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No. 100634-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

ANTONIA SPADONI,
Petitioner-Plaintiff,

v.

MICROSOFT CORP., a domestic corporation, and ALLYIS, INC., a domestic corporation,
Respondents-Defendants.

BRIEF OF AMICI CURIAE WELA, TOWARDS JUSTICE, NELP, NCLC, OMI, PEOPLE'S PARITY PROJECT, AND PUBLIC JUSTICE IN SUPPORT OF PETITIONER

Blythe H. Chandler
bchandler@terrellmarshall.com
TERRELL MARSHALL LAW
GROUP PLLC
936 North 34th Street, Suite 300
Seattle, Washington 98103-8869
Telephone: (206) 816-6603

Jeffrey L. Needle
jneedle@wolfenet.com
LAW OFFICE OF JEFFREY L. NEEDLE
119 First Avenue South, Suite 200
Seattle, Washington 98104
Telephone: (206) 477-1560

David Seligman
david@towardsjustice.org
Rachel Dempsey
rachel@towardsjustice.org
TOWARDS JUSTICE
303 E. 17th Avenue, Suite 400
Denver, Colorado 80203
Telephone: (720) 441-2236

Attorneys for Amici Washington Employment Lawyers Association; Towards Justice; National Employment Law Project, the National Consumer Law Center, the Open Markets Institute, People's Parity Project, and Public Justice

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I. INTEREST OF AMICI CURIAE

The Washington Employment Lawyers Association ("WELA") is an organization of approximately 200 lawyers in Washington. WELA advocates in favor of employee rights in recognition that employment with dignity and fairness is fundamental to the quality of life. WELA's members frequently represent employees in cases for wrongful discharge, failure to accommodate, and failure to provide safe working conditions. WELA members have an interest in ensuring that employees can pursue employment discrimination claims in court.

Towards Justice is a non-profit legal organization that uses impact litigation, policy advocacy, and collaboration with workers and workers' organizations to build worker power and advance economic justice. Towards Justice's clients are frequently bound by arbitration agreements that sharply limit their ability to pursue relief for legal violations. Its advocacy in this area has included representing plaintiffs in *Santich v. VCG*

Holding Corp., 443 P.3d 62 (Colo. 2019), a case involving the use of state law equitable estoppel in arbitration.

National Employment Law Project ("NELP") is a non-profit legal organization with over 50 years of experience advocating for the employment and labor rights of low-wage and unemployed workers. NELP seeks to ensure that all employees, and especially the most vulnerable ones, receive the full protection of labor and employment laws, and that employers are not rewarded for skirting those basic rights. NELP's area of expertise includes the workplace rights of contingent or nonstandard workers, including those workers whose employers impose private arbitration and class and collective waivers. NELP collaborates closely with community-based worker centers, unions, and state policy groups and has litigated directly and participated as amicus in numerous cases addressing the rights of contingent workers. This case is important to NELP and its constituents because permitting

employers to impose confusing waivers of rights on their employees has the potential to adversely affect many mid- to low-income workers clearly working as employees but called independent contractors by their employers.

The National Consumer Law Center ("NCLC") is a national research and advocacy organization focusing on justice in consumer financial transactions, especially for low income and elderly consumers. Since its founding as a nonprofit corporation in 1969, NCLC has been a resource center addressing numerous consumer finance issues. NCLC publishes a 21-volume Consumer Credit and Sales Legal Practice Series, including Consumer Arbitration Agreements (8th ed. 2020) and Consumer Class Actions (10th ed. 2020) and actively has been involved in the debate concerning mandatory pre-dispute arbitration clauses, class action waivers and access to justice for consumers. NCLC frequently appears

as amicus curiae in consumer law cases before trial and appellate courts throughout the country.

The Open Markets Institute (OMI) is a non-profit organization dedicated to promoting fair and competitive markets. It does not accept any funding or donations from for-profit corporations. Its mission is to safeguard our political economy from concentrations of private power that undermine fair competition and threaten liberty, democracy, and prosperity. OMI regularly provides expertise on antitrust law and competition policy to Congress, federal agencies, courts, journalists, and members of the public.

