No. ______

IN THE

Supreme Court of the United States

APPLIED UNDERWRITERS, INC. ET AL.,

Applicants,

v.

CITIZENS OF HUMANITY, LLC ET AL.,

Respondents.

APPLICATION TO THE HON. ANTHONY M. KENNEDY FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE SECOND APPELLATE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA

Pursuant to 28 U.S.C. § 2101(c) and Rule 13.5 of the Rules of this Court, Applicants Applied Underwriters, Inc., California Insurance Company, Continental Indemnity Company, Applied Risk Services, Inc., Joan Sheppard, Westin Fredrick Penfield, and Michael Scott Wichman ("Applicants") hereby move for an extension of time of 60 days, up to and including Monday, August 13, 2018, for the filing of a petition for a writ of certiorari to review the decision of the Second Appellate District Court of Appeal of the State of California dated November 22, 2017 (attached as Appendix A). The Supreme Court of California denied a petition for review on March 14, 2018 (attached as Appendix B). The jurisdiction of this Court is based on 28 U.S.C. § 1257.

1. The date within which a petition for a writ of certiorari would be due, if not extended, is June 12, 2018. This application is being filed more than 10 days before that date.

2. This case presents important and recurring questions of federal law that have divided federal and state courts of appeals regarding the effect of state anti-arbitration rules on arbitration agreements under the Federal Arbitration Act ("FAA"). In particular, this case concerns the enforceability of an arbitration provision in a contractual agreement between sophisticated companies. Respondents Citizens of Humanity, LLC and CM Laundry, LLC ("Respondents") entered into a contract with Applied Underwriters Captive Risk Assurance Company ("AUCRA"). The contract is known as the Reinsurance Participation Agreement ("RPA" or "Agreement"). The RPA allowed Respondents to enter into a loss-sensitive workers' compensation program, in which workers' compensation insurance policies were issued by Applicants, who are companies affiliated with AUCRA and individuals who represented AUCRA.

3. The RPA explicitly requires that "[a]ll disputes arising with respect to any provision of th[e] Agreement" shall be arbitrated. *Citizens of Humanity v. Applied Underwriters, Inc.*, 226 Cal. Rptr. 3d 1, 3 (Ct. App. 2017), *review denied* (Mar. 14, 2018). The RPA also stated that any question regarding arbitrability should be resolved by the arbitrator in the first instance. *Id.* Separately, the RPA contains a general choice-of-law provision referring to Nebraska law. *Id.* The Nebraska choice-of-law provision does not appear in the arbitration clause. Nor

does it expressly apply to the contract's arbitration provision. A Nebraska statute, 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).

4. In February 2015, Respondents filed a complaint against Applicants and AUCRA in the Superior Court of California, County of Los Angeles, alleging a variety of claims. All of the claims related to the Agreement. *See* Complaint, *Citizens of Humanity v. Applied Underwriters, Inc.*, BC 571593 (Cal. Super. Ct. Feb. 11, 2015). Respondents filed a preemptive motion to stay arbitration or, in the alternative, to schedule a jury trial on the issue of arbitrability. *See* Motion to Stay, *Citizens of Humanity*, BC 571593 (Mar. 13, 2015). Respondents also then dismissed AUCRA, subsequently filing suit against AUCRA in Nebraska state court—while continuing their litigation against Applicants in California state court. *See* Complaint, *Citizens of Humanity, LLC v. Applied Underwriters Captive Risk Assurance Co.*, No. C116-3070 (Neb. Dist. Ct., Apr. 12, 2016).

5. Pursuant to the terms of the Agreement, Applicants moved to compel arbitration. *See* Motion to Compel, *Citizens of Humanity*, BC 571593 (Apr. 15, 2015).

