreement in order to simplify and expedite the dispute-resolution process. They can and do reasonably conclude that litigating in court over the validity and scope of their agreement would squander (or at least dissipate) the primary benefits of arbitration: "efficient, streamlined procedures tailored to the type of dispute." *Concepcion*, 131 S. Ct. at 1749. Indeed, when the parties have agreed to arbitrate their disputes on the merits, simultaneously delegating gateway questions to the arbitrator reduces the marginal costs of determining, for example, the scope of an otherwise valid arbitration agreement; by contrast, "[a]llocating th[at] determination to a court, another decision maker, requires an additional transaction and an extra cost." Steven Walt, *Decision By Division: The Contractarian Structure of Commercial Arbitration*, 51 Rutgers L. Rev. 369, 410 (1999). Delegation clauses appear in the common form of arbitration clause used in automobile sales and financing. They also appear frequently in contracts used in other industries.[2]

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[2] One recent study examining the arbitration agreements adopted by credit-card issuers after *Rent-A-Center* found that delegation provisions are common, though not ubiquitous. The study found that just over half (51.3%) of issuers had adopted delegation provisions; measured by volume of "credit card loans outstanding in the[ir] sample," a similar proportion (52.6%) of loans "were subject to a delegation clause." Peter B. Rutledge &

Because "arbitration is a matter of contract" (*Rent-A-Center*, 130 S. Ct. at 2777-78), when parties agree to delegate gateway questions to an arbitrator rather than a court, the FAA requires courts to give full effect to the delegation. See, *e.g.*, *id.* at 2778-79 (enforcing provision delegating to arbitrator the "authority to resolve any dispute relating to the * * * enforceability * * * of this Agreement," and compelling arbitration of plaintiff's unconscionability defense); see also *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 943 (1995). "An agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other." *Rent-A-Center*, 130 S. Ct. at 2777-78.[3]

Christopher R. Drahozal, *Contract and Choice*, BYU L. Rev. (forthcoming) (manuscript at 24), *available at* http://tinyurl.com/c3mk33w.

[3] Despite this Court's insistence that delegation clauses be enforced just as other arbitration agreements are, the lower courts treat delegation issues in divergent ways. And notably, courts resolve these issues in ways that may mask judicial hostility to arbitration. Some courts determine that the delegation clause is unenforceable but compel arbitration of the underlying dispute. See, *e.g.*, *Scott* v. *Prudential Securities, Inc.*, 141 F.3d 1007, 1012-14 (11th Cir. 1998). Others purport to determine that the delegation clause is enforceable, but nonetheless decide the gateway questions of arbitrability in the first instance. See, *e.g.*, *Reliance Nat'l Ins. Co.* v. *Seismic Risk Ins. Servs., Inc.*, 962 F. Supp. 385, 389-90 (S.D.N.Y. 1997).

The Ninth Circuit's decision in this case falls within yet another category, in which a court that is hostile to arbitration may conclude that the delegation clause is unenforceable, assign to itself the determination as to arbitrability, and (giving effect to that hostility) determine that the underlying arbitration agreement is also unenforceable. This last category

Because a delegation clause is just a special kind of arbitration agreement, therefore, courts must not act out of suspicion about the arbitrator's competence to handle the question, and decline to refer to the arbitrator those disputes that are subject to the delegation clause. As this Court has explained, "arbitral tribunals are readily capable of handling the factual and legal complexities of" even complicated and technical federal claims, "notwithstanding the absence of judicial instruction and supervision," and "there is no reason to assume at the outset that arbitrators will not follow the law." *Shearson/American Express, Inc.* v. *McMahon*, 482 U.S. 220, 232 (1987).

