No. 18-_____

In The

Supreme Court of the United States

APPLIED UNDERWRITERS CAPTIVE RISK ASSURANCE COMPANY, INC.,

Petitioner,

v.

CITIZENS OF HUMANITY et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Nebraska Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

"Congress adopted the [Federal] Arbitration Act in 1925" because "courts were unduly hostile to arbitration." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018). Over 75 years later, "judicial antagonism toward arbitration" continues to "manifest[] itself in a great variety of devices and formulas." *Id.* at 1623 (internal quotation marks omitted). In *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995), to prevent choice-of-law clauses from transforming into an anti-arbitration "device," the Court held that, where a contract contains both a general choice-of-law clause and an arbitration provision, the choice-of-law clause "encompass[es] substantive principles that [the chosen state's] courts would apply, but not . . . special rules limiting the authority of arbitrators." *Id.* at 64. And in *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010), to avoid judicial hostility toward the delegation of questions of arbitrability to arbitrators, the Court held that the FAA requires a litigant to mount a challenge that is "specific to [an arbitration agreement's] delegation provision" in order to avoid the enforcement of that provision. *Id*. at 74. The Court below contravened both of these mandates. The questions presented are:

1. Whether a general choice-of-law clause in a contract that contains an arbitration agreement should be read, consistent with the Federal Arbitration Act and this Court's decisions, to import state substantive law without importing state rules impairing

QUESTIONS PRESENTED—Continued

arbitration, as ten federal courts of appeals and nine state courts of appeals have held, or whether a general choice-of-law clause should be read to incorporate both state substantive law and state arbitration principles, including those barring or otherwise evincing hostility to arbitration, as four state courts of appeals and one federal court of appeals have held.

2. Whether a litigant may avoid the enforcement of a contractual clause delegating questions of arbitrability to the arbitrator merely by stating that the litigant's objections to arbitration—which must ordinarily be resolved by the arbitrator—apply equally to the delegation clause itself.

RULE 29.6 STATEMENT

Petitioner Applied Underwriters Captive Risk Assurance Company, Inc. is a wholly owned subsidiary of Applied Underwriters, Inc. Applied Underwriters, Inc. is a wholly owned subsidiary of AU Holding Company, Inc., which is 81% owned by Berkshire Hathaway Inc. Berkshire Hathaway Inc. is a publicly traded company. No publicly traded corporation other than Berkshire Hathaway Inc. owns 10% or more of any of Petitioner's stock.

Respondents are Citizens of Humanity, LLC and CM Laundry, LLC.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Applied Underwriter Captive Risk Assurance Company, Inc. ("Petitioner" or "AUCRA") respectfully petitions for a writ of certiorari to review the judgment of the Nebraska Supreme Court.

INTRODUCTION

This Petition, like the petition in the companion case of *Applied Underwriters, Inc. v. Citizens of Humanity, LLC*, seeks review of two arbitration-related issues that have divided courts of appeals. *See* Petition for a Writ of Certiorari, *Applied Underwriters, Inc. v. Citizens of Humanity, LLC* (filed Aug. 6, 2018) ("*Applied Underwriters* California Pet.").

Congress enacted the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1 *et seq.*, in 1925 "to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219–20 (1985). The FAA embodies a "liberal federal policy favoring arbitration" and "create[s] a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). Under the FAA, "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Id.* And "as a matter of federal law, any doubts" about the construction of a contract must "be resolved in favor of arbitration." *Id.* at 24–25.

Despite the dictates of the FAA and its pro-arbitration policy enacted by Congress, lower courts continue to invent "new devices and formulas" evincing "antagonism toward arbitration." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1623 (2018). Petitioners seek review of a decision by the Nebraska Supreme Court that reflects judicial antagonism toward arbitration in several respects.

First, the decision below deepens an existing split of authority over whether, under the FAA, a choice-of-law clause governing an entire contract imports special state-law rules barring or otherwise limiting arbitration, or whether such a clause only adopts neutral, substantive principles of the referenced state law. Although most courts have adopted the latter position, the split of authority on this question is acknowledged. *See, e.g.*, *Roadway Package Sys., Inc. v. Kayser*, 257 F.3d 287, 288 (3d Cir. 2001) (noting the "circuit-split[]"), *abrogated on other grounds by Hall Street Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576 (2008). Here, the Nebraska Supreme Court sided with a minority of courts that have read choice-of-law clauses in interstate commercial contracts as incorporating state-law rules hostile to arbitration. In light of the FAA and this Court's precedents, the Nebraska Supreme Court's decision is plainly wrong. This Court should grant the Petition and resolve persisting conflict and confusion on this important and recurring question.