6. On July 8, 2016, the Superior Court denied Applicants' motion to compel arbitration. *See* Minute Order, Defendants' Motion to Compel, *Citizens of Humanity*, BC 571593 (July 8, 2016). The court acknowledged the FAA's federal policy favoring arbitration. It recognized that the "mode of analysis" in "many if not

most circumstances" involving arbitration provisions governed by the FAA would require the issue of arbitrability to be decided by an arbitrator. *Id.* But it held that the FAA does not apply to the Agreement in this case. Applying the general choice-of-law provision—even though that provision does not refer to arbitration—the court concluded that (1) Nebraska law, including its anti-arbitration rule, applies to the arbitration provision; (2) another federal statute (the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq*.) allows Nebraska's anti-arbitration law to "reverse preempt" the FAA and render it inapplicable; and (3) the contractual arbitration provision thus is unenforceable. The court therefore denied Applicants' motion to enforce the Agreement's contractual arbitration provision. 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.

7. The California Court of Appeal affirmed. The court rejected Applicants' argument that, based on *Mastrobuono v. Shearson Lehman Hutton, Inc*, 514 U.S. 52 (1995), the arbitration provision should be enforced. *Mastrobuono*, which this Court reaffirmed in *Preston v. Ferrer*, 552 U.S. 346 (2008), established 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." *Mastrobuono*, 514 U.S. at 64. Based on *Mastrobuono*, Applicants argued that the parties' choice of Nebraska law "constitute[d] an agreement to apply Nebraska law to resolve the parties' substantive claims only,

and not to incorporate state law rules limiting arbitration." *Citizens of Humanity*, 226 Cal. Rptr. 3d at 10. The Court of Appeal rejected this argument, finding that the arbitration clause in the RPA is governed by Nebraska law and its anti-arbitration rule. *Id.* In concluding that the Nebraska statute applied to the RPA, the Court also explicitly rejected the Third Circuit's conclusion to the contrary in a case involving the same Agreement. *Id.* (citing *South Jersey Sanitation Co. v. Applied Underwriters Captive Risk Assur. Co.*, 840 F.3d 138 (3d Cir. 2016)). The Court of Appeal also rejected Applicants' argument, based on *FTC v. Travelers Health Ass'n*, 362 U.S. 293 (1960), that the Nebraska anti-arbitration statute could not be given extraterritorial effect and should not govern a California contract. *Citizens of Humanity*, 226 Cal. Rptr. 3d at 11-12.

8. The Court of Appeal further found that the question of whether the dispute between Applicants and Respondents was arbitrable was for the court to decide, not for the arbitrator. *Citizens of Humanity*, 226 Cal. Rptr. 3d at 5-8. It so found despite the Agreement's express delegation of questions of arbitrability to an arbitrator. The court thus rejected Applicants' 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. *See Citizens of Humanity*, 226 Cal. Rptr. 3d at 5-7. The Court held that *Rent-A-Center* did not apply for two reasons. First, it held that Applicants' arguments for

invalidating the arbitration agreement as a whole applied equally to the delegation clause. *Citizens of Humanity*, 226 Cal. Rptr. 3d at 7. Second, the court concluded that it did not have the authority to compel the dispute to arbitration because "the threshold issue [of] whether the FAA applies" had not been resolved. *Id.* at 8. In reaching this conclusion, the court relied on the First Circuit's decision in *Oliveira v. New Prime, Inc.*, 857 F.3d 7 (1st Cir. 2017), *cert. granted sub. nom. New Prime, Inc. v. Oliveira*, 138 S. Ct. 1164 (2018). The court then endeavored to resolve the "threshold issue" of the FAA's application. *Citizens of Humanity*, 226 Cal. Rptr. 3d at 8. It agreed with the lower court that the McCarran-Ferguson Act "reverse-preempted" the FAA, and thus the FAA did not apply *at all*. Accordingly, the court reasoned, the issue of arbitrability need not be compelled to arbitration. *Id.* at 8-9.

9. Applicants petitioned the California Supreme Court for review. On March 14, 2018, the California Supreme Court denied that petition. *Citizens of Humanity v. Applied Underwriters, Inc.*, S246240 (Mar. 14, 2018).

