No. 18-____

IN THE

Supreme Court of the United States

SUBWAY SANDWICH SHOPS, INC.,

Petitioner,

v.

DAVID MOSHE RAHMANY AND YEHUDA RAHMANY,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Before this Court decided *Arthur Andersen LLP v. Carlisle,* 556 U.S. 624 (2009), federal courts had developed a federal version of the equitable estoppel doctrine that permits a non-signatory to enforce an arbitration agreement in certain circumstances. In its decision below, the Ninth Circuit held that Subway was not entitled to enforce Plaintiffs' arbitration agreements under California's equitable estoppel doctrine and failed to consider Subway's argument that the federal equitable estoppel doctrine provides an alternative basis for enforcement. The court of appeals applied California law based on its precedent holding that *Arthur Andersen* eliminated the federal equitable estoppel doctrine. *See Kramer v. Toyota Motor Corp.*, 705 F.3d 1122, 1128 (9th Cir. 2013). The court of appeals applied that precedent even though the *Arthur Andersen* Court never addressed the federal doctrine of equitable estoppel, let alone abrogated it. Meanwhile, other circuits continue to apply the federal equitable estoppel doctrine.

The question presented is:

Whether this Court's decision in *Arthur Andersen LLP v. Carlisle,* 556 U.S. 624 (2009), eliminated the federal equitable estoppel doctrine.[1]

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[1] This Court recently denied certiorari in *Subway Restaurants, Inc. v. Warciak*, No. 17-1956, which raised this same issue. Subway respectfully submits that certiorari is nevertheless warranted, particularly in light of the Fourth Circuit's June 12, 2018 opinion in *Weckesser v. Knight Enterprises, S.E.*, No. 17-1247, 2018 WL 2972665 (4th Cir. June 12, 2018), which demonstrates a clear circuit split on the continuing existence of the federal equitable estoppel doctrine. That case acknowledges *Arthur Andersen* but then proceeds to analyze a non-party's right to arbitrate under

the federal equitable estoppel doctrine. The Fourth Circuit's analysis in *Weckesser* is irreconcilable with the Ninth Circuit's decision to look exclusively to state law here. *See* Reasons for Granting the Petition, Section II, *infra*.

LIST OF PARTIES AND RULE 29.6 STATEMENT

Petitioner Subway Sandwich Shops, Inc. is the Defendant in the district court and Appellee in the court of appeals. Subway Sandwich Shops, Inc. is owned 50% by the Terminating Trust UA III of the Frederick A. DeLuca Revocable Trust and 50% by Peter Buck. No publicly held company owns 10% or more of Subway Sandwich Shops, Inc.'s stock.[2]

Respondents David Moshe Rahmany and Yehuda Rahmany are the Plaintiffs in the district court and Appellants in the court of appeals.

[2] The Complaint improperly named Subway Sandwich Shops, Inc. as the Defendant. Subway Franchisee Advertising Fund Trust, Ltd. is the proper party for the claims Plaintiff attempts to assert in this case. Subway Franchisee Advertising Fund Trust, Ltd. has no parent company, and no publicly traded company owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Subway Sandwich Shops, Inc. ("Subway"), respectfully petitions for a writ of certiorari to review the United States Court of Appeals for the Ninth Circuit's decision reversing the district court's order compelling arbitration.

OPINIONS BELOW

The Ninth Circuit's Opinion (App. 1a) is unreported. The district court's Order granting Subway's motion to compel arbitration (App. 4a) also is unreported.

JURISDICTION

The court of appeals entered its decision on April 5, 2018. This Court's jurisdiction lies in 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2 of the Federal Arbitration Act (the "FAA"), 9 U.S.C. § 2, provides in pertinent part:

> A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Section 3 of the FAA, 9 U.S.C. § 3, provides in pertinent part:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

STATEMENT

This petition presents a recurring issue of great importance: Whether this Court's decision in *Arthur Andersen LLP v. Carlisle,* 556 U.S. 624 (2009), abrogated by implication the federal equitable estoppel doctrine, which allows for nonsignatory enforcement of arbitration agreements when the doctrine's requirements are satisfied. The court of appeals applied the California equitable estoppel doctrine, to the exclusion of the federal doctrine, based on an interpretation of *Arthur Andersen* that is inconsistent with its express terms and does violence to the principles undergirding the FAA. If the court of appeals' decision is allowed to stand, then the FAA will be substantially weakened as litigants will be able to engage in gamesmanship to avoid admitted arbitration obligations.

1. The Rahmanys' Allegations Against Subway for a T-Mobile Text Message

On September 6, 2016, the Rahmanys filed their complaint, asserting claims against T-Mobile USA, Inc. ("T-Mobile") and Subway under the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227. Plaintiffs base their claims on their receipt of a single text message.[1] Although Plaintiffs sued both T-Mobile and Subway, Plaintiffs acknowledged from the outset that Subway did not send the text at issue. Compl. ¶¶ 10, 12 ("T-Mobile sent a text message" to each of their cellular telephones). Rather, the text was sent by T-Mobile to its customers (the Rahmanys) to provide information regarding the T-Mobile Tuesdays program, a T-Mobile service offering that provides free and discounted products and prizes to T-Mobile customers each Tuesday. The T-Mobile text directed the Rahmanys to a T-Mobile web site where they could review details about the program and weekly gifts. (Compl. ¶¶ 11, 13). The text the Rahmanys received stated, in its entirety:

> This T-Mobile Tuesday, score a free 6" Oven Roasted Chicken sub at SUBWAY, just for being with T-Mobile. Ltd. Supplies. Get app for details: http://t-mo.com/2bGIBjs.