Second, the Nebraska Supreme Court's decision deepens a conflict in the lower courts over whether the Supreme Court's decision in *Rent-A-Center, West,*

Inc. v. Jackson, 561 U.S. 63 (2010), requires a litigant to mount a challenge that is specific to an arbitration agreement's delegation provision to avoid the enforcement of that provision, or if a litigant may succeed in avoiding arbitration merely by raising a challenge that applies equally to the delegation provision and the arbitration agreement as a whole.

In *Rent-A-Center*, this Court emphasized that courts must give effect to delegation provisions directing that challenges to the validity and enforceability of an arbitration agreement must themselves be arbitrated. 561 U.S. at 72. The Nebraska decision below, however, incorrectly interpreted this Court's holding in *Rent-A-Center* when it refused to enforce the parties' contractual agreement to delegate issues of arbitrability to an arbitrator.

Both questions presented are important, affecting many commercial arbitration agreements. And these questions have recurred repeatedly. This Court's review is required to clarify the reach of the FAA and to thwart lower courts' continued hostility to arbitration.

For the reasons outlined in this Petition and in the *Applied Underwriters* California Petition filed concurrently with this Petition, AUCRA respectfully requests that the Court grant certiorari and consolidate this case with the *Applied Underwriters* California case for briefing and argument.

OPINIONS BELOW

The opinion of the Nebraska Supreme Court, App. 1a–35a, is reported at 909 N.W.2d 614 (Neb. 2018). The Nebraska Supreme Court's Order advancing argument and bypassing the Court of Appeals, App. 36a–37a, is unreported. The District Court's Order on Defendant's Motion to Dismiss or, Alternatively, to Stay Action Pending Arbitration, App. 38a–58a, is unreported but available at 2017 WL 9251551.

STATEMENT OF JURISDICTION

The Nebraska Supreme Court issued the opinion in this case on April 6, 2018. App. 1a. On June 18, 2018, Justice Gorsuch granted Petitioner an extension of time to file its Petition until August 4, 2018. *See* No. 17A1378. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause, U.S. Const. art. VI, cl. 2, provides in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution

> or Laws of any State to the Contrary notwithstanding.

Section 2 of the FAA, 9 U.S.C. § 2, provides in pertinent part:

> A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, . . . 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.

The Nebraska Uniform Arbitration Act, Neb. Rev. Stat. § 25-2602.01, provides in pertinent part:

> (b) A provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable, and irrevocable, except upon such grounds as exist at law or in equity for the revocation of any contract, if the provision is entered into voluntarily and willingly.
>
> . . . .
>
> (f) Subsection (b) of this section does not apply to:
>
> . . . .
>
> (4) . . . any agreement concerning or relating to an insurance policy other than a

contract between insurance companies including a reinsurance contract.

STATEMENT OF THE CASE

A. The Reinsurance Participation Agreement And Its Arbitration Provision.

This case, like the companion case addressed in the concurrently filed *Applied Underwriters* California Petition, concerns the enforceability of an arbitration provision in a contractual agreement between sophisticated companies.

Petitioner Applied Underwriters Captive Risk Assurance Company ("AUCRA") is a Nebraska company that, along with several associated corporations, offers workers' compensation insurance programs.

Respondent Citizens of Humanity, LLC, designs, manufactures, and sells high-end blue jeans, while Respondent CM Laundry, LLC (collectively, "Respondents"), launders those jeans to give them a broken-in look. Both companies have their principal place of business in California. According to the amended complaint, in the summer of 2012, Respondents were looking to replace their workers' compensation insurance policy. *See* Amended Complaint & Jury Demand ¶ 7, *Citizens of Humanity, LLC v. Applied Underwriters Captive Risk Assurance Co.*, No. CI 16-3070 (Neb. Dist. Ct. July 25, 2016) ("Nebraska Am. Complaint"). They received a plan summary for the EquityComp® insurance program. *Id.*, Attach. C, Insurance & Brokerage Services Proposal at 1–9. That program consisted of two main

components: (1) guaranteed cost workers' compensation insurance policies issued by California Insurance Company (a company affiliated with Petitioner), and (2) a risk sharing/profit sharing plan, effected through a Reinsurance Participation Agreement ("RPA") between Petitioner and Respondents. App. 3a.