People's Parity Project is a nationwide network of law students and new attorneys organizing to unrig the legal system and build a justice system that values people over profits. As members of the legal profession, the People's Parity Project network believes that it has a responsibility to demystify—and dismantle—the coercive legal tools that have

stacked the system against the people. People's Parity Project is fighting for a civil legal system that works for working people, especially workers of color, women, low-wage, immigrant, disabled, and LGBTQ+ workers.

Public Justice is a national public interest advocacy organization that fights against abusive corporate power and predatory practices, the assault on civil rights and liberties, and the destruction of the earth's sustainability. The organization maintains an Access to Justice Project that pursues high-impact litigation and advocacy efforts to remove procedural obstacles that unduly restrict the ability of workers, consumers, and people whose civil rights have been violated to seek redress in the civil court system. Towards that end, Public Justice has a longstanding practice of fighting against the unlawful use of mandatory arbitration clauses, and has litigated many arbitration-related cases in both state and federal court. As part of this work, Public Justice recently

briefed and argued *Morgan v. Sundance Inc.*, 142 S. Ct. 1708 (2022), in which the U.S. Supreme Court unanimously held that "a court [applying the FAA] may not devise novel rules to favor arbitration over litigation." *Id.* at 1713.

II. INTRODUCTION AND STATEMENT OF THE CASE

The trial court erred when it compelled an employee to arbitrate her claims against her former employers without even addressing her argument that one of her employers, Microsoft, was not a party to any arbitration agreement with her. This Court should clarify (1) that the question of whether a non-signatory to an arbitration contract can enforce it is always a matter for the court to decide, (2) that the purported "delegation clause" here was not "clear and unmistakable," and (3) that general, non-arbitration specific rules of "equitable estoppel" allow non-signatories to enforce a contract only where they can establish that they detrimentally relied on it.

Allyis hired Ms. Spadoni to work as a Junior Content Analyst for $13.00 per hour. CP 71. Microsoft is not a party to the contract between Allyis and Ms. Spadoni, and the contract does not mention Microsoft. CP 73. That is presumably by design, because Microsoft did not wish to be Ms. Spadoni's direct employer. But Ms. Spadoni's work reviewing disturbing images of children, pornography, and violence was done for Microsoft's Online Safety Team and for Microsoft's gain. CP 2-3.

In other words, Microsoft exploited Ms. Spadoni's work while also attempting to create a layer of contractual separation between it and Ms. Spadoni, thereby making it more difficult for Ms. Spadoni to hold Microsoft accountable under the employment laws. Its effort to exploit the contract's arbitration requirement to insulate itself from accountability here illustrates how this strategy disempowers workers.

This is a familiar pattern in both the labor and consumer markets. Across the marketplace, corporate players increasingly separate themselves from direct interactions or contractual relationships with workers and consumers through the use of intermediaries like staffing agencies, subcontractors, dealerships, and debt collectors. By fracturing the marketplace in this manner, powerful upstream corporate players cut costs while avoiding accountability to the workers and customers who drive their profits.

When corporations deliberately separate themselves from workers and consumers, they also often avoid adding their names to contracts with workers and consumers. This contractual separation is not a surprise to these firms—it is a feature of the marketplace they have often helped to construct and from which they profit. But when a dispute later arises, these upstream corporate actors seize upon the arbitration-specific variant of "equitable estoppel" to insert

themselves back into the contracts from which they intentionally remained distant.

Traditional common law principles of non-signatory enforcement should make the application of equitable estoppel in these contexts a tall order. In particular, the common law requires that parties asserting equitable estoppel demonstrate "reliance" on an "act, statement, or admission" by the other party resulting in an "injury" if the court "allows the first party to contradict or repudiate the prior act." *Cornerstone Equip. Leasing, Inc. v. MacLeod*, 159 Wn. App. 899, 907 (2011).

But some federal courts have developed an arbitration-specific equitable estoppel doctrine based on the idea that the Federal Arbitration Act requires favoring arbitration, which makes it far easier for corporations to have their cake and eat it too by maintaining contractual separation from their

workers and consumers while still benefitting from contracts to which they are not parties.

