No. 18-_____

In The
Supreme Court of the United States

APPLIED UNDERWRITERS, INC. ET AL.,

Petitioners,

v.

CITIZENS OF HUMANITY ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Second Appellate District Court Of Appeal Of The State Of California

PETITION FOR A WRIT OF CERTIORARI

GREGORY G. GARRE
ROMAN MARTINEZ
GRAHAM E. PHILLIPS
LATHAM & WATKINS LLP
555 Eleventh St., NW
Suite 1000
Washington, DC 20004
(202) 637-2207

CLIFFORD M. SLOAN
Counsel of Record
SYLVIA O. TSAKOS
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Ave., NW
Washington, DC 20005
(202) 371-7000
cliff.sloan@skadden.com

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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 arbitration, as ten federal courts of appeals and nine state

QUESTIONS PRESENTED—Continued

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

Petitioners California Insurance Company and Continental Indemnity Company are wholly owned subsidiaries of North American Casualty Co., which is owned by Petitioner Applied Underwriters, Inc. Petitioner Applied Risk Services, Inc. is also owned by Petitioner Applied Underwriters, Inc. In turn, Petitioner 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 Petitioners' stock.

Petitioners Joan S. Sheppard, Weston Fredrick Penfield, and Michael Scott Wichman are individuals.

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

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
RULE 29.6 STATEMENT	iii
PETITION FOR A WRIT OF CERTIORARI	1
INTRODUCTION	1
OPINIONS BELOW	5
STATEMENT OF JURISDICTION	5
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	5
STATEMENT OF THE CASE	7
A. The Reinsurance Participation Agreement And Its Arbitration Provision	7
B. Proceedings Below	9
REASONS FOR GRANTING THE WRIT	13
I. THE CHOICE-OF-LAW QUESTION WARRANTS REVIEW	15
A. The Decision Below Conflicts With The Decisions Of Other Courts Of Appeals	15
B. The Decision Below Conflicts With Supreme Court Precedent And Is Wrong	24
C. The Choice-of-Law Question Is Important And Recurring	28
II. THE DELEGATION CLAUSE QUESTION WARRANTS REVIEW	31
A. The Decision Below Conflicts With The Decisions Of Other Courts Of Appeals	31

TABLE OF CONTENTS—Continued

Page

B. The Decision Below Conflicts With Supreme Court Precedent And Is Wrong.... 33

C. The Delegation Clause Question Is Important And Recurring 34

CONCLUSION..... 36

APPENDIX

California Court of Appeal, Opinion, November 22, 2017 .....1a

Los Angeles County Superior Court, Order, July 8, 2016 .....26a

California Supreme Court, Order Denying Petition for Review, March 14, 2018 .....35a

Reinsurance Participation Agreement.....36a

TABLE OF AUTHORITIES

Page

CASES

1745 Wazee LLC v. Castle Builders Inc., 89 P.3d 422 (Colo. App. 2003).....20

Action Industries, Inc. v. U.S. Fiduciary & Guardian Co., 358 F.3d 337 (5th Cir. 2004) 19

Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995).....16

Anderson v. Maronda Homes, Inc. of Florida, 98 So. 3d 127 (Fla. Dist. Ct. App. 2012).....20

BG Group PLC v. Republic of Argentina, 134 S. Ct. 1198 (2014).....31

Citizens of Humanity, LLC v. Applied Underwriters Captive Risk Assurance Co., 909 N.W.2d 614 (Neb. 2018) 23, 32, 33

Davis v. Prudential Securities, Inc., 59 F.3d 1186 (11th Cir. 1995).....20

Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213 (1985).....1

DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463 (2015).....26

Ekstrom v. Value Health, Inc., 68 F.3d 1391 (D.C. Cir. 1995) 23

Epic Systems Corp. v. Lewis, 138 S. Ct. 1612 (2018).....2, 29

Estate of Sandefur v. Greenway, 898 S.W.2d 667 (Mo. Ct. App. 1995).....21

TABLE OF AUTHORITIES—Continued

Page

Ferro Corp. v. Garrison Industries, Inc., 142 F.3d 926 (6th Cir. 1998).....18, 22