(Compl. ¶¶ 11, 13).

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[1] The Rahmanys purport to bring their claims on behalf of a nationwide class of individuals defined as "[a]ll persons within the United States who received any text message from Defendants or its agent/s and/or employee/s, which was substantially similar or identical to the text messages alleged in Paragraphs 11 and 13 of the Complaint, to said person's cellular telephone made through the use of any automatic telephone dialing system, within the four years prior to the filing of this Complaint." (Compl. ¶ 32).

As this context makes clear, the Rahmanys' claims challenge T-Mobile's conduct. Nevertheless, just two days after filing the Complaint, the Rahmanys voluntarily dismissed T-Mobile as a defendant, electing to assert claims only against Subway. (Dkt. 5). The Rahmanys did not amend their complaint to focus on Subway's conduct; instead, their claims remain premised on the allegation that T-Mobile sent text messages that violate the TCPA. (App. At 8a.) (finding that "Plaintiffs' claims rest on T-Mobile's alleged conduct"). This maneuver was plainly motivated by the Rahmanys' desire to avoid their admitted arbitration agreements with T-Mobile.[2] The Rahmanys' agreements with T-Mobile also require them to arbitrate "claims against other parties," like Subway, when those claims are asserted in litigation where T-Mobile is also a defendant. The arbitration agreements provide:

> **2. Dispute Resolution and Arbitration. WE EACH AGREE THAT . . . ANY AND ALL CLAIMS OR DISPUTES IN ANY WAY RELATED TO OR CONCERNING THE AGREEMENT, [T-MOBILE'S] PRIVACY POLICY, [T-MOBILE'S] SERVICES, DEVICES OR PRODUCTS, INCLUDING ANY BILLING DISPUTES, WILL BE RESOLVED BY BINDING ARBITRATION OR IN SMALL CLAIMS COURT.** This includes any claims against other parties relating to Services or Devices provided or

[2] The Rahmanys conceded in the district court – and the district court found – that they are individually bound by the arbitration agreements in their company's wireless service agreement and telephone lease agreements with T-Mobile. (Dkt. 21 at 20) (admission that Plaintiffs are "signatories" to the service agreement); Dkt. 25 at 3.

> billed to you (such as our suppliers, Dealers or third party vendors) whenever you also assert claims against us in the same proceeding. We each also agree that the Agreement affects interstate commerce so that the Federal Arbitration Act and federal arbitration law apply (despite the choice of law provision in Section 27).

(Dkt. 19 ¶ 10) (emphasis in original).

For years, federal courts have applied the federal equitable estoppel doctrine to compel arbitration in similar scenarios. The FAA is thwarted if the Rahmanys are able to avoid their arbitration obligations by gaming the system, dismissing their claims against T-Mobile, and seeking to hold Subway liable for T-Mobile's alleged conduct.

2. Procedural History.

On October 31, 2016, Subway moved the district court to compel arbitration of the Rahmanys' claims based on their arbitration agreements with T-Mobile. Subway based its motion on the California equitable estoppel doctrine given Ninth Circuit precedent holding that state law governs equitable estoppel.[3] Subway

[3] Under California's equitable estoppel doctrine, non-signatories to arbitration agreements can invoke the doctrine when two circumstances are satisfied: "(1) when a signatory must rely on the terms of the written agreement in asserting its claims against the nonsignatory or the claims are intimately founded in and intertwined with the underlying contract, and (2) when the signatory alleges substantially independent and concerted misconduct by the nonsignatory and the allegations of interdependent misconduct are founded in or intimately connected with the obligations of the underlying agreement." *Kramer*, 705 F.3d at 1128-29.

based its motion in the district court on California law because the district court was bound to follow the Ninth Circuit's decision in *Kramer*, which squarely holds that state law governs whether a non-signatory can compel arbitration of a dispute. 705 F.3d at 1128-29.

On January 5, 2017, the district court granted Subway's motion. The district court held that the Rahmanys' claims fall within the scope of their arbitration agreements with T-Mobile and that "Plaintiffs have not met their burden of proving the arbitration agreement is unconscionable and it is therefore enforceable." (Dkt. No. 25 at 2-3). The district court then proceeded to consider whether Subway was entitled to compel arbitration under California's equitable estoppel doctrine. It answered this question in the affirmative, holding that both elements of California's equitable estoppel doctrine were satisfied. The court thus held that "Subway may enforce the arbitration agreement between Plaintiffs and T-Mobile." (*Id.* at 5). In reaching this conclusion, the court found it significant that "Plaintiffs dismissed T-Mobile from the lawsuit, yet all the allegations in the complaint remained the same." (*Id.* at 4-5).