This doctrine is improper. As the United States Supreme Court has emphasized, general principles of contract law govern questions of third-party enforcement. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995). Arbitration agreements stand on equal footing under state law with other contracts. *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708 (2022). Furthermore, equity cannot support a rule that risks even further exploitation by powerful corporate players at the expense of workers and consumers. Therefore, this Court should follow other courts that have returned equitable estoppel to its generally applicable common law roots. *See, e.g.*, *Santich v. VCG Holding Corp*., 443 P.3d 62 (Colo. 2019).

III. ARGUMENT

A. A mere reference to arbitration rules authorizing an arbitrator to resolve disputes about arbitrability is not an enforceable delegation clause.

As an initial matter, the trial court's order and the employers' briefs proceed from the incorrect premise that whether Ms. Spadoni's Employment Agreement calls for delegating questions of arbitrability to an arbitrator is purely a question of federal law. It is not. Instead, courts should decide whether the parties agreed to arbitrate arbitrability by applying ordinary state-law principles. *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). In conducting that analysis, courts "should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so." *Id.* Silence or ambiguity on the question of who should decide arbitrability means it is decided by a court. *Id.* at 944–45.

The Ninth Circuit's decision in *Brennan v. Opus Bank*, 796 F.3d 1125, 1129 (9th Cir. 2015), proceeds from the same faulty premise as the trial court's order. The court's conclusion that "federal law governs the arbitrability questions by default because the agreement is covered by the FAA" conflicts with the plain language of *First Options*. This Court, which need not follow the Ninth Circuit, should not further propagate its mistake. Instead, the Court should evaluate whether the Employment Agreement's reference to the AAA rules is a clear and unmistakable delegation of arbitrability issues by applying ordinary Washington contract interpretation principles.

The reference to the AAA rules in Ms. Spadoni's Employment Agreement is not clear and unmistakable evidence of a delegation for the reasons set forth in Ms. Spadoni's brief.

B. Whether a non-signatory can enforce an arbitration clause cannot be delegated to an arbitrator.

Furthermore, even if the delegation provision here were clear and unmistakable, the trial court erred in delegating to the arbitrator the question of whether Microsoft could benefit from the arbitration requirement. To benefit from the delegation provision—itself a matter of contract, just like the arbitration requirement in which it sits—Microsoft must establish that it has the right to enforce that provision. That question is necessarily for a court to decide.

Courts must ordinarily determine whether an agreement to arbitrate exists and encompasses the dispute at issue. *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000). The second part of that inquiry, whether a claim falls within the scope of an arbitration requirement, may be delegated to an arbitrator. Questions about whether an agreement may be unenforceable, for example because the

agreement is unconscionable, may also be delegated. *See, e.g., Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010).

But the very first question cannot be delegated because without an agreement to arbitrate, an arbitrator has no power over the parties. Courts considering this question must assess not just whether there is *any* arbitration agreement, but whether there is an arbitration agreement *between the parties in the lawsuit*. Arbitration, including arbitration over questions of arbitrability, is "strictly a matter of consent." *Granite Rock Co. v. Int'l Broth. of Teamsters*, 561 U.S. 287, 299 (2010); *see also Woodall v. Avalon Care Ctr.-Federal Way, LLC*, 155 Wn. App. 919, 935, 231 P.3d 1252 (2010) ("The strong policy favoring arbitration does not overcome the policy that one who is not a party to an agreement to arbitrate cannot generally be required to arbitrate.").

Whether Microsoft can enforce the delegation provision through the doctrine of equitable estoppel is not a question

about what claims are subject to arbitration or whether there are defenses to enforcement of an arbitration clause. It is a question of who has the power to enforce the arbitration provision at all, which depends on whether any agreement to arbitrate *with Microsoft* was ever formed. Nothing in the contract even arguably reflects Ms. Spadoni's consent to such an agreement. *See Burnett v. Pagliacci Pizza, Inc.*, 196 Wn.2d 38, 48, 470 P.3d 486 (2020) (manifestation of mutual assent required to form agreement to arbitrate just like any other contract). Nonetheless, the trial court ruled that "the arbitrator, not the court, should determine whether claims against non-signatory (like Microsoft) is subject to arbitration." CP 281. That was error because whether any agreement to arbitrate exists between Ms. Spadoni and Microsoft is not a question that can be delegated to an arbitrator.