Flintlock Construction Services, LLC. v. Weiss, 991 N.Y.S.2d 408 (N.Y. App. Div. 2014), *appeal dismissed*, 24 N.Y.3d 1209 (2015).....20

Frizzell Construction Co. v. Gatlinburg, LLC, 9 S.W.3d 79 (Tenn. 1999).....22

Hall Street Associates, LLC v. Mattel, Inc., 552 U.S. 576 (2008).....2

Henry Schein, Inc. v. Archer & White Sales, Inc., No. 17-1272, 2018 WL 1280843 (U.S. June 25, 2018).....34

Hudson v. ConAgra Poultry Co., 484 F.3d 496 (8th Cir. 2007).....18

Hunter, Keith Industries, Inc. v. Piper Capital Management Inc., 575 N.W.2d 850 (Minn. Ct. App. 1998).....21

In re L & L Kempwood Associates, L.P. v. Omega Builders, Inc., 9 S.W.3d 125 (Tex. 1999).....21

Jade Apparel, Inc. v. United Assurance, Inc., No. A-2001-14T1, 2016 WL 5939470 (N.J. Super. Ct. App. Div. Oct. 13, 2016) (unpublished opinion).....32

Kamaya Co. v. American Property Consultants, Ltd., 959 P.2d 1140 (Wash. Ct. App. 1998).....21

Kelley v. Michaels, 59 F.3d 1050 (10th Cir. 1995).....19

Kindred Nursing Centers Ltd. Partnership v. Clark, 137 S. Ct. 1421 (2017).....29

TABLE OF AUTHORITIES—Continued

Page

Kuhn v. Wells Fargo Bank of Nebraska, N.A., 771 N.W.2d 103 (Neb. 2009).....26

Labenz v. Labenz, 866 N.W.2d 88 (Neb. 2015) 26

Levine v. Advest Inc., 714 A.2d 649 (Conn. 1998).....21

Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52 (1995) .....*passim*

Milan Express Co. v. Applied Underwriters Captive Risk Assurance Co., 590 F. App'x 482 (6th Cir. 2014) 32

Minnieland Private Day School, Inc. v. Applied Underwriters Captive Risk Assurance Co., 867 F.3d 449 (4th Cir. 2017), *cert. denied*, *Applied Underwriters Captive Risk Assurance Co. v. Minnieland Private Day School, Inc.*, 138 S. Ct. 926 (2018) 33

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) 17

Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1 (1983).....*passim*

Nitro-Lift Technologies, LLC v. Howard, 568 U.S. 17 (2012).....31

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) 12

PaineWebber Inc. v. Bybyk, 81 F.3d 1193 (2d Cir. 1996).....19

PaineWebber Inc. v. Elahi, 87 F.3d 589 (1st Cir. 1996).....18

TABLE OF AUTHORITIES—Continued

Page

Porter Hayden Co. v. Century Indemnity Co., 136 F.3d 380 (4th Cir. 1998).....19

Preston v. Ferrer, 552 U.S. 346 (2008) 17, 24

Ramar Prod. Services, Inc. v. Applied Underwriters, Inc., No. D071443, 2017 WL 6546317 (Cal. Ct. App. Dec. 22, 2017) (unpublished opinion).....33

Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63 (2010).....*passim*

Roadway Package System, Inc. v. Kayser, 257 F.3d 287 (3d Cir. 2001) .....*passim*

Security Insurance Co. of Hartford v. TIG Insurance Co., 360 F.3d 322 (2d Cir. 2004).....2, 15

South Jersey Sanitation Co. v. Applied Underwriters Captive Risk Assurance Co., 840 F.3d 138 (3d Cir. 2016) 32

Southland Corp. v. Keating, 465 U.S. 1 (1984).....29

State Farm Mutual Automobile Insurance Co. v. George Hyman Construction Co., 715 N.E.2d 749 (Ill. App. Ct. 1999) 22, 23

Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University, 489 U.S. 468 (1989) 17