Moreover, it would be improper for a court to decline to enforce a delegation provision because of general concerns about an arbitrator's ability to impartially decide gateway questions of arbitrability, which go to the arbitrator's own jurisdiction. Courts "cannot rely on * * * judicial policy concern[s]" in refusing to enforce arbitration agreements. *14 Penn Plaza LLC* v. *Pyett*, 556 U.S. 247, 270 (2009). This Court has made clear that "[w]e are well past the time when * * * suspicion * * * of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626-27 (1985). There are no grounds to "'indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain

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creates a special risk that a court would liberally apply a contract defense so as to avoid enforcement of the arbitration agreement. See pp. 8-9, *infra*. That, of course, is exactly what happened in *Rent-A-Center*, *supra*.

competent, conscientious, and impartial arbitrators.'" *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991) (quoting *Mitsubishi Motors*, 473 U.S. at 634). For that reason, mere "speculat[ion]" that "arbitration panels will be biased" is insufficient to invalidate an arbitration agreement. *Ibid.*

Nor can courts evaluating arbitration agreements legitimately "thrust themselves into the paternalistic role of intervening to change contractual terms that the parties have agreed to, merely because the court believes the terms are unreasonable." Steven J. Burton, *The New Judicial Hostility to Arbitration: Federal Preemption, Contract Unconscionability, and Agreements to Arbitrate*, 2006 J. Disp. Resol. 469, 486-87. Just as a court may aggressively and unreasonably invoke doctrines such as unconscionability as a means to invalidate arbitration agreements (see *Rent-A-Center* and *Concepcion*, *supra*) so too may it rely on other principles of contract law—such as the general principles governing a nonsignatory's enforcement of a contract against a signatory—to reach the same result. Thus, by requiring that courts decide gateway questions of arbitrability, the Ninth Circuit's decision appears to create yet another device by which courts may refuse to enforce not only delegation provisions, but also agreements to arbitrate the merits of any dispute.

Under the FAA, nonsignatories may seek enforcement of a delegation provision in an arbitration agreement (*Rent-A-Center*, 130 S. Ct. at 2777-78) just as they may seek specific enforcement of any other contract provision under generally applicable contract law. That is entirely fair to signatories who, in adopting a delegation clause, have bargained for the arbitrator's answer (rather

than a court's answer) to gateway questions. It is possible—indeed, quite likely—that the arbitrator would find a dispute nonarbitrable for the same reasons that a court would. But even then, both the signatory and nonsignatory will have received a valuable benefit from the signatories' bargain: a quick, efficient, inexpensive determination from the arbitrator about the scope and applicability of the arbitration agreement.

More to the point, even if the arbitrator and a court would reach the same answers on the delegated gateway questions the court cannot substitute its judgment for the arbitrator's and insist on resolving in the first instance disputes that were committed to the arbitrator. In enacting the FAA, Congress mandated a division of jurisdiction between court and arbitrator, and that division must be respected.

In arrogating to the courts the gateway questions of arbitrability that the signatory agreed should be committed to the arbitrator, the Ninth Circuit failed to give the FAA's presumption of arbitrability its due. In conflict with decisions of two other courts of appeals, that differential treatment strayed from established principles and struck at the heart of the parties' substantive federal right to allocate gateway arbitrability disputes to arbitrators rather than to courts.

B. Depriving Nonsignatories Of The Right To Arbitrate Gateway Questions Of Scope And Validity Would Frustrate The Purposes Of The FAA In A Wide Range Of Cases.

Despite a clear and unmistakable delegation provision in the Toyota dealers' written vehicle-

purchase agreement, the Ninth Circuit refused to give effect to that provision. As petitioners have demonstrated, the Ninth Circuit disagreed with the First and Second Circuits on whether a nonsignatory can enforce an arbitration agreement's delegation of arbitrability questions to the arbitrator. This division in authority has significant consequences for the effective, efficient, and uniform enforcement of arbitration agreements.

1. In a wide range of disputes, a signatory to an arbitration agreement may sue a nonsignatory for claims that arise at least in part out of the contract containing the arbitration agreement. In these disputes, there is no question that the party to be charged with arbitration has consented to it. The question is: who may invoke the right to arbitrate a dispute (including threshold disputes about arbitrability)?