C. This Court should reconsider the arbitration-specific equitable estoppel rule adopted in *Townsend*.

This Court should also clarify the scope of equitable

estoppel as a matter of Washington law. Equitable estoppel is a longstanding common-law affirmative defense that is "based on the notion that 'a party should be held to a representation made or position assumed where inequitable consequences would otherwise result to another party who has justifiably and in good faith relied thereon.'" *Lybbert v. Grant Cnty., State of Wash.*, 141 Wn.2d 29, 35, 1 P.3d 1124, 1127 (2000). The elements of equitable estoppel are: "(1) an admission, statement or act inconsistent with a claim afterwards asserted, (2) action by another in [reasonable] reliance upon that act, statement or admission, and (3) injury to the relying party from allowing the first party to contradict or repudiate the prior act, statement or admission." *Id*. (quoting *Bd. of Regents v. City of Seattle*, 108 Wn.2d 545, 551, 741 P.2d 11 (1987)); *see also Colonial Imports, Inc. v. Carlton Northwest, Inc.*, 121 Wn.2d 726, 734, 853 P.3d 913 (1993). In other words, for equitable estoppel to apply, the party seeking its application

must prove detrimental reliance. Equitable estoppel "is not favored, and the party asserting estoppel must prove each of its elements by clear, cogent, and convincing evidence." *Carrillo v. City of Ocean Shores*, 122 Wn. App. 592, 611, 94 P.3d 961 (2004).

In *Townsend v. Quadrant Corp.*, 173 Wn.2d 451, 464, 268 P.3d 917 (2012), the Court did not apply these general principles, creating instead an arbitration-specific rule that makes it easier to allow third parties to gain the benefit of arbitration agreements to which they are not parties. The *Townsend* Court said that "[u]nder principles of equitable estoppel . . . , a party who knowingly exploits a contract for benefit cannot simultaneously avoid the burden of arbitrating." 173 Wn.2d at 464 (Stephens, J., concurring in part and dissenting in part).[1] But, the Court did not mention or

[1] Justice Stephens' concurrence/dissent in *Townsend* received five votes and therefore controls on the issue of non-signatory

analyze whether the defendant acted in reasonable reliance on the plaintiff's knowing exploitation of the contract or whether the defendant thereby suffered injury. *See Lybbert*, 141 Wn.2d at 35. Instead, it looked only to the first prong of the common-law test for equitable estoppel, i.e., whether the plaintiff benefitted from the contract at issue.

In disregarding the reliance and injury prongs of the test for equitable estoppel, *Townsend* relied on a closed universe of self-perpetuating arbitration-specific caselaw that is divorced from what Washington law actually requires. This runs counter to the equal footing principle underlying federal arbitration law, which the United States Supreme Court recently clarified: While arbitration requirements cannot be treated worse than other contracts as a matter of state law,

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enforcement of an arbitration clause. 173 Wn.2d at 464–66 (three justices joined lead opinion and four joined concurrence). The lead opinion controls on the other issues in the case.

they should not be elevated above other contracts either. *See Morgan*, 142 S. Ct. at 1713. The Court has also held that whether a non-signatory may enforce an arbitration agreement based on equitable estoppel is a question of state contract law. *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 631 (2009) (rejecting argument that whether nonparties may enforce a contract is a question of federal law and explaining whether an arbitration provision is made enforceable by a third party must be resolved "under state contract law").

Taken together, *Arthur Andersen* and *Morgan* demonstrate that *Townsend* was wrongly decided. *Townsend*'s adoption of an arbitration-specific equitable estoppel doctrine is not required by federal law and should be reconsidered. As set forth above, nowhere does *Townsend* acknowledge the three-pronged test for equitable estoppel under Washington law. Instead, for its Washington law analysis, the controlling concurrence and dissent relies upon *Satomi Owners Ass'n v.*

Satomi, LLC, 167 Wn.2d 781, 225 P.3d 213 (2009), which does not analyze equitable estoppel and relies on federal cases discussing non-signatory enforcement of arbitration clauses. *Id*. at 810-11 & n.22. *Woodall*, 155 Wn. App. 919, the other Washington case upon which the controlling opinion in *Townsend* relies, similarly does not address equitable estoppel.

