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

REPLY BRIEF FOR THE PETITIONER

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ARGUMENT

The Brief in Opposition (the "Opposition") concedes nearly every issue that makes certiorari warranted in this case.

First and foremost, Respondent acknowledges that its challenge to the delegation provision was no different than its challenge to the arbitration agreement as a whole. Under this Court's well-established precedent, Respondent's failure to identify a separate challenge to the delegation provision should have resulted in the Fourth Circuit granting Petitioner's motion to compel arbitration. *See Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63 (2010). Instead, the Fourth Circuit disregarded that binding precedent.

Furthermore, the Opposition implicitly concedes the importance of the issues presented in this Petition. Respondent makes no attempt to disagree with or minimize the evidence in the Petition concerning the prevalence of delegation provisions, the trend of courts refusing to enforce those provisions, and the prevalence of anti-arbitration statutes in the insurance context.

Because this case easily satisfies the criteria for this Court's review, the Petition should be granted.

I. RESPONDENT FAILS TO DISTINGUISH THIS CASE FROM *RENT-A-CENTER*

The Fourth Circuit held in this case that the Respondent's challenge to the arbitration agreement as a

whole also applied separately to the delegation provision, and therefore the Fourth Circuit was authorized by *Rent-A-Center* to decide the merits of the arbitrability issues. That holding directly conflicts with this Court's clear precedent interpreting the Federal Arbitration Act ("FAA").

1. In its Opposition, Respondent concedes that it failed to specifically challenge the delegation provision, and instead made arguments that applied to the arbitration agreement as a whole. (BIO 2) ("Minnieland challenged the validity as a matter of law of *any* arbitration provision in the contract. . . ."). With that concession, which is amply supported by the record below, there is no way to square the Fourth Circuit's opinion with *Rent-A-Center*.

Rent-A-Center requires a party to make a challenge to the delegation provision that is both specific and successful in order to have the court address arguments as to why the parties should not arbitrate. *Rent-A-Ctr., W.*, 561 U.S. at 71. In applying that rule, this Court found that Jackson's unconscionability arguments were not specific to the delegation clause because they applied to the arbitration agreement as a whole. *Id.* at 74. The Opposition makes no attempt to distinguish Respondent's attack on its arbitration agreement from Jackson's failed attack on his arbitration agreement. (BIO 2-9). Both are equally non-specific and both fail.

2. While failing to point out any substantive distinction between its arguments and those of Jackson,

Respondent attempts to distract this Court with irrelevant arguments. Critically, it holds up the McCarran-Ferguson Act as if it were a shield against application of the FAA and all of this Court's precedent interpreting it. (BIO 5-6). However, as explained in the Petition, any arguments relating to the McCarran-Ferguson Act are not specific to the delegation provision; they apply equally to the entire arbitration agreement (if at all).[1] Therefore, the McCarran-Ferguson Act, including the Virginia anti-arbitration statute, is not a valid basis to refuse to enforce the delegation provision under the test in *Rent-A-Center West, Inc.*, 561 U.S. at 71. (Pet. 12-17).

II. RESPONDENT FAILS TO DIMINISH THE IMPORTANCE OF THE QUESTIONS PRESENTED

The Supreme Court Petition establishes that all three criteria in Rule 10 support granting certiorari in this case: (1) conflict between the decision below and decisions of other federal courts of appeals and state

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[1] The Ninth Circuit's decision in *Rent-A-Center* similarly suggested that a statute made the dispute fall outside the arbitration agreement. *Jackson v. Rent-A-Ctr. W., Inc.*, 581 F.3d 912, 916 (9th Cir. 2009), *rev'd*, 561 U.S. 63 (2010) ("Jackson challenges the free-standing Agreement to Arbitrate he signed, contending that the Agreement is unconscionable and that he cannot be compelled to arbitrate his statutory discrimination claims."). In its reversal, this Court did not analyze the merits of the statutory preemption argument at all, but simply focused on the argument's lack of specificity to the delegation provision. *See Rent-A-Ctr., W.*, 561 U.S. at 71. That treatment confirms Petitioner's position that both the McCarran-Ferguson Act and the Virginia statute are irrelevant to the analysis of the delegation provision.

courts of last resort; (2) conflict between the decision below and *Rent-A-Center*; and (3) the presence of important questions of federal law.

Respondent does not and cannot diminish the importance of the questions presented in the Petition. The Opposition makes no effort to show that the enforcement of delegation clauses is not a recurring and important issue. Delegation provisions are explicitly included in the terms of such ubiquitous service providers as Uber,[2] and Words With Friends.[3] In addition, delegation provisions are included by reference in the terms of[4] Amazon Prime,[5] PayPal,[6]

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[2] *Legal – U.S. Terms of Use*, Uber, https://www.uber.com/legal/terms/us/ (last visited Dec. 26, 2017).