The answer to that question is particularly important to the automobile industry. In our industry, consumers enter into their lease or purchase agreements with dealers, not manufacturers. That is because, under the dealer laws of no fewer than forty-two states, automobile manufacturers and their distribution subsidiaries are prohibited from selling vehicles directly to consumers.[4] Although these state dealer laws may

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[4] See Ala. Code § 8-20-4(3)(s); Ariz. Rev. Stat. Ann. § 28-4460(A), (B)(1)-(2); Ark. Code Ann. § 23-112-403(a)(2)(M)(i) (amended 2013); Cal. Veh. Code § 11713.3(o)(1); Conn. Gen. Stat. § 42-133cc(8); Del. Code Ann. tit. 6 § 4913(b)(7); Fla. Stat. § 320.645(1); Ga. Code. Ann. § 10-1-664.1(c); Idaho Code Ann. § 49-1613(3)(g); 815 Ill. Comp. Stat. Ann. 710/4(f); Ind. Code § 9-23-13-23(3) (effective July 1, 2013) (current version at Ind. Code § 9-23-3-23(3)); Kan. Stat. Ann. § 8-2438(a); Ky. Rev. Stat.

differ somewhat in the details, they all generally prohibit manufacturers and their distribution subsidiaries from owning dealerships, competing with dealers, or selling directly to customers. The practical effect of these laws is that manufacturers and their distribution subsidiaries are not direct signatories to arbitration agreements in consumers' purchase or lease agreements. As a result, they are rarely, if ever, in privity with the consumers.

But manufacturers and distributors have a substantial interest in purchase or lease agreements and are routinely affected by them. After a dealer enters into a purchase agreement, for example, the manufacturer's finance subsidiary may be assigned some of the dealer's rights (such as the right to receive the payments under a "dealer-financing" arrangement that is actually underwritten by the manufacturer). And very often, when a consumer

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Ann. § 190.070(2)(j); La. Rev. Stat. Ann. § 32:1261(A)(1)(k); Me. Rev. Stat. Ann. tit. 10, § 1174(3)(K); Md. Code Ann., Transp. § 15-305(f); Mass. Gen. Laws ch. 93B, § 4(c)(10); Mich. Comp. Laws § 445.1574(1)(i); Minn. Stat. § 80E.13(i); Mont. Code Ann. § 61-4-208(3)(a) (amended 2013); Neb. Rev. Stat. § 60-1438.01(2); Nev. Rev. Stat. § 482.36385(1); N.H. Rev. Stat. Ann. § 357-C:3(III)(k); N.J. Stat. Ann. § 56:10-28; N.M. Stat. § 57-16-5(V) (amended 2013); N.C. Gen. Stat. § 20-305.2(a); N.D. Cent. Code § 39-22-24; Ohio Rev. Code Ann. § 4517.59(A)(5); Okla. Stat. tit. 47, § 565(A)(11); Or. Rev. Stat. § 650.130(10); 63 Pa. Cons. Stat. Ann. § 818.12(c)(1); R.I. Gen. Laws § 31-5.1-4(c)(14); S.C. Code Ann. § 56-15-45(D); S.D. Codified Laws § 32-6B-80; Tenn. Code Ann. § 55-17-114(c)(17); Tex. Occ. Code Ann. § 2301.476(c); Utah Code Ann. § 13-14-201(1)(u); Vt. Stat. Ann. tit. 9, § 4097(8); Va. Code Ann. § 46.2-1572; Wash. Rev. Code § 46.96.185(1)(g); Wis. Stat. § 218.0121(2m); Wyo. Stat. Ann. § 31-16-108(c)(vii), (j). Two additional states' laws apply to automobile manufacturers but not explicitly to distributors. See Iowa Code § 322.3(14); W. Va. Code § 17A-6A-10(2)(i).

sues a manufacturer, the theory of liability advanced and the remedy sought will arise out of the consumer's purchase agreement.