The Rahmanys appealed to the Ninth Circuit. They did not appeal the district court's findings that they are bound by the arbitration agreements, that their claims fall within the scope of the arbitration agreements, or that the arbitration agreements are enforceable. Instead, they challenged only the district court's holding that Subway was entitled to compel arbitration under the California equitable estoppel doctrine. The Rahmanys relied on this Court's decision in *Arthur Andersen* to argue that California law provides the exclusive basis for nonsignatory

enforcement of an arbitration agreement. They then argued that Subway had not satisfied the requirements of California's equitable estoppel doctrine. (Appellants' Br. at 8-36). In response, Subway contended that the district court properly permitted Subway to enforce the Rahmanys' arbitration agreements with T-Mobile under the California equitable estoppel doctrine. (Appellee's Br. at 11-38). Subway also argued, in the alternative, that the federal equitable estoppel doctrine permits Subway to compel arbitration of this dispute.[4]

The court of appeals reversed, holding that the California equitable estoppel doctrine does not permit Subway to compel arbitration of the Rahmanys' claims. The court of appeals did not address Subway's alternative argument that the federal equitable estoppel doctrine allowed Subway to compel arbitration of this dispute, erroneously concluding that the parties had "stipulated" that California law applies exclusively. (App. at 2a). Subway did not so stipulate. As discussed above, it would have been futile for Subway to argue in the district court that the federal equitable estoppel doctrine applied in light of binding Ninth Circuit law establishing state law as the exclusive source of equitable estoppel. Subway's reliance on state law thus did not constitute a stipulation that state law applies nor does it constitute a waiver of its argument for enforcement under the federal doctrine. *See Hively v. Ivy Tech Cmty. College of Ind.*, 853 F.3d 339, 351 (7th Cir. 2017) (exercising discretion to

[4] The federal equitable estoppel doctrine is broader than California's equitable estoppel doctrine because, unlike the California test, it does not require that the allegations of substantially interdependent and concerted misconduct be connected to the underlying agreement containing the arbitration clause. *See id.*

consider argument not presented to the district court because "that court would have been powerless to overturn precedent"); *In re Vivendi, S.A. Securities Litig.*, 838 F.3d 223, 264 (2d Cir. 2016) ("[P]arties are not required to raise arguments directly contrary to controlling precedent to avoid waiving them.") (internal quotation marks omitted); *see also US Airways, Inc. v. McCutchen*, 568 U.S. 88, 101 n.7 (2013) (concluding that an issue not presented to the court of appeals was "adequately preserved and presented" to the Supreme Court because "Third Circuit precedent foreclosed his . . . argument").

If the court of appeals had applied the federal doctrine, Subway undoubtedly would have been able to compel arbitration, as the Rahmanys admitted on appeal that the Complaint alleged concerted misconduct between Subway and T-Mobile. (*See* Appellants' Br. at 24).[5] Thus, the court of appeals applied a state-law doctrine to foreclose arbitration where it was undisputed that federal law would have permitted Subway to compel arbitration of the claims the Rahmanys are asserting in this action. If the court of appeals' decision is allowed to stand, then litigants can sidestep their arbitration obligations simply by engaging in gamesmanship – a result that undermines and substantially weakens the FAA.

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[5] Rather than challenging the existence of concerted misconduct, the Rahmanys argued only that, under California's more restrictive version of the equitable estoppel doctrine, "a finding of collusive activity alone is not enough for application of equitable estoppel." (*Id.*). The Rahmanys admitted on reply that the federal equitable estoppel doctrine is "less restrictive" than California's version of the test, but argued that California's test should override the strong federal policy in favor of arbitration because of "the heightened protections afforded to California consumers under California law." (Appellants' Reply Br. at 23.)

3. The Decision of the Court of Appeals Substantially Undermines the FAA.

The FAA reflects a strong federal policy in favor of arbitration. *See, e.g.*, *Volt Information Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 475-76 (1989). Consistent with this policy, the federal courts have developed a "body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). This body of federal law includes the federal equitable estoppel doctrine, which permits non-signatories to enforce arbitration agreements in certain limited circumstances where it would be inequitable and inconsistent with the strong federal policy in favor of arbitration to deny the non-signatory's right to arbitrate the dispute. *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942 (11th Cir. 1999) (recognizing federal equitable estoppel doctrine); *Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524 (5th Cir. 2000) (same). The federal equitable estoppel doctrine exists to prevent litigants from using a subterfuge – as the Rahmanys have done here – to avoid their admitted arbitration obligation. *See Morselife Found., Inc. v. Merrill Lynch Bank & Tr. Co., FSB*, No. 09-81143-CIV, 2010 WL 2889932, at *3 (S.D. Fla. Jul. 21, 2010) (applying federal equitable estoppel doctrine to prevent the plaintiff from "engaging in a tactical ploy to try to avoid [a] binding agreement to arbitrate").

If the federal equitable estoppel doctrine no longer exists, then litigants can avoid admitted contractual arbitration obligations simply by dismissing their claims against the signatory to an arbitration agreement and instead pursuing a third party and asserting

vicarious liability claims that challenge the conduct of the party with which they entered into an arbitration agreement. The court of appeals' decision below stands to have widespread effect, particularly given that companies often provide services to their consumers using third-party vendors or service providers. Indeed, this case demonstrates the magnitude of the erosion of the strong federal policy in favor of arbitration. The Rahmanys agreed to arbitrate their claims against T-Mobile and originally named T-Mobile as a defendant in this lawsuit. They then quickly decided to voluntarily dismiss their claims against T-Mobile, leaving intact their allegations of T-Mobile misconduct but choosing to pursue claims only against Subway for a text T-Mobile sent them in connection with their T-Mobile service. The federal equitable estoppel doctrine is specifically designed to prevent this sort of blatant gamesmanship that is unquestionably designed to avoid an obligation to arbitrate.