Respondents ultimately accepted the terms of the proposal and signed the RPA. Nebraska Am. Complaint ¶ 10. Under the RPA, a portion of premiums and losses were allocated to a segregated "cell" account, so that Respondents could share in either the profits or the losses that resulted from their workers' compensation policy. App. 3a.

The RPA explicitly requires that "[a]ll disputes arising with respect to any provision of th[e] Agreement" shall be arbitrated under the rules of the American Arbitration Association ("AAA"). App. 61a, 63a. The RPA also provides that any question regarding arbitrability should be resolved by the arbitrator in the first instance. *Id.* 48a–49a, 61a–63a. Clauses delegating questions of arbitrability to arbitrators are common in such agreements, and are referred to as a contract's "delegation clause."

Separately, the RPA contains a general choice-of-law provision referring to Nebraska law. *Id.* at 64a–65a. The Nebraska choice-of-law provision does not appear in the arbitration clause. *Id.* at 61a–65a. Nor does it expressly apply to the contract's arbitration provision. 64a–65a.

B. Proceedings Below.

After Respondents participated in the EquityComp® program for a few years, a dispute over costs arose. *Id.* at 8a. In December 2014, AUCRA filed an arbitration demand. *Id.* In February 2015, Respondents filed a complaint against AUCRA and several other defendants in the Superior Court of California, County of Los Angeles, alleging a variety of claims. *See id.* at 9a. Respondents eventually dismissed AUCRA from the California action, subsequently filing suit against AUCRA in Nebraska state court while continuing their litigation against the other defendants in California. *See* App. 9a.[1]

Pursuant to the RPA, Petitioner filed a motion to dismiss or to stay this action pending arbitration in the Nebraska District Court. *See* Motion, *Citizens of Humanity*, No. CI 16-3070 (Aug. 4, 2016).

On January 19, 2017, the Nebraska District Court granted AUCRA's motion, and stayed the action pending arbitration of the parties' dispute. App. 38a–58a. The district court found that the FAA governed because the parties "are organized under and have their principal places of business in different states" and the "financial transactions involved . . . constitute commerce and implicate the FAA under the expansive reach intended by Congress." *Id.* at 46a. Relying on

[1] Companies and individuals affiliated with Petitioner are filing a petition for certiorari in this Court regarding Respondents' companion California litigation on the same day that this Petition is filed. *Applied Underwriters* California Pet. Because the two cases stem from the same underlying facts and involve the same questions presented, Petitioner requests that the cases be granted and consolidated.

Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63 (2010), the district court concluded that, "[i]n light of the arbitration agreement's broad and sweeping language, along with the incorporation of the [American Arbitration Association] rules," the parties "clearly and unmistakably delegated threshold issues of arbitrability to an arbitrator." App. 49a. The district court also determined that Respondents had failed to specifically challenge the Agreement's delegation provision. *Id.* at 57a. As a result, the district court determined that the legal claims raised in Respondents' complaint had to be arbitrated.

Respondents appealed to the Nebraska Court of Appeals and asked for a transfer of the case to the Nebraska Supreme Court. Brief of Appellants, *Citizens of Humanity, LLC v. Applied Underwriters Captive Risk Assurance Co.*, No. A-17-000178 (Neb. Ct. App. May 22, 2017); Petition to Bypass, *Citizens of Humanity*, No. A-17-000178 (May 22, 2017). The Nebraska Supreme Court granted Respondents' petition to bypass. App. 37a.

On April 6, 2018, the Nebraska Supreme Court reversed the Nebraska District Court's decision. *Id.* at 1a–35a. *First*, the Nebraska Supreme Court held that the RPA's general choice-of-law clause imported a Nebraska anti-arbitration statute that voided the contract's arbitration clause altogether. *Id.* at 29a–34a. That statute, a provision of the Nebraska Uniform Arbitration Act ("NUAA"), prohibits the enforcement of arbitration provisions in "any agreement concerning or relating to an insurance policy." Neb. Rev.