For example, the consumer might seek recovery for express warranties created by the sale of the vehicle—warranties that could not exist without the contract of sale. See, *e.g.,* Cal. Civ. Code § 1791.2(a)(1) (defining an "express warranty" as "[a] written statement arising out of a sale to the consumer of a consumer good pursuant to" certain obligations by the "manufacturer, distributor, or retailer"). Those warranties—particular as to the length of time, miles driven, and scope of coverage—run from the manufacturer to the consumer, and are a fundamental benefit of the bargain.

Alternatively, the consumer could assert a claim for diminution in value, on a theory that she did not receive the benefit of her anticipated bargain. Moreover, certain consumer-protection statutes, such as California's Consumer Legal Remedies Act, require a purchase or transaction as a predicate to pursuing a claim. See, *e.g.*, Cal. Civ. Code § 1761(d) (defining a consumer as "an individual who seeks or acquires, by purchase or lease, any goods or services for personal, family, or household purposes"). Furthermore, the consumer could seek rescission of the contract itself. Such claims presume the existence of, arise out of, and relate directly to the contract, and therefore may fall within the scope of the contract's arbitration provision.

Because state law keeps manufacturers out of privity with the purchasers, however, the manufacturer could face liability resulting from the agreement, yet in the Ninth Circuit's view could not invoke the arbitration provision to streamline resolu-

tion of the dispute in accordance with the FAA. But Congress surely did not intend to give one side all the benefits of the contract while the other side bears the burdens—including the wholly unnecessary burden to endure costly, time-consuming in-court litigation when the other side has expressly agreed to a more efficient system of dispute resolution.

2. The rule established below also creates incentives for plaintiffs' lawyers to end-run the FAA and this Court's arbitration jurisprudence. Under the Ninth Circuit's rule, a lawyer can avoid individual arbitration of disputes with a signatory dealer by the simple expedient of pursuing a class action against the manufacturer without naming the dealer who may well have participated in some or all of the conduct alleged as a basis for relief. Accordingly, neither party to the resulting lawsuit will benefit from the consumer's earlier agreement to arbitrate disputes and to delegate questions of scope and validity to the arbitrator.

Consider the following example. A motorist buys a new car under a purchase agreement that contains an arbitration provision with a delegation clause. One of the options that the buyer selects is a remote engine starter that is made by the manufacturer but must be installed by the dealer. When installing the starter, a service technician at the dealership negligently crosses some electrical wires, causing the car's electrical system to short out.

The buyer may then have a dispute with the dealer that could be readily resolved to the parties' satisfaction through individual arbitration. But that result might not be enough to satisfy a lawyer with dreams of a big class-action score. Although under this Court's decision in *Concepcion*, strategies for

ginning up a class action to multiply the recovery and the attendant attorneys' fees from the dealer may be foreclosed by a class-action waiver in the arbitration provision, the Ninth Circuit's rule here puts massive class actions, with years of needless litigation and hyperinflated potential recoveries, back on the table. Plaintiff's counsel would merely have to file a claim against the manufacturer (who is not a signatory to the arbitration agreement) instead of the dealer. The easily arbitrable claim against the dealer for negligence might thereby be transmogrified into a nationwide class claim for negligent failure to train and supervise dealers and their employees in installing and servicing dealer-installed optional equipment, with claims of design and manufacturing defects thrown in for good measure.