Following *Morgan*, this Court should join its sister courts and discard the arbitration-specific equitable estoppel rule in favor of holding that a non-signatory to an arbitration clause must prove the traditional equitable estoppel elements. The Colorado Supreme Court recently addressed equitable estoppel in a case similar to this one. In *Santich v. VCG Holding Corp.*, 443 P.3d 62 (Colo. 2019), a group of employees sued both club owners for whom they worked directly (and with whom they had a written agreement to arbitrate), and the corporate parents of the clubs. *Id.* at 64. The corporate-parent defendants argued equitable estoppel required the workers to

arbitrate claims against them, as well as the club owners who were parties to the agreements. *Id.*

The Colorado Supreme Court rejected an intermediate appellate court ruling that a person who signs an arbitration agreement can be required to arbitrate claims against non-signatories to an agreement when those claims are closely related to claims against a signatory. *Id.* at 65. The court held that "nonsignatories to a contract containing an arbitration provision" can compel arbitration on equitable estoppel grounds only when they prove "all four traditionally defined elements of the doctrine," including detrimental reliance. *Id.* at 66. Other state high courts are in accord. *See Hirsch v. Amper Fin. Servs.*, 215 N.J. 174, 180, 71 A.3d 849 (2012) ("Equitable estoppel is more properly viewed as a shield to prevent injustice rather than a sword to compel arbitration."); *B.C. Rogers Poultry, Inc. v. Wedgeworth*, 911 So. 2d 483, 492 (Miss. 2005) (applying state law to equitable estoppel analysis in the

arbitration context); *Ervin v. Nokia, Inc.*, 349 Ill. App.3d 508, 285 Ill. Dec. 714, 812 N.E.2d 534 (2004) (rejecting arbitration-specific equitable estoppel rule); *see also Scheurer v. Fromm Fam. Foods LLC*, 863 F.3d 748, 753 (7th Cir. 2017) (noting that under *Arthur Andersen*, "[s]ubstantive federal arbitration law does not 'alter background principles of state contract law regarding the scope of agreements (including the question of who is bound by them)'" and analyzing an equitable estoppel argument under state law accordingly (internal citations omitted)).

At a minimum, the Court should reject Microsoft's invitation to further extend the arbitration-specific equitable estoppel doctrine, as *Townsend*'s holding does not support a ruling that Ms. Spadoni is bound to arbitrate with Microsoft. In *Townsend*, homeowners sued the construction company that built their homes. 173 Wn.2d at 453. The construction company sought to enforce an arbitration clause in its

purchase and sale agreements with the homeowners. *Id.* This Court held that because the homeowners' procedural unconscionability challenges were to the purchase and sale agreements as a whole, rather than the arbitration clause specifically, they were for an arbitrator to resolve. *Id.* at 460.

But on the question of whether the homeowners' children were required to arbitrate based on the agreements signed by their parents, the Court reached a different result. The Court rejected the view that the non-signatory children were bound by the arbitration clause because their claims were closely related to their parents' claims and were part of a complaint that sought recission of the contract. Rather, the Court concluded that the "crux" of the non-signatory children's claims "sound in tort and allege personal injuries," and did not "arise out of the contract." *Id.* at 465. That the plaintiffs generally (including non-signatory children) also brought

contract-related claims "is hardly a sufficient basis for applying equitable estoppel." *Id.* at 464.

Townsend stands for the proposition that when a non-signatory makes claims based on duties independent of those created by the contract, *i.e.* claims sounding in tort, that party is not claiming the benefits of the contract and is not bound by equitable estoppel to arbitrate under the contract. Ms. Spadoni's claims are for negligence and violations of the Washington Law Against Discrimination, CP 5-7, so she is not seeking to enforce any duties created by her Employment Agreement with Allyis against Microsoft. As a result, there is "no sufficient factual basis for applying equitable estoppel" to require Ms. Spadoni to arbitrate with non-signatory Microsoft. *Townsend*, 173 Wn.2d at 465.

Equitable estoppel is particularly inappropriate here because Microsoft is seeking to enforce a contract from which it deliberately excluded itself. In *Townsend*, a signatory to a

contract (the builder) sought to bind non-signatories to arbitration under equitable estoppel rules. Here, a non-signatory demands the benefit of arbitration under a contract it chose not to enter. Microsoft disclaims any obligations under Ms. Spadoni's Employment Agreement, yet claims the benefit of the Agreement's arbitration clause. *See* Microsoft's Answering Brief at 13 n.4 ("Microsoft denies it was Spadoni's co- or joint-employer."). This is not equity.