Stat. § 25-2602.01(f)(4). Ordinarily, such a blatant anti-arbitration state law would be preempted by the FAA. But the court held that another federal statute (the McCarran-Ferguson Act, 15 U.S.C. §§ 1011 *et seq*.) saves Nebraska's anti-arbitration law from such preemption (a process sometimes called "reverse preemption"). *Id.* at 17a–21a. The result of the Court's holding was to render the RPA's detailed arbitration provision superfluous and meaningless, based on a general choice-of-law clause found elsewhere in the same agreement. The anomalous reasoning resulted in parties agreeing to arbitration via a robust arbitration provision and voiding that robust arbitration provision in the same agreement.

In so holding, the court rejected Petitioner's argument that, under *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995), the arbitration provision should be enforced. *See* Appellee's Brief, *Citizens of Humanity*, No. A-17-000178 (June 21, 2017) ("Appellee's Brief"), at 20–25. *Mastrobuono*, which this Court reaffirmed and applied in *Preston v. Ferrer*, 552 U.S. 346 (2008), established that, where a contract contains a general choice-of-law clause and an arbitration provision, the choice-of-law clause "encompass[es] substantive principles that [the chosen state's] courts would apply, but not . . . special rules limiting the authority of arbitrators." *Mastrobuono*, 514 U.S. at 64. Based on *Mastrobuono*, Petitioner argued that the parties' choice of Nebraska law "only sets forth an agreement to apply Nebraska law to substantive claims, but not rules limiting arbitration." Appellee's Brief at 23. Nevertheless, the court held that the general

choice-of-law provision incorporated *all* of Nebraska's laws, including the NUAA. App. at 29a. Remarkably, the Nebraska Supreme Court did not cite or discuss *Mastrobuono*. In concluding that Nebraska's anti-arbitration statute barred enforcement of the arbitration agreement, the Nebraska Supreme Court also rejected Petitioner's argument, based on *FTC v. Travelers Health Ass'n*, 362 U.S. 293 (1960), that Nebraska's anti-arbitration statute could not be given extraterritorial effect and should not govern a California contract. *See* Appellee's Brief at 26–32.

In addition, the Nebraska Supreme Court determined that the FAA, the McCarran-Ferguson Act, and Nebraska's anti-arbitration law could coexist because the NUAA fell within the ambit of the Savings Clause in Section 2 of the FAA. Section 2 permits arbitration agreements to be voided only "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Ordinarily, anti-arbitration rules are not considered "generally applicable contract defenses" that would be shielded by the Savings Clause. *See, e.g.*, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (internal quotation marks omitted). But the Nebraska Supreme Court determined that the state's anti-arbitration rule was a "generally applicable" defense—despite only targeting arbitration for disfavored treatment—because the law rendered arbitration clauses "illegal or invalid." App. 20a.

Second, the Nebraska Supreme Court further found that the question of whether the dispute between Petitioner and Respondents was arbitrable was

for the court to decide in the first instance, not for the arbitrator, despite the Agreement's express delegation of questions of arbitrability to an arbitrator. App. 21a. The court thus rejected Petitioner's argument that this Court's decision in *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010), required the court to enforce the delegation clause. *Rent-A-Center* established that, where an agreement includes a delegation clause, a court may determine questions of arbitrability only if the party opposing arbitration has specifically challenged the delegation provision. App. 25a–26a. The court held that *Rent-A-Center* did not apply because Respondents' arguments for invalidating the arbitration agreement as a whole constituted "a sufficiently specific challenge to the validity of the delegation clause." *Id.* at 28a.

The Nebraska Supreme Court recognized that "[a] circuit split has arisen" on this issue with respect to this very agreement. *Id.* at 27a. The Nebraska Supreme Court announced that its holding would be "contrary to the Third and Sixth Circuits" and would instead "favor the approach taken by the Fourth Circuit." *Id.*

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari for the reasons outlined in this Petition and in the concurrently filed *Applied Underwriters* California Petition, which stems

from the same dispute and raises the same questions presented.

The Nebraska Supreme Court's decision in this case evinces precisely the sort of judicial hostility to arbitration agreements that the FAA was enacted to proscribe. Several aspects of the court's decision to eviscerate the parties' agreement to arbitrate are problematic, but two warrant this Court's intervention because they implicate broader conflicts on recurring issues that have impeded the FAA and the federal rule it embodies favoring arbitration agreements.