Wolsey, Ltd. v. Foodmaker, Inc., 144 F.3d 1205 (9th Cir. 1998).....19

WPH Architecture, Inc. v. Vegas VP, LP, 360 P.3d 1145 (Nev. 2015).....20

TABLE OF AUTHORITIES—Continued

Page

CONSTITUTION

U.S. Const. art. VI, cl. 2 5

STATUTES

9 U.S.C. §§ 1 *et seq*. ..... *passim*

9 U.S.C. § 2 6

15 U.S.C. §§ 1011 *et seq*. 10

28 U.S.C. § 1257 5

Cal. Health & Safety Code § 1363.1 (West 1994) 29

Ga. Code. Ann. § 9-9-2 (2013) 29

Haw. Rev. Stat. Ann. § 431:10-221 (West 1987) 29

Ky. Rev. Stat. Ann. § 417.050 (West 1996) 29

La. Stat. Ann. § 22:868 (2011) 30

Mo. Ann. Stat. § 435.350 (West 1996) 30

Neb. Rev. Stat. § 25-2602.01 ..... 6, 10, 30

Okla. Stat. Ann. tit. 12, § 1855 (West 2008) 30

Va. Code Ann. § 38.2-312 (West 2017) 30

Wash. Rev. Code Ann. § 48.18.200 (West 2018) 30

TABLE OF AUTHORITIES—Continued

Page

OTHER AUTHORITIES

Mariana Isabel Hernández-Gutiérrez, *The Remaining Hostility Towards Arbitration Shielded by the McCarran-Ferguson Act: How Far Should the Protection to Policyholders Go?*, 1 U. P.R. Bus. L.J. 35 (2010).....30

PETITION FOR A WRIT OF CERTIORARI

Petitioners Applied Underwriters, Inc., Applied Risk Services, Inc., California Insurance Company, Continental Indemnity Company, Joan Sheppard, Weston Fredrick Penfield, and Michael Scott Wichman (collectively, "Petitioners") respectfully petition for a writ of certiorari to review the judgment of the Second Appellate District Court of Appeal of the State of California ("California Court of Appeal").

INTRODUCTION

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 California Court of Appeal that reflects judicial antagonism toward arbitration in several respects. This case presents important and recurring questions of federal law that have divided federal and state courts of appeals.

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). The Second Circuit has called the question "a recurring and troubling theme in many commercial contracts." *Security Ins. Co. of Hartford v. TIG Ins. Co.*, 360 F.3d 322, 323 (2d Cir. 2004). And Judge Ambro has emphasized "that in light of the Circuit split on this issue . . . the Supreme Court may wish to clarify" the law in this area and resolve the confusion. *Roadway Package Sys., Inc.*, 257 F.3d at 307 n.7 (Ambro, J., concurring).

Here, the California Court of Appeal 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. Indeed, the Court of Appeal held that the choice-of-law provision in the contract at issue here incorporated a state-law ban on arbitration of insurance disputes—even though the effect of applying that provision would be to completely nullify the parties' express agreement to arbitrate such disputes.

In light of the FAA and this Court's numerous precedents, the California Court of Appeal's decision is plainly wrong. In *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995), the Court held that, where a contract contains both a general choice-of-law clause and an arbitration provision, as a matter of federal substantive law under the FAA, 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. The California Court of Appeal held exactly the opposite, reading a general choice-of-law clause in the parties' agreement to import a state law anti-arbitration rule *that invalidated the arbitration clause altogether*. Not only is this contrary to well-established rules of contract interpretation—allowing one general clause to invalidate another, more specific clause—it is manifestly prohibited by the FAA. This Court should grant the Petition and resolve the persisting conflict and confusion on this important and recurring question.

Second, the California Court of Appeal'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 California decision below, however, refused to enforce the parties' unambiguous contractual agreement to delegate issues of arbitrability to an arbitrator. Delegation provisions, like all arbitration agreements, must be enforced according to their terms. If parties are 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 a nullity. *Any* issue of arbitrability could be decided by a court in the first instance, contrary to clear contractual agreements.

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.