Rather than *Townsend*, the facts here more closely resemble *David Terry Investments, LLC-PRC v. Headwaters Development Grp. LLC*, 13 Wn. App. 2d 159, 463 P.3d 117 (2020), which Microsoft cites to support its equitable estoppel argument. *David Terry*, however, is doubly wrong: part of the opinion purports to rely on *Townsend*, which for the reasons set forth above should be reconsidered. Moreover, the section of the *David Terry* opinion that Microsoft relies on goes far beyond *Townsend*. It adopts arbitration-specific California rule.

Id. at 171 (citing *Metalclad Corp. v. Ventana Evntl. Organizational P'Ship*, 1 Cal. Rptr.3d 328 (2003)). This Court should reject Division III's the conclusion that "when a party has signed an agreement to arbitrate but attempts to avoid arbitration by suing non-signatory defendants for claims that are based on the same facts and are inherently inseparable from arbitrable claims against signatory defendants." *Id*. This arbitration-specific standard for equitable estoppel bears almost no relationship to the actual requirements for equitable estoppel under Washington law. Therefore, this Court should not adopt it, and should clarify that *David Terry* was wrongly decided.

D. Allowing powerful corporate entities to disclaim obligations to employees while exploiting the benefit of arbitration clauses in employment contracts to which they are not parties is not equity.

As suggested by its name, equitable estoppel sounds in equity, but Microsoft's effort to compel Ms. Spadoni to arbitration highlights the profound inequity of workplace

relationships like the one here. Experts describe employment relationships like the one Microsoft and Allyis created for content moderators like Ms. Spadoni as "fissured" workplaces. *See, e.g.,* Tanya Goldman & David Weil, *Who's Responsible Here? Establishing Legal Responsibility in the Fissured Workplace*, 43 Berkley J. Emp. & Lab. L. 55 (2021). A "fissured workplace" model "shifts responsibilities from lead businesses to other organizations while still maintaining significant control over workers' outcomes." *Id.* at 64. "This fissuring comes from outsourcing, contracting, subcontracting, or the use of digital platforms to undertake much of the lead business' work." *Id.* at 64–65. Fissuring has "undermined the rights and protections typically afforded workers via employment." *Id.* at 65. By shedding the direct employment of workers, firms cut costs and maximize profits.

The results have been profound and devastating for workers—low-wage workers in particular. According to recent

data, the proportion of workers who are hired out through a contractor nearly tripled between 2005 and 2015. Lawrence F. Katz & Alan B. Krueger, *The Rise and Nature of Alternative Work Arrangements in the United States*, 1995-2015, National Bureau of Economic Research (Sept. 2016).[2] Workers hired through an intermediary like a temporary staffing agency are likely to earn lower wages, have fewer benefits, and be more vulnerable to exploitative and dangerous workplace practices than employees who work directly for the upstream company contracting for their labor. *See generally* Neil Irwin*, To Understand Rising Inequality, Consider the Janitors at Two Top Companies, Then and Now*, N.Y. Times (Sept. 3, 2017)[3]; Miranda Dietz, UC Berkeley Labor Center, *Temporary Workers in California are Twice as Likely as Non-Temps to Live in*

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[2] Available at http://www.nber.org/papers/w22667.

[3] Available at https://www.nytimes.com/2017/09/03/upshot/to-understand-rising-inequality-consider-the-janitors-at-two-top-companies-then-and-now.html.

Poverty: Problems with Temporary and Subcontracted Work in California (Aug. 28, 2012)[4]; National Employment Law Project, Temp Workers Demand Good Jobs (February 2022).[5] Additionally, staffing agencies, franchisees, and subcontractors have lower profit margins and greater incentives to cut corners when it comes to complying with labor standards laws. National Employment Law Center, *Temp Workers Demand Good Jobs* at 6-8 (Feb. 2022).[6]

These trends have a disparate impact on workers and business owners of color. While the owners and decision-makers at the powerful corporations exerting control from the

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[4] Available at https://laborcenter.berkeley.edu/temporary-workers-in-california-are-twice-as-likely-as-non-temps-to-live-in-poverty-problems-with-temporary-and-subcontracted-work-in-california/.