REASONS FOR GRANTING THE PETITION

I. THE NINTH CIRCUIT'S DECISION RESTS ON A MISINTERPRETATION OF THIS COURT'S DECISION IN *ARTHUR ANDERSEN LLP V. CARLISLE*, RESULTING IN THE NINTH CIRCUIT'S FAILURE TO APPLY THE FEDERAL EQUITABLE ESTOPPEL DOCTRINE IN DECIDING AN IMPORTANT AND RECURRING ISSUE OF ARBITRABILITY.

The Ninth Circuit analyzed Subway's motion to compel arbitration exclusively under California's equitable estoppel doctrine. The court of appeals decision neither acknowledges nor addresses Subway's argument that it also was entitled to compel arbitration under the broader federal equitable estoppel doctrine.

Based on its citation to *Kramer v. Toyota Motor Corp.*, 705 F.3d 1122, 1128-29 (9th Cir. 2013), it presumably adhered to the rule first articulated therein that a court must look to state law to determine whether a non-signatory can enforce an arbitration agreement.

The holding in *Kramer* is based on a misunderstanding of *Arthur Andersen*. In *Kramer*, the Ninth Circuit relied exclusively on this Court's decision in *Arthur Andersen* to conclude that state law provides the sole basis for a non-signatory's right to compel arbitration of a dispute. The *Kramer* court reasoned:

> The United States Supreme Court has held that a litigant who is not a party to an arbitration agreement may invoke arbitration under the FAA if the relevant state contract law allows the litigant to enforce the agreement. *See Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 632, 129 S.Ct. 1896, 173 L.Ed.2d 832 (2009). We therefore look to California contract law to determine whether Toyota, as a nonsignatory, can compel arbitration.

705 F.3d at 1128. The court of appeals failed to correct this misinterpretation of *Arthur Andersen* when it relied on *Kramer* and applied state law to the exclusion of the federal equitable estoppel doctrine.

Arthur Andersen did not address the federal equitable estoppel doctrine at all, much less what happens when federal equitable estoppel allows for enforcement but state law does not. Instead, in *Arthur Andersen,* this Court decided a narrow question of appellate jurisdiction: "whether appellate courts have jurisdiction under § 16(a) [of the FAA] to review denials of stays requested by litigants who were not parties to the arbitration agreement." 556 U.S. at 625.

This Court answered that question in the affirmative, reasoning that there are certain circumstances in which non-signatories to arbitration agreements can compel a party who is bound by the agreement to arbitrate a dispute. *See id.* at 631. One of those circumstances exists when "traditional principles of state law allow a contract to be enforced by or against nonparties to the contract through assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel." *Id.* (internal quotation marks omitted).

The Ninth Circuit has relied on this language from *Arthur Andersen* as establishing that state law provides the exclusive basis for non-signatory enforcement of arbitration agreements. *Kramer*, 705 F.3d at 1128; *Murphy v. DirecTV, Inc.*, 724 F.3d 1218, 1229 (9th Cir. 2013) (citing *Arthur Andersen*, 556 U.S. at 632); *Rajagopalan v. NoteWorld, LLC*, 718 F.3d 844, 847 (9th Cir. 2013) (same). But viewed in the context of the entire *Arthur Andersen* decision, the Ninth Circuit has stretched this isolated excerpt from *Arthur Andersen* too far. *Arthur Andersen* provided merely one example of a circumstance in which a non-signatory to an arbitration agreement is entitled to compel arbitration. Because *Arthur Andersen* focused on a limited question of appellate jurisdiction, once the Court found that there was one circumstance in which a non-signatory could compel arbitration, it did not have to go any further to consider whether there were other bases for third-party enforcement – such as the federal equitable estoppel doctrine.

Indeed, this Court in *Arthur Andersen* carefully cabined the scope of its holding, recognizing that the broad federal policy in favor of arbitration "cannot possibly require the disregard of state law *permitting*

arbitration by or against nonparties to the written arbitration agreement." *Arthur Andersen*, 556 U.S. at 630 n.5 (emphasis in original). The Court's emphasis on the word "permitting" has meaning. The only reasonable conclusion is that the Court recognized that the federal policy in favor of arbitration may require disregard of state law *prohibiting* enforcement. Given this pro-arbitration policy, courts are authorized to look to traditional state law principles to enforce arbitration agreements. But the Court never held that state common law is the exclusive basis to enforce such an agreement. This Court simply recognized in *Arthur Andersen* the uncontroversial proposition that the FAA does not preclude application of state laws that are consistent with, and further, Congress' purpose in enacting the FAA.

The First Circuit recognized this limitation of *Arthur Andersen* in *Grand Wireless, Inc. v. Verizon Wireless, Inc.*, 748 F.3d 1, 13 (1st Cir. 2014), noting that the *Arthur Andersen* Court "seemingly limited the scope of its holding" to situations where "state law . . . permit[s] arbitration and [is] therefore compatible with and, indeed, supportive of the federal policy embodied in the FAA" and that nothing in *Arthur Andersen* "specifically disapproves the fashioning of federal law to avoid" a party's ability to "frustrate an arbitration clause" with artful pleading, for example, by "simply naming employees as party defendants along with the signatory company in a judicial action." *Arthur Andersen* does not hold that the "traditional principles of state law" that allow non-signatories to compel arbitration in some circumstances are the ***exclusive*** circumstances in which a non-signatory can compel arbitration. *Arthur Andersen*, 556 U.S. at 631. And it does not address the circumstance that is presented by

this case – whether a state law that ***prohibits*** arbitration trumps a federal doctrine that indisputably would allow arbitration to proceed.

II. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS THAT CONTINUE TO APPLY FEDERAL EQUITABLE ESTOPPEL POST-*ARTHUR ANDERSEN*.

The *Arthur Andersen* decision has created substantial confusion in the courts of appeals. Although several courts of appeals have read *Arthur Andersen* as the Ninth Circuit does, the Second and Fourth Circuits continue to apply the federal equitable estoppel doctrine even after *Arthur Andersen*. *Compare Scheurer v. Fromm Family Foods LLC*, 863 F.3d 748, 752-53 (7th Cir. 2017); *Kroma Makeup EU, LLC v. Boldface Licensing + Branding, Inc.*, 845 F.3d 1351, 1355 n.1 (11th Cir. 2017); *Belnap v. Iasis Healthcare*, 844 F.3d 1272, 1293 (10th Cir. 2017); *Flintkote Co. v. Aviva PLC*, 769 F.3d 215, 220 (3d Cir. 2014); *Crawford Prof'l Drugs, Inc. v. CVS Caremark Corp.*, 748 F.3d 249, 261-62 (5th Cir. 2014); and *In re Wholesale Grocery Prods. Antitrust Litig.*, 707 F.3d 917, 921 (8th Cir. 2013) *with Ragone v. Atlantic Video at Manhattan Center*, 595 F.3d 115 (2d Cir. 2010) and *Aggarao v. MOL Ship Management Co.*, 675 F.3d 355 (4th Cir. 2014). This conflict in the decisional law applied by the various courts of appeals independently warrants this Court's review.

In *Ragone*, the Second Circuit held that an employee of a production company was required to arbitrate her sexual harassment claims against a separate company that was not a party to the arbitration agreement. 595 F.3d 115. In reaching this conclusion, the Second Circuit explained that "***this Court*** has recognized a

number of common law principles of contract law that may allow non-signatories to enforce an arbitration agreement, including equitable estoppel." *Id.* at 126 (emphasis added) (internal quotation marks omitted). In analyzing the equitable estoppel doctrine, the court relied exclusively on Second Circuit precedent – that is, federal equitable estoppel – rather than any state law doctrine. *See id.*

In light of *Ragone*, district courts in the Second Circuit have routinely continued to apply the federal equitable estoppel doctrine, even after *Arthur Andersen*. *See, e.g.*, *In re A2P SMS Antitrust Litig.*, 972 F. Supp. 2d 465, 476 (S.D.N.Y. 2013); *Lismore v. Societe Generale Energy Corp.*, No. 11-cv-6705, 2012 WL 3577833, at *6 (S.D.N.Y. Aug. 17, 2012) ("One of the common law theories recognized by the Second Circuit for allowing a non-signatory to enforce an arbitration agreement is equitable estoppel . . . ."); *Alghanim v. Alghanim*, 828 F. Supp. 2d 636, 647 (S.D.N.Y. 2011) ("Pursuant to federal law . . . the fact that non-signatories did not sign a written arbitration agreement does not foreclose the application of the well-established contract and agency principles under which nonsignatories sometimes can be obligated by, or benefit from agreements signed by others.") (internal quotation marks omitted); *see also Lucy v. Bay Area Credit Servs. LLC*, 792 F. Supp. 2d 320, 326-28 (D. Conn. 2011) (concluding that *Ragone* sets out the Second Circuit's equitable estoppel doctrine but that its requirements were not satisfied in the specific circumstance presented to the court). Indeed, the Southern District of New York recently held that this Court has not overturned the "well-established body of law" that makes up the federal equitable estoppel doctrine. *See Bankers Conseco Life Ins. Co. v. Feuer*, No. 16 Civ. 7646, 2018

WL 1353279, at *6 (S.D.N.Y. Mar. 15, 2018) (concluding that *American Express Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013), "did not do away with the . . . longstanding principle of equitable estoppel in determining which parties may be bound by an agreement to arbitrate") (internal quotation marks omitted).

The Fourth Circuit also has continued to apply the federal equitable estoppel doctrine after *Arthur Andersen*. In *Aggarao*, the court relied exclusively on Fourth Circuit and other federal precedent to conclude that two non-signatory defendants could compel the plaintiff signatory to arbitrate his claims under an equitable estoppel theory because the plaintiff had raised "allegations of substantially interdependent and concerted misconduct by both the non-signatory and one or more of the signatories to the contract." 675 F.3d at 373 (alterations and internal quotation marks omitted). A district court in the Fourth Circuit recently rejected the plaintiff's argument that it should not apply the federal equitable estoppel doctrine "because in *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624 (2007), the Supreme Court superseded Fourth Circuit law on the issue." *Hunter v. NHcash.com*, No. 3:17-cv-348, 2017 WL 4052386, at *5 n.4 (E.D. Va. Sept. 12, 2017). *Id.* Other courts have reached the same result. *See Meridian Imaging Solutions, Inc. v. OMNI Business Solutions LLC*, 250 F. Supp. 3d 13, 21-22 (E.D. Va. 2017) (concluding that notwithstanding *Arthur Andersen*, "it appears that federal law is the correct source" of law for the equitable estoppel doctrine).