First, courts of appeals are split as to whether, under the FAA, a choice-of-law clause governing a contract generally can be read to import special state-law arbitration rules, or whether such a clause adopts only substantive principles of the referenced state law. The Nebraska Supreme Court's decision below deepened this split. That decision was also plainly wrong. In *Mastrobuono*, the Court held, as a matter of federal substantive law, that a choice-of-law clause should be interpreted to "encompass substantive principles that [the chosen state's] courts would apply, but not . . . special rules limiting the authority of arbitrators." 514 U.S. at 64. Yet the Nebraska court erroneously held, contrary to *Mastrobuono*, that a general choice-of-law clause should be read not only to import "special rules limiting the authority of arbitrators," but even to import a state rule that would *prohibit arbitration outright and thus render the arbitration clause entirely superfluous and void*. Such a reading is flatly inconsistent with well-established Supreme Court precedent.

Moreover, the split of authority is important and recurring. As courts have acknowledged, many commercial contracts throughout the nation contain both arbitration provisions and general choice-of-law clauses, and thus the issue has far-reaching consequences for the viability of arbitration in the commercial context.

Second, a split of authority likewise exists as to whether the Supreme Court's decision in *Rent-A-Center* requires a litigant to mount a challenge that is "specific to [an arbitration agreement's] delegation provision" to avoid the enforcement of that provision, 561 U.S. at 74, or whether a litigant may succeed in avoiding arbitration merely by raising a challenge that applies equally to the delegation provision and the arbitration agreement as a whole. The split is illustrated by a disagreement among courts of appeals in the context of *this specific RPA*. *See* pp. 22–23, *infra*. The Nebraska Supreme Court's holding that, so long as a challenge applies equally to the delegation clause and the arbitration agreement as a whole, it may be heard by a court rather than the arbitrator makes little sense. Were that so, delegation provisions would quickly become meaningless, as it would be all too easy to evade their enforcement. Given courts' continued hostility to arbitration generally and to delegation provisions in particular, this question is important and certain to recur.

Thus, the Court should grant the Petition, consolidate this case with the companion case addressed in the *Applied Underwriters* California Petition, and resolve the two pressing questions presented.

I. THE CHOICE-OF-LAW QUESTION WARRANTS REVIEW.

A. The Decision Below Conflicts With The Decisions Of Other Courts Of Appeals.

As outlined at length in the *Applied Underwriters* California Petition, the decision below deepened an existing split of authority regarding whether, under the FAA, a choice-of-law clause governing a contract generally can be read to import special state-law rules barring or otherwise limiting arbitration, or whether such a clause adopts only neutral, substantive principles of the referenced state law. The split of authority on this question has been acknowledged by multiple courts. *See Roadway Package Sys., Inc. v. Kayser*, 257 F.3d 287, 288 (3d Cir. 2001) (noting the "circuit-split[]"); *see also Security Ins. Co. of Hartford v. TIG Ins. Co.*, 360 F.3d 322, 323 (2d Cir. 2004) (calling the tension between choice-of-law clauses and arbitration agreements "a recurring and troubling theme in many commercial contracts"). At least one judge has called for this Court's intervention and clarification. *Roadway Package Sys., Inc.*, 257 F.3d at 307 n.7 (Ambro, J., concurring) ("I would suggest . . . that in light of the Circuit split on this issue . . . the Supreme Court may wish to clarify its holding in *Mastrobuono*." (citation omitted)).

At least ten federal courts of appeals have interpreted *Mastrobuono*, this Court's subsequent decision in *Preston v. Ferrer*, 552 U.S. 346 (2008), and the FAA to set forth a rule that general choice-of-law clauses should be read to incorporate state substantive law, but not state arbitration rules. *See, e.g.*, *PaineWebber*