[3] *Legal – Terms of Service*, Zynga, https://www.zynga.com/legal/terms-of-service (last visited Dec. 26, 2017).

[4] These companies' terms of service provide for binding arbitration under the rules of the American Arbitration Association ("AAA"). Every federal circuit to consider the issue has concluded that agreeing to arbitrate under the rules of the AAA is the equivalent of a delegation provision. *See, e.g., Brennan v. Opus Bank*, 796 F.3d 1125, 1130 (9th Cir. 2015) (noting that "[v]irtually every circuit to have considered the issue has determined that incorporation of the [AAA] arbitration rules constitutes clear and unmistakable evidence that the parties agreed to arbitrate arbitrability."); *Fallo v. High-Tech Inst.*, 559 F.3d 874, 878 (8th Cir. 2009); *Contec Corp. v. Remote Solution Co.*, 398 F.3d 205, 208 (2d Cir. 2005).

[5] *Amazon Prime Terms*, Amazon, https://www.amazon.com/gp/help/customer/display.html?nodeId=13819201 (last updated Oct. 31, 2017).

[6] *PayPal User Agreement – Agreement to Arbitrate*, PayPal, https://www.paypal.com/us/webapps/mpp/ua/useragreement-full#agreement-arbitrate (last visited Dec. 26, 2017).

Pandora[7], American Express,[8] and many more services that people use every day. Similarly, the Opposition does not challenge the data regarding the number of anti-arbitration statutes in the insurance context or the importance of whether those should apply to a delegation clause. The importance of the issues presented is incontrovertible.

1. Respondent's only efforts to respond to the criteria supporting review are half-hearted and misdirected. For example, it argues that the trend of state and federal cases refusing to enforce unchallenged delegation provision "has no applicability here." (BIO 11). But that ignores the point. Petitioner understands that this Court generally does not grant petitions raising errors of law. However, if that same error of law is important and is being made by multiple courts it becomes necessary to correct – especially when it is contrary to this Court's precedent. *See, e.g.*, *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 568 n.1 (2013) (granting review after two circuits interpreted the *Stolt-Nielsen v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010) decision incorrectly, and another circuit had interpreted it correctly). The Petition establishes that multiple federal circuit courts are ignoring or misreading *Rent-A-Center*.

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[7] *Pandora Services Terms of Use*, Pandora, https://www.pandora.com/legal (last visited Dec. 26, 2017).

[8] *American Express Cardmember Agreements – Blue from American Express*, American Express, 6, https://web.aexp-static.com/us/content/pdf/cardmember-agreements/blue/Blue_From_American_Express_AECB_09-30-2017.pdf (last visited Dec. 26, 2017).

Most egregiously, the Opposition minimizes the conflict with the other two circuits who have confronted motions to compel by Petitioner. (BIO 9-10). Those circuits were reviewing the same arbitration agreement and delegation provision as the Fourth Circuit, and similar anti-arbitration insurance statutes, and yet correctly decided to compel arbitration. Importantly, the Sixth Circuit addressed arguments exactly like those addressed by the Fourth Circuit (a state anti-arbitration statute that allegedly was controlling by virtue of the McCarran-Ferguson Act) and found they were not specific to the delegation provision. *Milan Exp. Co. v. Applied Underwriters Captive Risk Assur. Co.*, 590 F. App'x 482, 486 (6th Cir. 2014) ("Milan's challenge, to the arbitration clause as a whole, is limited to the argument that it is unenforceable under Nebraska law.").

Further, the Opposition fails to address at all the implicit conflict between the decision below and other circuits who are faithfully following *Rent-A-Center*. As demonstrated in the Petition, other circuits have uniformly concluded that when a challenge applies equally to the arbitration agreement as a whole, it is not specific to the delegation provision, and therefore the delegation provision must be enforced. (Pet. 17).

2. This Court has regularly granted certiorari and reversed anti-arbitration decisions of the federal circuits that ignored or misapplied the Court's earlier arbitration precedent. *See, e.g.*, *BG Group, PLC v. Republic of Argentina*, 134 S. Ct. 1198 (2014); *CompuCredit Corp. v. Greenwood*, 565 U.S. 95 (2012);

Stolt-Nielsen v. AnimalFeeds Int'l Corp., 559 U.S. 662 (2010). This Court has also addressed important issues of arbitration law in recent years on appeal from federal circuit courts. *See, e.g.*, *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564 (2013); *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013).

Finally, this Court continues to recognize the importance of resolving circuit splits in the area of arbitration. Just this Term, the Court heard argument over the interplay between the nation's labor laws and the FAA after a circuit split had developed. *See Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (argued Oct. 2, 2017) (No. 16-285). The instant case combines all of those elements – a federal circuit court's misapplication of this Court's precedent, an important issue, and a circuit split. Therefore, the Petition should be granted.

CONCLUSION

The Petition for Writ of Certiorari should be granted. The Court may simply wish to consider summary reversal.

Respectfully submitted,

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