No. 17-717

IN THE

Supreme Court of the United States

APPLIED UNDERWRITERS CAPTIVE RISK ASSURANCE COMPANY, INC.,

Petitioner,

v.

MINNIELAND PRIVATE DAY SCHOOL, INC.,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether the Fourth Circuit erred in finding Respondent had challenged the validity of the delegation provision of an arbitration clause in a contract under § 2 of the Federal Arbitration Act?

Whether the Fourth Circuit erred in holding the District Court must determine the validity of the delegation provision of an arbitration clause in a contract under § 2 of the Federal Arbitration Act before ordering compliance with it under § 4?

CORPORATE DISCLOSURE STATEMENT

Respondent Minnieland Private Day School, Inc. is a privately held Virginia corporation.

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STATEMENT

The courts below found that Respondent Minnieland Private Day School, Inc. (Minnieland) "lodged a challenge against the delegation provision" contained in the arbitration clause of a contract, which the District Court "must consider . . . before ordering compliance with [such provisions]." Pet. App. 11a (citing *Rent-A-Center, West, Inc. v. Jackson*, 561, U.S. 63, 71 (2010) (*Rent-A-Center*). Petitioner Applied Underwriters Captive Risk Assurance Company, Inc.'s (Applied Underwriters) disappointment with that finding does not present compelling reasons for this Court's review.

The Fourth Circuit correctly stated the rule of law at issue and properly applied ordinary principles of Virginia law, the McCarran-Ferguson Act, and the Federal Arbitration Act to the Motion to Compel Arbitration under the contract.

Far from displaying "hostility to arbitration" and "defiance of *Rent-A-Center,*" the Fourth Circuit followed this Court's precedent precisely. Its application of law to this contract demonstrates reasoned and faithful respect for Congressional statutory purpose and Virginia's explicit authority over the business of insurance in the Commonwealth.

There is no conflict among the circuits and the decision below does not otherwise merit this court's review.

REASONS FOR DENYING THE PETITION

I. WHETHER THE FOURTH CIRCUIT ERRED IN FINDING RESPONDENT HAD IN FACT CHALLENGED THE VALIDITY OF THE DELEGATION PROVISION OF AN ARBITRATION CLAUSE IN A CONTRACT UNDER § 2 OF THE FEDERAL ARBITRATION ACT DOES NOT PRESENT COMPELLING REASONS FOR REVIEW

Applied Underwriters sought to compel arbitration under a contract[1] containing what it describes as "a broad arbitration agreement with a delegation provision."[2] Pet. at 4. Minnieland challenged the validity as a matter of law of *any* arbitration provision in the contract pursuant to Virginia's insurance statute, Va. Code Ann § 38.2-312, and contract law. Pet. App 6a. Under the McCarran Ferguson Act, 15 U.S.C. § 1012, the FAA does not preempt state laws regulating the business of insurance such as the Virginia insurance statute at issue here.

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[1] Applied Underwriters describes the contract as part of "EquityComp®, a workers' compensation program," Pet. at 4, a "program" that has been described as "an insurance scheme . . . so inventive and novel it has been patented." *National Convention Services, LLC v. Applied Underwriters Captive Risk Assurance Company, Inc.*, 239 F.Supp.3d 761, 767 (S.D.N.Y. 2017) (*National Convention Services*).

[2] Consistent with the absence of compelling reasons for review here, Applied Underwriters did not seek enforcement of the "broad arbitration agreement with a delegation provision" in *National Convention Services*. *Id*. at 767 n.1.

A. The Fourth Circuit Properly Stated and Applied the Rule of Law at Issue

Resolution of Applied Underwriters' Motion "pursuant to 9 U.S.C. § 4 . . . to dismiss this action and refer it to binding arbitration under the [contract's] arbitration clause" or "[i]n the alternative . . . pursuant to 9 U.S.C. § 3, to stay this action until the parties arbitrate under the [contract]," Pet. App. at 82a., required the lower courts to decide "whether the delegation provision is valid under § 2" of the Federal Arbitration Act, 9 U.S.C. § 1-14 (FAA). *Rent-A-Center*, 561 U.S. at 70.

In addressing the issue, the Fourth Circuit began by recognizing the FAA

> provides that "[a] written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The Federal Arbitration Act generally preempts state laws limiting the enforceability of arbitration agreements. *See, e.g., Preston v. Ferrer*, 552 U.S. 346, 352-53 (2008).