Inc. v. Elahi, 87 F.3d 589 (1st Cir. 1996) (holding, where a contract included both an arbitration clause and a New York choice-of-law clause, that the contract should not be read to incorporate a New York law requiring a court rather than an arbitrator to adjudicate an argument that certain claims were time-barred); *PaineWebber Inc. v. Bybyk*, 81 F.3d 1193, 1202 (2d Cir. 1996) (holding that a New York "choice of law provision will not be construed to impose substantive restrictions on the parties' rights under the Federal Arbitration Act, including the right to arbitrate claims for attorneys' fees"); *Roadway Package Sys., Inc.*, 257 F.3d at 296 ("[A] generic choice-of-law clause, standing alone, is insufficient to support a finding that contracting parties intended to opt out of the FAA's default standards."); *Porter Hayden Co. v. Century Indem. Co.*, 136 F.3d 380, 383 (4th Cir. 1998) ("[A]bsent a clearer expression of the parties' intent to invoke state arbitration law, we will presume that the parties intended federal arbitration law to govern" the interpretation of an arbitration clause.); *Action Indus., Inc. v. U.S. Fid. & Guar. Co.*, 358 F.3d 337, 341–43 (5th Cir. 2004) ("In the wake of *Mastrobuono*, . . . a choice-of-law provision is insufficient, by itself, to demonstrate the parties' clear intent to depart from the FAA's default rules" governing arbitration.); *Ferro Corp. v. Garrison Indus., Inc.*, 142 F.3d 926 (6th Cir. 1998) (applying the FAA's presumption in favor of arbitration to hold that a fraudulent inducement claim should be arbitrated and that an Ohio general choice-of-law clause should be read to incorporate only state substantive law); *Hudson v. ConAgra Poultry Co.*, 484 F.3d 496 (8th Cir. 2007)

(refusing to apply an Arkansas law barring arbitration of tort claims despite the contract's general choice-of-law provision incorporating Arkansas law); *Wolsey, Ltd. v. Foodmaker, Inc.*, 144 F.3d 1205, 1213 (9th Cir. 1998) ("*Mastrobuono* dictates that general choice-of-law clauses do not incorporate state rules that govern the allocation of authority between courts and arbitrators. . . ."); *Kelley v. Michaels*, 59 F.3d 1050, 1055 (10th Cir. 1995) ("[T]he arbitration panel did not exceed its authority by awarding the Kelleys punitive damages" as permitted by NASD rules governing arbitration "despite the choice of New York law."); *Davis v. Prudential Sec., Inc.*, 59 F.3d 1186, 1188–89 (11th Cir. 1995) ("[A] choice of law provision in a contract governed by the Arbitration Act merely designates the substantive law that the arbitrators must apply in determining whether the conduct of the parties warrants an award of punitive damages; it does not deprive the arbitrators of their authority to award punitive damages.").

At least nine states' courts of appeals are in agreement. *See, e.g.*, *WPH Architecture, Inc. v. Vegas VP, LP*, 360 P.3d 1145, 1148 (Nev. 2015) (Concerning a contract with a general choice-of-law clause pointing to Nevada law, "we hold that the arbitration was substantively governed by Nevada law and procedurally governed by the AAA rules."); *Flintlock Const. Servs., LLC. v. Weiss*, 991 N.Y.S.2d 408, 410–11 (N.Y. App. Div. 2014) ("Merely stating, without further elaboration, that an agreement is to be construed and enforced in accordance with the law of New York does not suffice to. . . . remove the issue of punitive damages from the

arbitrators. . . ." (citation omitted)), *appeal dismissed*, 24 N.Y.3d 1209 (2015); *Anderson v. Maronda Homes, Inc. of Fla.*, 98 So. 3d 127, 130 (Fla. Dist. Ct. App. 2012) ("[The parties] agreed to arbitration in accordance with the rules of the American Arbitration Association (AAA). Consequently, the choice of Florida law relates to Florida substantive law governing the parties' respective rights and obligations[, not] . . . state rules or laws of arbitration."); *1745 Wazee LLC v. Castle Builders Inc.*, 89 P.3d 422, 424 (Colo. App. 2003) (holding, as in *Mastrobuono*, choice-of-law clause in parties' contract related only to Colorado substantive law and the FAA applied with respect to arbitration procedures); *In re L & L Kempwood Assoc., L.P. v. Omega Builders, Inc.*, 9 S.W.3d 125, 127–28 (Tex. 1999) (holding that Texas choice-of-law clause did not require application of Texas arbitration law); *Levine v. Advest Inc.*, 714 A.2d 649, 661 (Conn. 1998) (reasoning that general New York choice-of-law clause alone did not permit application of New York law of arbitration, and instead, "as a matter of federal arbitration law, the parties' agreement must be construed to indicate that controversies as to the timeliness of claims are to be resolved by arbitrators"); *Kamaya Co. v. Am. Prop. Consultants, Ltd.*, 959 P.2d 1140, 1147–48 (Wash. Ct. App. 1998) (holding that because general Japanese choice-of-law clause did not unequivocally indicate intent to invoke Japanese arbitration law, the FAA applied); *Hunter, Keith Indus., Inc. v. Piper Capital Mgmt. Inc.*, 575 N.W.2d 850, 854 (Minn. Ct. App. 1998) ("We disagree with the district court's determination that Minnesota law governs the entire arbitration. As