OPINIONS BELOW

The order of the California Supreme Court denying Petitioners' petition for review, App. 35a, is unreported. The opinion of the Second Appellate District Court of Appeal of the State of California, App. 1a–25a, is reported at 226 Cal. Rptr. 3d 1 (Ct. App. 2017). The Superior Court's minute order denying Petitioners' motion to compel arbitration, App. 26a–34a, is unreported.

STATEMENT OF JURISDICTION

The California Supreme Court denied Petitioners' petition for review on March 14, 2018. App. 35a. On May 29, 2018, Justice Kennedy granted Petitioners an extension of time to file their Petition until August 11, 2018. *See* No. 17A1315. 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 re-insurance contract.

STATEMENT OF THE CASE

A. The Reinsurance Participation Agreement And Its Arbitration Provision.

This case concerns the enforceability of an arbitration provision in a contractual agreement between sophisticated companies.

Petitioners are two insurance companies, California Insurance Company (a California company) and Continental Indemnity Company (an Iowa company), along with two affiliated companies, Applied Underwriters, Inc. and Applied Risk Services, Inc. (both Nebraska companies), and three individual attorneys who worked for Petitioners on workers' compensation claims made under policies issued by the insurers. Another entity affiliated with the insurers—Applied Underwriters Captive Risk Assurance Company ("AUCRA")—was originally a party to this suit, but Respondents later voluntarily dismissed AUCRA from the California case and filed a parallel suit against AUCRA in Nebraska state court.

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. According to the complaint, in August 2012, Respondents were looking to replace their workers'

compensation insurance policy. *See* Complaint ¶¶ 13–16, *Citizens of Humanity v. Marsh & McLellan Agency, LLC*, BC 571913 (Cal. Super. Ct. Feb. 9, 2015) ("California Complaint"). They and their broker reviewed a proposal and plan summary for Petitioners' EquityComp® insurance program. *Id.* ¶¶ 15–16. That program consisted of two main components: (1) guaranteed cost workers' compensation insurance policies issued by California Insurance Company, and (2) a risk sharing/profit sharing plan, effected through a Reinsurance Participation Agreement ("RPA") between AUCRA and Respondents. *Id.* ¶ 13.

Respondents ultimately accepted the terms of the proposal and signed the RPA. *Id.* ¶ 13. 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. *Id.* ¶¶ 13–14.

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. 37a. The RPA also provides that any question regarding arbitrability should be resolved by the arbitrator in the first instance. *Id.*; *see also id.* at 9a–10a. 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. App. 41a. The

Nebraska choice-of-law provision does not appear in the arbitration clause. *Id.* Nor does it expressly apply to the contract's arbitration provision. *Id.*

B. Proceedings Below.

After participating in the EquityComp® program for a few years, Respondents evidently became unhappy with its cost. In February 2015, Respondents filed a complaint against Petitioners and AUCRA in the Superior Court of California, County of Los Angeles, alleging a variety of claims. *See* California Complaint.

Recognizing that the contract to which they agreed contains a detailed arbitration provision, Respondents filed a 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 571913 (Mar. 13, 2015). Respondents also dismissed AUCRA from the California action, subsequently filing suit against AUCRA in Nebraska state court while continuing their litigation against Petitioners in California state court. *See* Complaint, *Citizens of Humanity, LLC v. Applied Underwriters Captive Risk Assurance Co.*, No. CI 16-3070 (Neb. Dist. Ct. Apr. 12, 2016).[1]

---

[1] AUCRA is filing a petition for certiorari in this Court regarding Respondents' companion Nebraska litigation on the same day that this Petition is filed ("AUCRA Petition"). Because the two cases stem from the same underlying facts and involve the same questions presented, Petitioners request that the cases be granted and consolidated.

Pursuant to the terms of the RPA, Petitioners and AUCRA moved to compel arbitration. *See* Motion to Compel, *Citizens of Humanity*, BC 571913 (Apr. 15, 2015).