10. This case presents legal questions of substantial importance regarding the scope of the FAA. Those questions implicate multiple conflicts of authority among appellate courts. By applying the general choice of law provision in the RPA to invalidate the arbitration agreement, the California Court of Appeal undermined the FAA and contravened this Court's decision in *Mastrobuono*. The Court of Appeal violated *Mastrobuono*'s command that state anti-arbitration rules should not be read into arbitration agreements merely by virtue of a general choice-of-law provision. *Mastrobuono*, 514 U.S. at 64. The Court of Appeal's holding, and the

subsequent holding of the Nebraska Supreme Court in *Citizens of Humanity, LLC v. Applied Underwriters Captive Risk Assurance Co.*, 909 N.W.2d 614 (Neb. 2018), create a clear conflict with numerous appellate courts, including multiple federal courts of appeal. *See, e.g.*, *Hudson v. ConAgra Poultry Co.*, 484 F.3d 496, 499-500 (8th Cir. 2007); *Jacada (Europe), Ltd. v. Int'l Mktg. Strategies, Inc.*, 401 F.3d 701, 709-12 (6th Cir. 2005), *abrogated on other grounds by Hall St. Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576 (2008); *Action Indus., Inc. v. U.S. Fid. & Guar. Co.*, 358 F.3d 337, 341-43 (5th Cir. 2004); *Sovak v. Chugai Pharm. Co.*, 280 F.3d 1266, 1269-70 (9th Cir. 2002). In *Hudson v. ConAgra Poultry Co.*, for example, the Eighth Circuit refused to apply an Arkansas law barring arbitration of tort claims based on a contract's general choice-of-law provision incorporating Arkansas law. 484 F.3d at 499-503. In so holding, the Eighth Circuit relied on *Mastrobuono*. It reasoned that this Court's admonishment "to interpret 'any doubts concerning the scope of arbitrable issues' under the contract 'in favor of arbitration'" required it to "give the direct statement of the parties' intent in the arbitration provision greater weight than the indirect insinuation of a contrary intent that arguably arises from the choice-of-law provision." *Id.* at 503 (citation omitted). That holding squarely conflicts with the Court of Appeal's conclusion in this case.

11. Further, in deciding the question of whether the parties' dispute should be arbitrated, rather than allowing the arbitrator to address issues of arbitrability, the California Court of Appeal's decision ran afoul of yet another of this Court's FAA precedents: *Rent-A-Center*. That holding, too, is in tension with

precedent from multiple courts of appeal. *See, e.g.*, *Parnell v. CashCall, Inc.*, 804 F.3d 1142, 1146-49 (11th Cir. 2015); *see also Lefoldt v. Horne, LLP*, 853 F.3d 804 (5th Cir. 2017), *as revised* (Apr. 12, 2017). In rejecting *Rent-A-Center*, the Court of Appeal relied on the First Circuit's judgment in *Oliveira*, *supra*, which is currently being reviewed by this Court.

12. Both of the Court of Appeal's holdings evince a clear hostility to arbitration and are in conflict with this Court's precedent, as well as with the FAA's "federal policy favoring arbitration," *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)—as is the Court of Appeal's holding that the McCarran-Ferguson Act necessarily trumps the FAA in this case.

13. Applicants' Counsel of Record in this case, Clifford M. Sloan, became involved in the case only recently. He requires additional time to research the extensive factual record and complex legal issues presented in order to prepare a petition that fully addresses the important questions raised by the decision below.