in *Mastrobuono*, we read the choice-of-law provision to govern the rights and duties of the parties, while the arbitration clause covers the arbitration."); *Estate of Sandefur v. Greenway*, 898 S.W.2d 667, 672 (Mo. Ct. App. 1995) (holding, despite an agreement's New York choice-of-law clause, that "the arbitrator panel had the power to award punitive damages," despite state law to the contrary).

In contrast, at least one federal court of appeals and four states' courts of appeals—including the Nebraska Supreme Court in this case—have held that a general choice-of-law clause incorporates state-law arbitration rules, even when those rules are in tension or conflict with the FAA or AAA rules specified by the arbitration provision. *See, e.g.*, App. 1a–35a; *Citizens of Humanity, LLC v. Applied Underwriters, Inc.*, 226 Cal. Rptr. 3d 1, 2 (Ct. App. 2017), *review denied* (Mar. 14, 2018) (holding, in companion case, that the RPA's choice-of-law clause imported the NUAA's anti-arbitration rule); *Frizzell Constr. Co. v. Gatlinburg, LLC*, 9 S.W.3d 79 (Tenn. 1999) (holding that the parties' incorporation of a general Tennessee choice-of-law clause barred them from arbitrating fraudulent inducement claims, since those claims were not arbitrable under Tennessee law); *State Farm Mut. Auto. Ins. Co. v. George Hyman Constr. Co.*, 715 N.E.2d 749, 755 (Ill. App. Ct. 1999) (holding that it was within the court's "authority to hold the general [Illinois] choice of law provision did extend to the arbitration clause," thus obviating the need to comply with the FAA); *Ekstrom v. Value Health, Inc.*, 68 F.3d 1391 (D.C. Cir. 1995) (holding that

Connecticut's 30-day review period for arbitration awards applied rather than the FAA's 90-day time limit based on a Connecticut choice-of-law clause).

The instant case squarely implicates this split, with the Nebraska Supreme Court joining the minority position. This acknowledged split is firmly entrenched and can only be resolved by this Court.

B. The Decision Below Conflicts With Supreme Court Precedent And Is Wrong.

For similar reasons to those explained in the concurrently filed *Applied Underwriters* California Petition, the Nebraska Supreme Court's decision in this case is plainly wrong. As this Court held in *Moses H. Cone*, the FAA "create[s] a body of federal substantive law of arbitrability," including questions about "the construction of the contract language itself," "applicable to any arbitration agreement within the coverage of the Act." 460 U.S. at 24. Federal substantive law requires that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration" embodied in the FAA. *Id.* Accordingly, as this Court held in *Mastrobuono*—and as it reiterated in *Preston*—courts (both state and federal) are generally required to "harmonize [a] choice-of-law provision with [an] arbitration provision" when the two are in tension by reading the choice-of-law clause "not to include special rules limiting the authority of arbitrators." 514 U.S. at 63–64.

The Nebraska Supreme Court did exactly the opposite, reading the choice-of-law clause to obliterate the arbitration provision rather than attempting to "harmonize" the two. It explained its holding in a single, unreasoned sentence, noting only that in "paragraph 16 of the RPA, the parties chose to apply Nebraska law, *including Nebraska's Uniform Arbitration Act and necessarily the antiarbitration provision* in § 25-2602.01(f)(4)." App. 29a (emphasis added). Remarkably, the Court failed to engage with or cite *Mastrobuono* or *Preston* even once, despite Petitioner's extensive reliance on those opinions in its appellate briefing. *See* Appellee's Brief, *Citizens of Humanity*, No. A-17-000178 (June 21, 2017) ("Appellee's Brief"), at 20–25. Only by ignoring these binding Supreme Court precedents could the Nebraska court have determined that a general choice-of-law clause completely erased the RPA's arbitration provision. The court's choice to eschew these important, binding precedents further illustrates its hostility to arbitration.