On July 8, 2016, the Superior Court denied the motion to compel arbitration. *See* App. 26a–34a. The court acknowledged the arbitration provision in the parties' contract and the FAA's federal policy favoring arbitration. It also 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, given the RPA's delegation clause. *Id.* at 27a. But it held that the FAA does not apply to the agreement in this case. *Id.* at 29a. Applying the general choice-of-law provision, and despite the arbitration provision's express direction that AAA rules should govern the arbitration provision, the court concluded that Nebraska law should apply to the arbitration provision. *Id.* at 32a–33a. Moreover, the court determined that a Nebraska anti-arbitration statute voided the arbitration provision entirely. *Id.* at 33a. 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, 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"). App. 33a. The court

therefore denied Petitioners' motion to enforce the Agreement's contractual arbitration provision. *Id.* at 34a. 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.

The California Court of Appeal affirmed. The court rejected Petitioners' argument that, based on *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995), the arbitration provision should be enforced. *Mastrobuono*, which was 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*, Petitioners 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." App. 18a. The Court of Appeal squarely rejected this argument, finding that the arbitration clause in the RPA is governed by Nebraska law and its anti-arbitration rule. *Id.* at 18a–20a.

The Court of Appeal further found that the question of whether the dispute between Petitioners and

Respondents was arbitrable was for the court to decide in the first instance, not for the arbitrator. *Id.* at 9a–15a. It so found despite the Agreement's express delegation of questions of arbitrability to an arbitrator. The court thus rejected Petitioners' 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. 11a. The court held that *Rent-A-Center* did not apply for two reasons. First, it held that Petitioners' arguments for invalidating the arbitration agreement as a whole applied equally to the delegation clause. *Id.* at 12a. 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 14a. 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. App. 12a. It agreed with the lower court that the McCarran-Ferguson Act "reverse-preempted" the FAA because of the contract's general choice-of-law clause, and thus the FAA did not apply to the contract *at all*. Accordingly, the court reasoned, the issue of arbitrability need not be compelled to arbitration. *Id.* at 12a–15a.

Petitioners sought review in the California Supreme Court. On March 14, 2018, the California Supreme Court denied that petition. App. 35a.

REASONS FOR GRANTING THE WRIT

The California Court of Appeal'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 California Court of Appeal'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 California court below 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. 34–37, *infra*. The California Court of Appeal'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. The Court should grant the Petition and resolve the issue.

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

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

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)).

The split stems, in part, from lower courts' differing interpretations of this Court's opinion in

Mastrobuono. In that case, the Court examined a contract that contained both an arbitration provision and a general choice-of-law clause incorporating New York law. 514 U.S. at 54–55. Relying on the FAA, the Court held that the general choice-of-law provision in the contract should not be read to incorporate a New York anti-arbitration rule prohibiting arbitrators from awarding punitive damages. *Id.* at 64.

In support of its holding, the Court observed that Congress had passed the FAA to "overcome courts' refusals to enforce agreements to arbitrate." *Id.* at 55 (quoting *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270 (1995)). Under the FAA, "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration" embodied in the FAA. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983). Thus, "as a matter of federal law, any doubts" about the meaning of a contract must "be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Id.*

Relying on these well-established principles, the *Mastrobuono* Court concluded that "the best way to harmonize the choice-of-law provision with the arbitration provision is to read 'the laws of the State of New York' to encompass substantive principles that New York courts would apply, but not to include special rules limiting the authority of arbitrators." *Id.* at 63–64. This holding avoids putting "the two clauses in conflict with one another," *id.* at 64, and is consistent with

the FAA principle that "ambiguities" should be "resolved in favor of arbitration," *id.* at 62 (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 476 (1989)).

In *Preston*, reviewing a decision by the California Court of Appeal, the Court reaffirmed *Mastrobuono* and noted that its reasoning applies with particular force where a contract incorporates the rules of a private arbitral association, such as the American Arbitration Association ("AAA"), that conflict with state anti-arbitration law. Citing *Mastrobuono*, the Court in *Preston* rejected the plaintiff's contention that a general California choice-of-law clause signaled the parties' intention to limit arbitration by requiring exhaustion of California's administrative remedies before proceeding to arbitration. 552 U.S. at 363–64. Such a reading would be in tension, at the very least, both with AAA rules and with the purpose of arbitration, which is "to achieve 'streamlined proceedings and expeditious results.'" *Id.* at 357 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985)). The best way to "harmonize" the choice-of-law clause with the arbitration provision and AAA rules was to read the clause as incorporating substantive rights and obligations, but not "special rules limiting the authority of arbitrators." *Id.* at 362–63 (quoting *Mastrobuono*, 514 U.S. at 63–64). The Court thus reversed the California Court of Appeal's holding to the contrary.