The Fourth Circuit's most recent equitable estoppel opinion demonstrates that court's acknowledgment that *Arthur Andersen* did not abrogate the federal equitable estoppel doctrine. In *Weckesser v. Knight*

Enterprises, S.E., the Fourth Circuit quoted *Arthur Andersen* for the proposition that "the FAA doesn't 'purport[] to alter background principles of state contract law regarding the scope of agreements (including the question of who is bound by them).'" No. 17-1247, 2018 WL 2972665, at *2 (4th Cir. June 12, 2018) (quoting *Arthur Andersen*, 556 U.S. at 630). Nevertheless, later in that same opinion, the Fourth Circuit applied federal law to determine whether a non-signatory was entitled to compel arbitration under the equitable estoppel doctrine. *See id.* at *6. The court clarified that federal law was the source of the applicable equitable estoppel doctrine by citing its own precedent and noting that "***[w]e*** have said that equity may estop a party from asserting that the lack of another's signature on a written contract precludes enforcement of the contractor's arbitration clause when the party has consistently maintained that other provisions of the same contract should be enforced to benefit him. *Id.* (emphasis added) (internal quotation marks omitted). Notably, though the Fourth Circuit concluded that South Carolina law applied to other issues in the dispute, it did not apply South Carolina's equitable estoppel doctrine, which requires proof of the following elements:

> (1) lack of knowledge and the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party estopped; and (3) action based thereon of such a character as to change his position prejudicially.

Thompson v. Pruitt Corp., 784 S.E.2d 679, 689 (S.C. Ct. App. 2016) (internal quotation marks and citation omitted). Moreover, the Fourth Circuit relied primarily on *American Bankers Insurance Group, Inc. v. Long*, 453 F.3d 623 (4th Cir. 2006) in describing the

elements of the equitable estoppel doctrine. *See Weckesser*, 2018 WL 2972665, at *6. *American Bankers* is a pre-*Arthur Andersen* case that relied exclusively on federal law to assess whether a non-signatory to an arbitration agreement was entitled to compel arbitration of a dispute under the equitable estoppel doctrine.[6] *Weckesser* demonstrates that the Fourth Circuit continues to apply the federal equitable estoppel doctrine even nearly ten years after *Arthur Andersen*.

Thus, a geographical patchwork exists today where non-signatories in the Second and Fourth Circuits (and likely the First Circuit as well based on that court's comments in *Grand Wireless*)[7] can enforce arbitration agreements under the federal equitable estoppel doctrine, but elsewhere non-signatories cannot depending on the state law at issue. This circuit conflict and the patchwork of results as to whether arbitration is compelled in the same circumstances necessitates this Court's review. Under the

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[6] The only state court decision that the Fourth Circuit cited in its equitable estoppel analysis is *Thompson v. Pruitt Corp.*, which analyzed a non-signatory's ability to compel arbitration under both state and federal law. 784 S.E.2d at 687-90. The portion of the *Thompson* opinion that the Fourth Circuit cited in *Weckesser* is from the section of the opinion discussing the federal equitable estoppel doctrine. *See Weckesser*, 2018 WL 2972665, at *6 (quoting *Thompson*, 784 S.E.2d at 568).

[7] A district court in the First Circuit recently looked exclusively to federal precedent to assess whether a non-signatory was entitled to compel arbitration of a dispute. *See Hogan v. SPAR Grp., Inc.*, No. 17-10024-LTS, 2018 WL 1319234, at *3 (D. Mass. Mar. 12, 2018) ("'Federal courts have been willing to estop a signatory from avoiding arbitration with a nonsignatory when the issues the nonsignatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed.'") (quoting *Sourcing Unlimited, Inc. v. ASIMCO Int'l, Inc.*, 526 F.3d 38, 47 (1st Cir. 2008)).

current state of the law, a non-signatory's ability to compel arbitration under federal law is determined by the happenstance of the circuit in which the dispute arose. As this Court has recognized, "important policy considerations militate in favor of continuity and predictability in the law." *Boys Mkts., Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 240 (1970); *see also Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 272 (1980) (recognizing "broad[] societal interests in evenhanded, consistent, and predictable application of legal rules"); *Lau Ow Bew v. United States*, 144 U.S. 47, 58 (1892) (recognizing that "the interest of uniformity" is of sufficient importance to warrant review by this Court). This interest in predictability and uniformity is presently absent given the confusion that exists in the various courts of appeals, and this Court's intervention is necessary to restore it. This Court should grant Subway's petition to clarify its holding in *Arthur Andersen* and to ensure that the source of law governing a non-signatory's ability to compel arbitration is consistent across the country.

III. SUBWAY'S PETITION PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

Certiorari should be granted to address the impact of *Arthur Andersen* on the federal equitable estoppel doctrine.