In the First and Second Circuits, the manufacturer could forestall that abusive class action by moving to compel arbitration of the questions of the arbitration agreement's scope and validity that have been delegated to the arbitrator. See *Contec Corp.* v. *Remote Solution Co.*, 398 F.3d 205, 211 (2d Cir. 2005) (citing *Apollo Computer, Inc.* v. *Berg*, 886 F.2d 469 (1st Cir. 1989)). But in the Ninth Circuit, the manufacturer might find itself mired in months or years of expensive litigation on the delegated gateway determination whether the case should be sent to arbitration for resolution on the merits. Solely because a plaintiff frames the claim as against the manufacturer rather than the dealer, in other words, the court of appeals' decision here would deprive the nonsignatory manufacturer—perhaps permanently—of the benefits of the speedy and efficient resolution of the arbitrability question to which the plaintiff had expressly agreed. And for related reasons, the Ninth Circuit's rule also

unnecessarily increases friction between manufacturers, distributors, and dealers by encouraging suits that omit dealers regardless of the characteristics or merits of the complained-of harm.

By reallocating into court the gateway questions of arbitrability that should properly be before the arbitrator, a court following the Ninth Circuit's decision will, in short, "breed[] litigation from a statute that seeks to avoid it." *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 275 (1995). That outcome thwarts the parties' intent in entering into arbitration agreements in the first place: "trad[ing] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Mitsubishi Motors*, 473 U.S. at 628.

3. As this Court has held, a "long delay[ ]" of arbitration would be in "contravention of Congress' intent" in enacting the FAA "'to move the parties * * * out of court and into arbitration as quickly and easily as possible.'" *Preston* v. *Ferrer*, 552 U.S. 346, 357 (2008) (quoting *Moses H. Cone Mem'l Hosp.* v. *Mercury Construction Corp.*, 460 U.S. 1, 22 (1983)). By requiring nonsignatories to resort to the courts for disputes over gateway questions of arbitrability, the Ninth Circuit's rule increases the marginal costs to courts and litigants alike of resolving disputes through arbitration. Cf. Walt, 51 Rutgers L. Rev. at 410.

Just such a derailment of the agreed-upon system of efficient dispute resolution happened here: Court proceedings on the arbitrability question have consumed 19 months and counting.

4. Such undue impositions on judicial resources also impose substantial and unwarranted costs on the automotive industry (not to mention individual claimants). That industry is a major driver of the national economy. New light-vehicle sales in 2011 topped 12.72 million units, with retail revenue of $609 billion. See National Automobile Dealers Association, *NADADATA 2012: State-Of-The-Industry Report*, at 6 (June 2012), *available at* http://tinyurl.com/bucwr78. And that reflects the protracted economic slowdown that has decreased sales figures from the levels that they were a few years ago. See *id.* at 9. In the face of persistent pressure on automobile manufacturers and distributors to keep costs down, the decision below adds entirely unnecessary costs of litigating gateway questions of arbitrability with buyers who have broadly agreed to arbitrate their disputes. Indeed, the holding below risks effectively nullifying the choice commonly made in automobile purchase and financing contracts—as well as in contracts in other industries—to use arbitration provisions with delegation clauses to secure "the streamlined procedures of arbitration" without "any consequential restriction on substantive rights." *McMahon*, 482 U.S. at 232.

5. The sharp divide in circuit authority is significant for the additional reason that it impairs a nonsignatory's ability to manage its disputes predictably. Manufacturers and distributors operate in all the regional circuits. Depending on the region, nonsignatory manufacturers and distributors must prepare to incur disparate and additional costs associated with litigating arbitrability in court, rather than in the more efficient and less expensive alternative forum that the signatories bargained for.

For disputes arising in the western part of the country, the decision below will delay the resolution of disputes on the merits, inject uncertainty into a nonsignatory's litigation strategies, raise the costs of defending against claims, and increase pressure to settle meritless disputes.

* * *

In this case, consumers clearly and unmistakably agreed to delegate questions of arbitrability to the arbitrator. That choice should be given effect, in order to ensure that arbitration proceeds "in accordance with the terms of the agreement" (9 U.S.C. § 3), rather than according to a judicially preferred structure for dispute resolution.

Because a nonsignatory's ability under generally applicable state law to enforce arbitration agreements is of critical practical importance, this Court should grant certiorari to resolve the conflict between the Ninth Circuit and the First and Second Circuits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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