Pet. App. 8a. Courts are obligated, the Fourth Circuit recited, to determine the validity of a challenged arbitration agreement, including a delegation provision in an arbitration clause that purports to authorize arbitration of questions of arbitrability:

> *Rent-A-Center* makes clear, however, that "[i]f a party challenges the validity under § 2 of the precise agreement to arbitrate at issue,

> the federal court must consider the challenge before ordering compliance with that agreement under § 4." *Id.* at 71. Accordingly, because delegation provisions constitute "an additional, antecedent agreement" to arbitrate, such provisions are "valid under § 2 'save upon such grounds as exist at law or in equity for the revocation of any contract.'" *Id.* at 69-70 (quoting 9 U.S.C. § 2). Federal courts, therefore, "must consider" challenges to delegation provisions "before ordering compliance with [such provisions]." *Id.* at 71.

Pet. App. 11a.

Applied Underwriters' assertion that "the Fourth Circuit ignored the rule of severability," Pet. at 10, is incorrect. In fact, the Fourth Circuit's recitation that courts must consider validity challenges is taken verbatim from the *Rent-A-Center* court's discussion of the severability rule:

> But that agreements to arbitrate are severable does not mean that they are unassailable. *If a party challenges the validity under § 2 of the precise agreement to arbitrate at issue, the federal court must consider the challenge before ordering compliance with that agreement under § 4.* In *Prima Paint*, for example, if the claim had been "fraud in the inducement of the arbitration clause itself," then the court would have considered it. 388 U.S., at 403-404, 87 S.Ct. 1801. "To immunize an arbitration agreement from judicial challenge on the ground of fraud in the inducement would be to elevate it over other forms of contract," *id.*, at 404, n. 12, 87 S.Ct. 1801.

Rent-A-Center, 561 U.S. at 71 (emphasis added) (quoted at Pet. App. 11a).

Applied Underwriter's rhetoric that the Fourth Circuit's decision "defies this Court's precedent in *Rent-A-Center*," Pet. 12, is empty. The Fourth Circuit followed *Rent-A-Center* precisely. Applied Underwriters' assertion otherwise reflects its unwillingness to accept that "the FAA operates on this additional arbitration agreement [delegation provisions] just as it does on any other." Pet. App. at 11a (quoting *Rent-A-Center*, 561 U.S. at 70).

In this case, determination of the validity of the delegation provision of the arbitration clause in the contract required consideration of the McCarran-Ferguson Act, 15 U.S.C. §§ 1011 through 1015, which, the Fourth Circuit explained,

> provides that 'no Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance.' 15 U.S.C. § 1012. "Thus, McCarran-Ferguson authorizes 'reverse preemption' of generally applicable federal statutes by state laws enacted for the purpose of regulating the business of insurance." *ESAB Grp., Inc. v. Zurich Ins. PLC*, 685 F.3d 376, 380 (2012).

Pet. App. 8a.

In regulating the business of insurance, the Fourth Circuit continued, the Commonwealth of Virginia

> [p]rovides that "[n]o insurance contract delivered or issued for delivery in this Commonwealth and covering subjects which are located or residing in this Commonwealth . . . shall

> contain any condition, stipulation or agreement . . . [d]epriving the courts of this Commonwealth of jurisdiction in actions against the insurer" and that "[a]ny such condition, stipulation or agreement shall be void." Va. Code Ann. § 38.2-312.

Pet. App. 9a. Addressing Minnieland's challenge to the validity of the delegation provision of the arbitration agreement in the contract, the Fourth Circuit noted that Minnieland specifically "argued that Section 38.2-312 rendered void '*any*' arbitration provision in the RPA, J.A. 208-09 (emphasis added), necessarily including the delegation provision, which is simply 'an additional, antecedent agreement' to arbitrate, *Rent-A-Center*, 561 U.S. at 70 . . . " Pet. App. 12a-13a.

> And to avoid any doubt that its challenge to the enforceability of the arbitration agreements in the RPA extended to the delegation provision, Minnieland expressly asserted that, under Section 38.2-312, "*[t]he court must resolve* the validity of the arbitration provision," an argument relevant only to the enforceability of the delegation provision. J.A. 208-09 (emphasis added).

Id. at 13a.[3]

In finding Minnieland had challenged the validity of the delegation provision and remanding to the District

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[3] The statute itself demonstrates the specificity of the challenge to the delegation provision Minnieland lodged in this case. It applies only to "any condition, stipulation or agreement" in an insurance contract limiting jurisdiction and requiring construction by foreign law "but any such voiding shall not affect the validity of the remainder of the contract." Va. Code Ann. § 38.2-312.

Court for its determination whether "the [contract] is an insurance contract under Virginia law," and therefore, subject to Va. Code Ann. § 38.2-312, Pet. App. 20a, the Fourth Circuit followed this Court's precedents with fidelity.