14. Furthermore, Mr. Sloan must become familiar with an extensive body of case law concerning this very agreement, as numerous policyholders have sought to evade applicability of the explicit arbitration provision. Federal courts of appeals have divided on the enforcement of this provision. *Compare, e.g.*, *S. Jersey Sanitation Co. v. Applied Underwriters Captive Risk Assurance Co.*, 840 F.3d 138 (3d Cir. 2016) (enforcing the arbitration provision in the RPA); *Milan Exp. Co., Inc. v. Applied Underwriters Captive Risk Assurance Co., Inc.*, 590 F. App'x. 482 (6th Cir. 2014) (same); *with Minnieland Private Day Sch., Inc. v. Applied Underwriters*

Captive Risk Assurance Co., Inc., 867 F.3d 449 (4th Cir. 2017) (refusing to enforce the arbitration provision), *cert. denied* No. 17-717 (Jan. 22, 2018). Indeed, the Nebraska Supreme Court recently took sides in this Circuit split, explicitly agreeing with the Fourth Circuit and disagreeing with the Third and Sixth Circuits. *See Citizens of Humanity, LLC*, 909 N.W.2d 614. The Nebraska Supreme Court decision, moreover, involves not only the same Agreement, but the same dispute with the same Respondents. As noted, Respondents in this case initially included AUCRA as a defendant in the California litigation, and then dismissed AUCRA and refiled suit against it in Nebraska. Like the California Court of Appeal and the Fourth Circuit, and unlike the Third and Sixth Circuits, the Nebraska Supreme Court concluded that the RPA's arbitration provision is invalid. *Id.* at 633.

15. In addition, Mr. Sloan has substantial existing obligations in advance of and near the current due date of the petition, including in cases before this Court. Mr. Sloan is counsel of record for the petitioners in *Five Star Senior Living Inc. v. Mandviwala*, No. 17-1357 (docketed Mar. 27, 2018), for which a certiorari-stage reply brief will be filed on or before June 5, 2018; counsel of record for the petitioner in *Five Star Senior Living Inc. v. Lefevre,* No. 17-1470 (docketed Apr. 25, 2018), for which a certiorari-stage reply brief will be filed on or before June 30, 2018; and counsel for appellee in a case before the United States Court of Appeals for the District of Columbia Circuit, for which a brief is due in July. In addition, Mr. Sloan is counsel for the defendant in a complex criminal insider-trading case in the United States District Court for the Central District of California, for which trial had been

scheduled to begin on June 5, 2018, which was continued by order of the court only recently, and which has required extensive pre-trial motions practice and factual preparation.

16. With regard to the Nebraska Supreme Court decision issued after the Court of Appeal decision in this case, moreover, AUCRA anticipates seeking certiorari, with Mr. Sloan as counsel of record. Again, Mr. Sloan has not been involved in the lower court proceedings in that case. Because the two cases raise similar questions presented, Applicants respectfully submit that it would be of assistance for the Court to receive and consider the petitions on or around the same date.

17. To the extent that this case has involved issues regarding the intersection of two federal statutes (the FAA and the McCarran-Ferguson Act), it also will be of assistance to this Court's consideration of the petition if Applicants have adequate time to evaluate the possible impact of *Epic Systems Corp. v. Lewis*, No. 16-285 (May 21, 2018).

18. An extension of time will not prejudice Respondents.

For the foregoing reasons, Applicants hereby respectfully request that an extension of time up to and including August 13, 2018, be granted within which Applicants may file a petition for a writ of certiorari.

Respectfully submitted,

s/ Clifford M. Sloan

Clifford M. Sloan
Counsel of Record
Caroline S. Van Zile
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Avenue, NW
Washington, DC
(202) 371-7000
cliff.sloan@skadden.com

May 25, 2018

Counsel for Applicants

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Applicants California Insurance Company and Continental National Indemnity are wholly owned subsidiaries of North American Casualty Co., which is owned by Applicant Applied Underwriters, Inc. Applicant Applied Risk Services, Inc. is also owned by Applicant Applied Underwriters, Inc. In turn, Applicant Applied Underwriters, Inc. is a wholly owned subsidiary of AU Holding Company, Inc., which is wholly 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 Applicants' stock.

Applicants Joan Sheppard, Westin Fredrick Penfield, and Michael Scott Wichman are individuals.