[5] Available at https://s27147.pcdn.co/wp-content/uploads/Temp-Workers-Demand-Good-Jobs-Report-2022.pdf; *see also* National Employment Law Project, Lasting Solutions for America's Temporary Workers (August 2019), available at https://s27147.pcdn.co/wp-content/uploads/Lasting-Solutions-for-Americas-Temporary-Workers-Brief.pdf.

[6] David Weil, *The Fissured Workplace: The Problem*, http://www.fissuredworkplace.net/the-problem.php.

top of these corporate hierarchies are disproportionately white, business owners of color are more likely to own tightly-controlled businesses like franchises, and workers of color are disproportionately represented among gig workers, hospitality and service workers, and other industries disproportionately affected by workplace fissuring. Sandeep Vaheesan, *How Antitrust Perpetuates Structural Racism*, The Appeal (Sept. 16, 2020).[7]

Upstream contractors, meanwhile, have exploited this model while maintaining power and control over workers employed under their brand. Fissuring often allows dominant firms further up the fissured labor market to evade labor laws by avoiding accountability for wage theft, misclassification, and discrimination and by preventing workers from collectively bargaining in negotiations with them. *See, e.g.*, Marshall

[7]Available at https://theappeal.org/how-antitrust-perpetuates-structural-racism/.

Steinbaum, *Antitrust, the Gig Economy, and Labor Market Power*, 82 Law & Contemp. Problems 45, 49 (2019) (describing how dominant firms leverage contractual relationships with other corporate entities that supply them with services and labor while fissuring to evade labor laws). At the same time, those firms continue to exercise control over their workers, by for example, controlling where they work, what food they can serve, and (for workers in customer-facing positions) what prices they can charge. *See generally* Sanjukta Paul, *Fissuring and the Firm Exemption*, 82 Law and Contemp. Problems 65-87 (2019)[8]; David Seligman, *Having Their Cake & Eating It Too*, Harv. Labor & Worklife Program (2019).[9] As one scholar recently remarked, "[a]lthough most workers remain statutory employees of some employer, they are increasingly remote

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[8] Available at https://scholarship.law.duke.edu/lcp/vol82/iss3/4.

[9] Available at https://lwp.law.harvard.edu/files/lwp/files/webpage_materials_papers_seligman_june_13_2018.pdf.

from the decision-making entity that exerts power over their day-to-day lives and terms of work." *See* Steinbaum at 46.

Firms like Microsoft profit from the critical work done by those like Ms. Spadoni who are employed by staffing agencies like Allyis. Those workers tend to earn lower wages and are more likely to suffer from exploitative workplace practices than employees of lead firms contracting for staffing agency labor. Meanwhile, by contracting their labor needs out through staffing agencies, powerful upstream employers skirt liability for labor violations occurring in their workplaces. And when workers nonetheless try to hold the lead firms accountable for workplace harm, the same companies that distance themselves intentionally from the workers providing labor via staffing agency intermediaries then seek to rely on the arbitration-specific equitable estoppel doctrine to enforce arbitration provisions in the staffing agencies' contracts.

Similar trends are at work in the consumer marketplace, where dominant firms like manufacturers and financial services giants operate through third parties that can interact with and gather information about consumers.

In the consumer context, car manufacturers that are not parties to purchase agreements between consumers and dealerships have sought to invoke the doctrine to shield themselves from breach of warranty claims. *See, e.g.*, *Ngo v. BMW of N. Am.*, 23 F.4th 942, 946 (9th Cir. 2022) (holding state law determines whether non-signatory manufacturer is third-party beneficiary of contract between consumer and dealership and concluding BMW was not). Debt collectors that have no direct contractual relationship with debtors have pointed to equitable estoppel in moving to compel arbitration based on the contractual relationship between the creditor and debtor. *See, e.g.*, *Pagan v. Integrity Sol. Servs., Inc.*, 42 F. Supp. 3d 932 (E.D. Wis. 2014). And banks that facilitate

predatory payday loans issued by other lenders have compelled arbitration of consumer claims based on the arbitration requirement in the payday loan agreement. *See, e.g.*, *Achey v. BMO Harris Bank, N.A.*, 64 F. Supp. 3d 1170, 1177 (N.D. Ill. 2014). In all these cases, corporate players seek to benefit from contractual separation between themselves and consumers while at the same time seeking to weaponize consumer contracts to insulate themselves from claims.