A. The Federal Equitable Estoppel Doctrine Is an Important Part of the Strong Federal Policy in Favor of Arbitration.

Prior to *Arthur Andersen*, federal courts around the country consistently applied the federal equitable estoppel doctrine to allow non-signatories to compel

arbitration of the claims brought by a signatory to an arbitration agreement in the following two circumstances: (1) "when the signatory references or presumes the existence of a written agreement in asserting its claims against the non-signatory;" and (2) "when the signatory raises allegations of substantially interdependent and concerted misconduct by both the non-signatory and one or more of the signatories to the contract." *Paragon Micro, Inc. v. Bundy*, 22 F. Supp. 3d 880, 889 (N.D. Ill. 2014); *see also MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942 (11th Cir. 1999); *Grigson v. Creative Artists Agency, LLC*, 210 F.3d 524 (5th Cir. 2000); *Hughes Masonry Co., Inc. v. Greater Clark Cty. Sch. Bldg. Corp.*, 659 F.2d 836 (7th Cir. 1981). The equitable estoppel doctrine is an important part of the "body of federal substantive law of arbitrability." *See Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24. The purpose of that federal substantive law is to support the strong "national policy favoring arbitration" that this Court has consistently recognized. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 346 (2011) (internal quotation marks and citation omitted).

The federal equitable estoppel doctrine is a crucial part of this body of substantive federal law because it exists to prevent parties from engaging in tactical gamesmanship to avoid an obligation to arbitrate. *See Grigson*, 210 F.3d at 528 (equitable estoppel doctrine "fulfill[s] federal pro-arbitration policy"). As the Fifth Circuit has explained, it is "inequitable" to foreclose arbitration

> where, as here, a signatory non-defendant is charged with interdependent and concerted misconduct with a non-signatory defendant. In such instances, that signatory, in essence, becomes a party, with resulting loss, *inter*

> *alia*, of time and money because of its required participation in the proceeding. Concomitantly, detrimental reliance by that signatory *cannot* be denied: it and the signatory-plaintiff had agreed to arbitration in lieu of litigation (generally far more costly in terms of time and expense); but, the plaintiff is seeking to avoid that agreement by bringing the action against a non-signatory charged with acting in concert with that non-defendant signatory.

Id.; *see also MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999) (recognizing that without the federal equitable estoppel doctrine, the arbitration agreement at issue "would be rendered meaningless and the federal policy in favor of arbitration effectively thwarted") (alterations, internal quotation marks, and citation omitted); *MorseLife Found., Inc. v. Merrill Lynch Bank & Tr. Co., FSB*, No. 09-81143-CIV, 2010 WL 2889932, at *3 (S.D. Fla. Jul. 21, 2010) (federal equitable estoppel doctrine exists to prevent a "tactical ploy to try to avoid [the plaintiff's] binding agreement to arbitrate").

The type of gamesmanship employed by the Rahmanys is precisely what the federal equitable estoppel doctrine is designed to prevent. The Rahmanys originally sued both T-Mobile and Subway in this action and alleged in the Complaint that T-Mobile, not Subway, sent the text message that forms the basis of the Rahmanys' claims. Nevertheless, the Rahmanys dismissed their claims against T-Mobile only two days later, leaving Subway as the only defendant on claims based exclusively on T-Mobile's conduct. The Rahmanys obviously knew that if T-Mobile remained a defendant in this action, their claims against both Subway and T-Mobile would fall directly within the arbitration

clause in their agreements with T-Mobile. Those agreements expressly apply to "claims against others relating to services or equipment provided or billed to you (such as [T-Mobile's] suppliers, dealers or vendors) when you also assert claims against [T-Mobile] in the same proceeding." (Dkt. 14 ¶ 19). It is manifestly inequitable – and inconsistent with the strong federal policy in favor of arbitration – to permit the Rahamnys to escape their obligation to arbitrate simply by striking T-Mobile's name from the caption of this lawsuit.

B. The Courts of Appeals' Varying Approaches to the Federal Equitable Estoppel Doctrine Lead to Unpredictability and Uncertainty in an Important Area of Law in Contravention of the Strong Federal Policy in Favor of Arbitration.

Review of the Ninth Circuit's decision is also warranted because, as discussed above, some federal courts continue to apply the federal equitable estoppel doctrine to allow non-signatories to enforce arbitration agreements, while other courts of appeals refuse to apply it.[8] Resolving this uncertainty is particularly critical given that this case involves arbitration, which this Court has previously recognized involves "certain rules of fundamental importance." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 681 (2010). Indeed, this Court frequently grants petitions for

[8] The post-*Arthur Andersen* equitable estoppel decisions of the Second Circuit do not expressly mention *Arthur Andersen*. Nevertheless, courts are "presumed to know the law and apply it in making their decisions." *See United States v. Chavez-Meza*, 854 F.3d 655, 659 (10th Cir. 2017) (internal quotation marks and citation omitted).

certiorari that involve issues related to arbitration. *See, e.g.*, *KPMG LLP v. Cocchi*, 565 U.S. 18 (2011); *Concepcion*, 563 U.S. 333; *Granite Rock Co. v. Int'l Broth. of Teamsters*, 561 U.S. 287 (2010); *Stolt-Nielsen S.A.*, 559 U.S. 662; *Arthur Andersen*, 556 U.S. 624; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 623 (1985) ("We granted certiorari primarily to consider whether an American court should enforce an agreement to resolve antitrust claims by arbitration when that agreement arises from an international transaction."); *Moses H. Cone Mem'l Hosp.*, 460 U.S. 1; *John Wiley & Sons, Inc. v. Livingston*, 375 U.S. 543 (1964).