B. The Fourth Circuit's Opinion Is a Carefully Reasoned Analysis and Application of the McCarran-Ferguson Act, the Federal Arbitration Act, and Virginia State Law to the Contract at Issue in This Case

The lower courts' agreement that Va. Code § 38.2-312 "reverse preempts" the FAA through the McCarran-Ferguson Act presents no compelling reason for review.

Virginia's regulation of the interpretation and enforcement of Virginia insurance contracts, Va. Code § 38.2-312, is the "core of 'the business of insurance'" the McCarran-Ferguson Act, 9 U.S.C. § 1012(a), reserves to state regulation. *U.S. Department of Treasury v. Fabe*, 508 U.S. 491, 503 (1993) (McCarran-Ferguson preempts activities that "affect performance of the insurance contract or enforcement of contractual obligations."); *SEC v. National Securities, Inc.*, 393 U.S. 453, 459-460 (1969) ("The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement – these were the core of 'the business of insurance.'").[4]

[4] "The McCarran-Ferguson Act was passed in reaction to this court's decision in *U.S. v. South-Eastern Underwriters Ass'n*, 332 U.S. 533 (1944). Prior to that decision, it had been assumed, in the language of the leading case, that '(i)ssuing a policy of insurance is not a transaction of commerce.' *Paul v. Virginia*, 8 Wall. 168, 183, 19 L.Ed. 357 (1989). Consequently, regulation of

The FAA is not an Act of Congress that "specifically relates to the business of insurance," 15 U.S.C. § 1012(b), and it does not preempt state laws regulating the relationship between insurer and insured, specifically including prohibitions of mandatory, binding arbitration of insurance contracts. *Am. Bankers Ins. Co. of Florida v. Inman*, 436 F.3d 490, 493 (5th Cir. 2006) (Mississippi statute prohibiting arbitration of any claim arising under uninsured motorist coverage "reverse preempt[s] the FAA pursuant to the McCarran-Ferguson Act."); *McKnight v. Chicago Title Ins. Co., Inc.*, 358 F.3d 854, 857 (11th Cir. 2004) (exclusion from Georgia Arbitration Code of "any contract of insurance" preempts FAA); *Standard Security Life Insurance Co. of NY v. West*, 267 F.3d 821, 823 (8th Cir. 2001) (Missouri Arbitration Act exception of contracts of insurance "inverse preempts" FAA); *Washington, Dept. Transp. v. James River Insurance Company*, 176 Wash.2d 390, 403, 292 P.3d 118, 124 (Wash. 2013) (statue prohibiting any agreement in insurance contracts "depriving the courts of this state of jurisdiction of action against the insurer" is "shielded from preemption by the FAA under the McCarran-Ferguson Act.").

The Fourth Circuit's determination that it was for the District Court to determine whether "the [contract] is an insurance contract under Virginia law," Pet. App. 20a, does not merit review. *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 474 (1989) ("[T]he interpretation

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insurance transactions was thought to rest exclusively with the States. In *South-Eastern Underwriters*, this Court held that insurance transactions were subject to federal regulation under the Commerce Clause, and that the antitrust laws in particular, were applicable to them. Congress reacted quickly." *Id.*, 393 U.S. at 458.

of private contracts is ordinarily a question of state law, which this Court does not sit to review."). The court cannot determine whether the FAA applies to the contract or whether any provision under which Applied Underwriters seeks to compel arbitration, including the delegation provision, is valid without making such a determination. *Norfolk Southern Ry. Co. v Kirby*, 543 U.S. 14, 24 (2004) (court looks to the "nature and character of the contract" to determine what law governs it).

C. There is No Conflict Among the Circuits

Applied Underwriters' assertion that the decision below created conflict among the Circuits is more than a stretch. Both cases cited to establish the claimed conflict, cases in which Applied Underwriters itself was involved, are "inapposite," as the Fourth Circuit stated. Pet. App. 16a. Both were "governed by different state laws" and neither "considered – much less decided – whether the relevant state insurance laws rendered unenforceable the *delegation provision* in the [contract] – the question we resolve here." *Id*. (original emphasis).