There is no equity in allowing upstream employers or other corporations to disclaim responsibility for workplace conditions while wrapping themselves in the shield of arbitration clauses found in contracts to which they are not parties. This court should return equitable estoppel to its equitable roots by rejecting the arbitration-specific rule Microsoft advocates for here.

IV. CONCLUSION

Amici respectfully request that the Court hold that a mere reference to arbitrator rules is not an enforceable delegation clause as a matter of Washington law. The Court should further hold that there is no arbitration-specific equitable estoppel rule in Washington. Non-signatories seeking to enforce agreements to arbitrate should be required to show reliance and injury just as any other party asserting equitable estoppel would be required to do.

V. RAP 18.17(B) CERTIFICATION

I hereby certify that this brief contains 4,837 words in compliance with RAP 18.17(b) and RAP 18.17(c)(6).

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RESPECTFULLY SUBMITTED AND DATED this 9th day of December, 2022.

WASHINGTON EMPLOYMENT
LAWYERS ASSOCIATION

By: /s/ Blythe H. Chandler, WSBA #43387
Blythe H. Chandler, WSBA #43387
Email: bchandler@terrellmarshall.com
Jeffrey L. Needle, WSBA #6346
Email: jneedlel@wolfenet.com
936 N. 34th Street, Suite 300
Seattle, Washington 98103-8869
Telephone: (206) 816-6603

David Seligman
Email: david@towardsjustice.org
Rachel Dempsey
Email: rachel@towardsjustice.org
TOWARDS JUSTICE
303 E. 17th Street, Suite 400
Denver, CO 80203
Telephone: (720) 441-2236

Attorneys for Amici Washington Employment Lawyers Association; Towards Justice; National Employment Law Project, the National Consumer Law Center, the Open Markets Institute, People's Parity Project, and Public Justice

CERTIFICATE OF SERVICE

I certify that on December 9, 2022, I caused a true and correct copy of the foregoing to be served on the following via the Court of Appeals Electronic Filing Notification System:

Jennifer D. Bennett
GUPTA WESSLER PLLC
100 Pine Street, Suite 1250
San Francisco, California 94111
Telephone: (202) 888-1741

Matthew W. H. Wessler
GUPTA WESSLER PLLC
2001 K St. NW, Suite 850
Washington, DC 20009
Telephone: (202) 888-1741

Rebecca J. Roe, WSBA #7560
Jamal Whitehead, WSBA #39818
SCHROETER GOLDMARK & BENDER
401 Union Street, Suite 3400
Seattle, Washington 98101
Telephone: (206) 622-8000

Attorneys for Petitioner

Robert J. Maguire, WSBA #29909
Melissa K. Mordy, WSBA #41879
Arthur A. Simpson, WSBA#44479
DAVIS WRIGHT TREMAINE LLP
920 Fifth Avenue, Suite 3300
Seattle, Washington 98104
Telephone: (206) 622-3150
Attorneys for Respondent Microsoft Corp.

Heather M. Jensen, WSBA #29635
Donna M. Chamberlin, WSBA #31227
Kylene R. Slocum, WSBA #58600
LEWIS BRISBOIS BISGAARD & SMITH LLP
1111 Third Avenue, Suite 2700
Seattle, Washington 98101
Telephone: (206) 436-2020

Attorneys for Defendant-Respondent Allyis, Inc.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 9th day of December, 2022.

By: /s/ Blythe H. Chandler, WSBA #43387
Blythe H. Chandler, WSBA #43387

TERRELL MARSHALL LAW GROUP PLLC

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- roe@sgb-law.com
- tami.foster@lewisbrisbois.com
- vickewhite@dwt.com
- whitehead@sgb-law.com

Comments:

Sender Name: Holly Rota - Email: hrota@terrellmarshall.com
Filing on Behalf of: Blythe H Chandler - Email: bchandler@terrellmarshall.com (Alternate Email:)

Address:
936 N. 34th Street
Suite 300
Seattle, WA, 98103
Phone: (206) 816-6603

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