The need to resolve this uncertainty is particularly important here because states across the country apply very different versions of the equitable estoppel doctrine. Several states track the federal doctrine. *See, e.g.*, *Tobel v. AXA Equitable Live Ins. Co.*, No. 298129, 2012 WL 555801, at *12 (Mich. Ct. App. Feb. 21, 2012) ("[B]ecause plaintiffs' complaint raises allegations of substantially interdependent and concerted misconduct . . . plaintiffs are equitably estopped from arguing that their claims against [the non-signatory] should not be subject to arbitration."); *BlackBerry Limited v. Nokia Corp.*, No. 17-cv-155-RGA, 2018 WL 1525797, at *2 (D. Del. Mar. 28, 2018) (applying Delaware law); *Rossi Fine Jewelers, Inc. v. Gunderson*, 648 N.W.2d 812, 815-16 (S.D. 2002). Other states apply a more restrictive version of the doctrine. For example, the California version requires the allegations of substantially concerted and dependent conduct to be "founded in or intimately connected with the obligations of the underlying agreement." *Kramer*, 705 F.3d at 1128-29. Other states are even more restrictive. *See, e.g.*, *Scheurer*, 863 F.3d at 753 ("Under Wisconsin law, equitable estoppel requires:

(1) action or non-action; (2) on the part of one against whom estoppel is asserted; (3) which induces reasonable reliance thereon by the other, either in action or non-action; (4) which is to the relying party's detriment.") (internal quotation marks and citations omitted); *Warciak v. Subway Rests., Inc.*, 880 F.3d 870, 872 (7th Cir.2018) ("In Illinois, a claim of equitable estoppel exists where a person, by his or her statements or conduct, induces a second person to rely, to his or her detriment, on the statements or conduct of the first person.").

The stark differences in state law is illustrated by Subway's experience in this case and in *Warciak v. Subway Restaurants, Inc.*, which arises out of the same alleged conduct. In *Warciak*, the Seventh Circuit concluded that Illinois governed Subway's ability to invoke the equitable estoppel doctrine and that, to invoke the doctrine, Subway was required to establish "detrimental reliance." 880 F.3d at 872. By contrast, here, the Ninth Circuit found that California law only permitted Subway to compel arbitration where the plaintiffs' claims reveal a "claim of [a] violation of any duty, obligation, term or condition imposed" by the agreement containing the arbitration clause." *Rahmany v. Subway Sandwich Shops, Inc.*, 717 F. App'x 752, 753 (9th Cir. 2018). Given these vastly different state laws, the abrogation of the federal equitable estoppel doctrine would mean that the rights of third-party vendors who contract with companies who have agreements to arbitrate with their customers vary substantially based on the happenstance of the state law that governs the dispute between the third-party vendor and the customer. As the Court has consistently recognized, "[t]he preeminent concern of Congress in passing the [FAA] was to enforce private agreements into which parties had entered, and that

concern ***requires that we rigorously enforce agreements to arbitrate***." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985) (emphasis added). The obligation to rigorously enforce agreements to arbitrate undoubtedly includes an obligation to prevent litigants from avoiding an obligation to arbitrate by engaging in artful pleading. The rejection of the federal equitable estoppel doctrine by certain courts of appeals allows parties to do just that. This Court's review is required to correct the Ninth Circuit's erroneous interpretation of *Arthur Andersen* and to restore the strong federal policy in favor of arbitration that the Court has consistently held to be of critical importance.

The importance of this issue is underscored by the fact that the issue of whether the equitable estoppel doctrine survived *Arthur Andersen* is a recurring issue of substantial importance. A 2008 study found that over three-quarters of consumer contracts contain mandatory arbitration clauses. Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. Mich. J.L. Reform 871, 883 (2008). Given the prevalence of arbitration clauses in consumer contracts, the issue of whether third-party vendors who contract with companies that include arbitration clauses in contracts with their customers is likely to arise frequently. Indeed, just last month, a plaintiff in a TCPA case in the Northern District of Illinois voluntarily dismissed his claims against AT&T and Illinois Bell — signatories to his arbitration agreement — and opted to pursue claims solely against a non-signatory contractor to avoid his arbitration obligation. *See Thompson v. AT&T Corp.*, No. 1:17-cv-03607 (N.D. Ill.), at Dkt. 57.

As Subway's experience here demonstrates, vendors who contract with companies that include arbitration agreements with their consumers are in an uncertain position when they are involved in disputes with those consumers. Under the current state of the law, those vendors can invoke the federal equitable estoppel doctrine to compel arbitration of the dispute if they happen to be sued in the First, Second, or Fourth Circuits. If a vendor is sued in another Circuit, its ability to arbitrate will be dependent upon the state law that is found to govern that particular dispute, which varies widely from state-to-state. This situation is untenable, as it makes it nearly impossible for a vendor to assess accurately the risk of entering into business arrangements that benefit the customers of companies who have chosen to include arbitration clauses in their contracts with their customers.

CONCLUSION

For the reasons discussed above, Subway respectfully requests that the Court grant its petition for certiorari to clarify whether the federal equitable estoppel doctrine continues to exist after *Arthur Andersen*.

Respectfully submitted,

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