Applied Underwriter's recourse to the Sixth Circuit's unpublished, nonprecedential opinion in *Milan Express Co., Inc. v. Applied Underwriters Captive Risk Assurance Company, Inc.*, 590 Fed. Appx. 482 (6th Circ. 2014) is particularly unavailing. Not only did the Sixth Circuit not mention or consider the McCarran-Ferguson Act and its applicability to the Nebraska arbitration statute at issue there, its decision rested squarely on its finding that Milan failed to assert "a challenge to the validity of the arbitrability agreement, specifically (or the Agreement as a whole), on grounds that would warrant revocation." *Id.* at 486. Similarly, the Third Circuit's holding in *South Jersey Sanitation Company, Inc. v. Applied Underwriters Captive Risk Assurance*

Company, Inc., 840 F.3d 138 (3rd Cir. 2016), while again interpreting the Nebraska statute not at issue here, found "neither of South Jersey's challenges focus on the arbitration provision alone," *id*. at 144, and that "the District Court never found that the [contract] falls within the ambit of the Nebraska Statut[e]," *id*. at 146. By contrast, in this case Minnieland challenged the delegation provision of the arbitration clause alone as prohibited by Va. Code. § 38.2-312.

Applied Underwriters' suggestion that Alabama's decision in *Ex Parte Foster*, 758 So. 2d 516 (Ala. 1999), represents any conflict here is singularly inapt. The *Ex Parte Foster* court summarily ruled it had "rejected Foster's first argument – that the McCarran-Ferguson Act precludes application of the FAA to her insurance contract," 758 So. 2d at 519, in its previous decision *American Bankers Ins. Co. of Florida v. Crawford*, 757 So. 2d 1125 (Ala. 1999) (*Crawford*). *Crawford* held, unremarkably, that "[b]ecause Alabama's statute which states that agreements to arbitrate are unenforceable is a general statute not found in the insurance code, but instead found in Alabama's general contract law and directed at entities other than insurance companies, it is not a statute which regulates insurance within the meaning of McCarran-Ferguson." 757 So.2d at 1134. That Alabama's general statute "directed at entities other than insurance companies" does not raise McCarran-Ferguson preemption issues does not conflict in any way with the Fourth Circuit's decision in this case, which indisputably involves a Virginia insurance statute concerned solely with the business of insurance.

Finally, the Fourth Circuit's decision is completely consistent with those circuits that have in fact

considered the validity of state insurance statutes prohibiting binding arbitration in insurance contracts. *Supra* at 8.

D. The Fourth Circuit Did Not Evade *Rent-A-Center*

Applied Underwriters' specter of a "growing trend to evade *Rent-A-Center,*" Pet. 18-22, is essentially a listing of irrelevant cases purportedly involving "unchallenged delegation provisions." Pet. 18-22. It represents nothing so much as Applied Underwriters' refusal to accept the fact that Minnieland did challenge the validity of the delegation provision at issue in this case. Its discussion of unrelated federal cases has no applicability to the decision here, where the Fourth Circuit explicitly stated and followed the *Rent-A-Center* framework to address the validity challenge to the delegation provision. The Fourth Circuit never discussed, mentioned, considered, or relied on any purported exception to *Rent-A-Center's* framework or analysis, as Applied Underwriters had to acknowledge. Pet. 19 ("Although the Fourth Circuit did not reference the wholly groundless exception . . ."). The state decisions Applied Underwriters cited are equally inapplicable cases where "the plaintiff failed to specifically challenge the delegation provision," Pet. 20, unlike Minnieland's specific validity challenge in this case.

II. THE FOURTH CIRCUIT DID NOT ASSUME THE CONTRACT IS AN INSURANCE CONTRACT AND THE QUESTION WHETHER THE LOWER COURTS ERRED IN DECIDING THE MOTION TO COMPEL ARBITRATION IS PREMATURE UNTIL THE FOURTH CIRCUIT HAS REVIEWED THAT DECISION

Applied Underwriters spends several pages arguing that the Fourth Circuit concluded that the contract at issue is an insurance contract, Pet. 22-25, when in fact the Fourth Circuit remanded the case to the District Court for consideration of that issue. Pet. App. 20a. Following the Fourth Circuit's mandate, the district court ordered briefs and argument on whether the contract is an insurance contract under Virginia law. Pet. App. 20a.

Pursuant to that mandate, on November 9, 2017, the District Court issued its Order on Applied Underwriters' Motion to Compel Arbitration. On December 1, 2017, Applied Underwriters noticed its appeal of that Order, which appeal was docketed in the Fourth Circuit on December 5, 2017 as Case No. 17-2385.

Applied Unerwriters' Motion to Compel Arbitration has yet to be finally resolved by the Fourth Circuit. The specific question whether the contract at issue in this case is an insurance contract pursuant to Virginia law remains pending in the Fourth Circuit. Even were Applied Underwriters arguments otherwise worthy of consideration, review of the lower courts' ruling on Applied Underwriters' Motion to Compel Arbitration is premature until the Fourth Circuit has expressed its opinion on the matter.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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