Moreover, in determining that Nebraska's anti-arbitration law is compatible with Section 2 of the FAA, the Nebraska Supreme Court blatantly misconstrued Supreme Court jurisprudence. As this Court has held, arbitration agreements cannot be voided "by defenses that apply only to arbitration" or that "derive their meaning from the fact that an agreement to arbitrate is at issue." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). The NUAA is exactly such a defense. Whether an anti-arbitration rule results in "illegality" or some subtler form of discrimination

against arbitration, such rules are plainly rejected by the FAA and cannot be salvaged by its Savings Clause. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1623 (2018).

C. The Choice-of-Law Question Is Important And Recurring.

The choice-of-law question presented by the Petition is recurring. It has arisen repeatedly over the last two decades in both state and federal court. *See* pp. 16–22, *supra*. For the reasons discussed in the concurrently filed *Applied Underwriters* California Petition, the choice-of-law question is important, affects a wide range of contracts, and merits resolution by this Court.

II. THE DELEGATION CLAUSE QUESTION WARRANTS REVIEW.

A. The Decision Below Conflicts With The Decisions Of Other Courts Of Appeals.

As explained further in the concurrently filed *Applied Underwriters* California Petition, courts of appeals are split as to whether this Court's decision in *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010), requires a litigant to mount a challenge that is "specific to [an arbitration agreement's] delegation provision" in order to avoid the enforcement of that provision, *id*. at 74, or if a litigant may succeed in avoiding arbitration merely by raising a challenge that applies equally to the delegation provision and the arbitration agreement as a whole. As the Nebraska Supreme Court recently acknowledged: "A circuit split

has arisen between the Third and Sixth Circuits and the Fourth Circuit" regarding the application of *Rent-A-Center* to *this specific RPA*, "in which the Third and Sixth Circuits have ordered arbitration and the Fourth Circuit has allowed the court to consider a challenge to the [agreement]'s delegation clause" that would have applied equally to the arbitration agreement as a whole. App. 27a; *see also Applied Underwriters* California Pet. at 34–37.

To resolve such a division of authority, this Court's review is required.

B. The Decision Below Conflicts With Supreme Court Precedent And Is Wrong.

The decision below, which deepened an acknowledged circuit split, incorrectly interpreted *Rent-A-Center*. Delegation provisions, like all other agreements to arbitrate, must be "enforce[d] according to their terms." *Rent-A-Center*, 561 U.S. at 67. And a delegation clause must be enforced unless a plaintiff raises a challenge "specific to the delegation provision." *Id.* at 74. If parties were able to avoid sending issues of arbitrability to an arbitrator merely by claiming that their challenge applies equally to the delegation clause *and* the arbitration clause as a whole, then delegation clauses would quickly become meaningless. Such a loophole would swallow the rule of delegation clauses—that issues of arbitrability must be decided by the arbitrator in the first place when the parties so specify.

C. The Delegation Clause Question Is Important And Recurring.

As further explained in the concurrently filed *Applied Underwriters* California Petition, the decision of the Nebraska Supreme Court—and the holdings of other courts on its side of the split—reflect judicial hostility to a specific form of arbitration agreement: delegation clauses specifying that issues of arbitrability must be decided by the arbitrator. That judicial hostility, as manifested by the circuit split over *Rent-A-Center*, is important, recurring, and warrants this Court's review.

The decision below reflects continued and pervasive judicial hostility to arbitration, including delegation clauses directing questions of arbitrability to arbitrators. The Supreme Court should grant certiorari to review and correct that judicial hostility, as it has done in other cases in which courts flout the FAA and erroneously create obstacles to enforcement of the parties' agreed-upon arbitration provision.

CONCLUSION

This Petition along with the companion petition in the *Applied Underwriters* California case present perfectly suited vehicles for review of two persistent and important circuit splits. Each split evinces lower courts' continued hostility to arbitration, despite the dictates of the FAA. Petitioners respectfully ask the Court to grant certiorari to review and resolve these

disagreements among courts of appeals, and to consolidate this case along with the companion case addressed in the *Applied Underwriters* California Petition.

Respectfully submitted,

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August 6, 2018