At least ten federal courts of appeals and nine states' appellate courts have interpreted *Mastrobuono*, *Preston*, 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. For example, in *Ferro Corp. v. Garrison Indus., Inc.*, 142 F.3d 926 (6th Cir. 1998), the Sixth Circuit interpreted a contract that included an Ohio choice-of-law provision. Under Ohio law, fraudulent inducement claims must be adjudicated in a judicial forum and cannot be arbitrated. *Id.* at 937. Nevertheless, the court expressly applied the FAA's presumption in favor of arbitration to hold that the contract required a fraudulent inducement claim to be arbitrated and that the general choice-of-law clause should be read to incorporate only state substantive law. *Id.*

Similarly, in *Hudson v. ConAgra Poultry Co.*, 484 F.3d 496 (8th Cir. 2007), the Eighth Circuit refused to apply an Arkansas law barring arbitration of tort claims despite the contract's general choice-of-law provision incorporating Arkansas law. *Id.* 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 contracts '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).

The First, Second, Third, Fourth, Fifth, Ninth, Tenth, and Eleventh Circuits have reached the same conclusion in a variety of contexts. *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.); *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." (citation omitted)).

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 Constr. 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

California Court of Appeal 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.

For example, in *Frizzell Construction Co. v. Gatlinburg, LLC*, 9 S.W.3d 79 (Tenn. 1999), the Tennessee Supreme Court held 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. This holding squarely conflicts with the Sixth Circuit's determination in *Ferro Corp.*, 142 F.3d 926, that fraudulent inducement claims should be arbitrated despite a similar choice-of-law clause, as well as the Washington Court of Appeals' conclusion in a similar fraudulent inducement case, *see Kamaya Co.*, 959 P.2d 1140.

Additionally, in *State Farm Mutual Automobile Insurance Co. v. George Hyman Construction Co.*, 715 N.E.2d 749, 755 (Ill. App. Ct. 1999), the Illinois Court of Appeals held that it was within its "authority to hold the general [Illinois] choice of law provision did extend to the arbitration clause" and obviated the need to comply with the FAA. Relying on Illinois law, the court eschewed an AAA "no waiver" rule that would otherwise have been incorporated into the agreement and held that the defendant had waived arbitration of cross-claims against several other parties. *Id.* at 756–58. The court also applied state law to read an *exception* to the relevant arbitration clause broadly—which is, of

course, the inverse of what the FAA would ordinarily require. *Id.* at 758–59.

And in *Ekstrom v. Value Health, Inc.*, 68 F.3d 1391 (D.C. Cir. 1995), the D.C. Circuit held 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, applying state law arbitration rules to a contract otherwise subject to the FAA.

The instant case squarely implicates this split, with the California Court of Appeal joining the minority position. Rather than "harmonizing" the terms of the arbitration provision and choice-of-law clause in the RPA, the California Court of Appeal obliterated the arbitration provision by importing Nebraska's anti-arbitration law into the contract through the choice-of-law clause. The Court thus declined to hold that the choice-of-law clause "encompass[es] substantive principles" but not "special rules limiting the authority of arbitrators." *Mastrobuono*, 514 U.S. at 64. The Court also disregarded the clause in the RPA's arbitration provision specifying that AAA rules should apply. *See* App. 18a–20a.

Shortly after the California Court of Appeal's decision in this case, the Nebraska Supreme Court issued a similar decision in the same underlying dispute, which further widened the split. *Citizens of Humanity, LLC v. Applied Underwriters Captive Risk Assurance Co.*, 909 N.W.2d 614 (Neb. 2018). Considering a case brought by the same Respondents to avoid arbitration

of the identical RPA, the Nebraska Supreme Court also held that the general state choice-of-law provision should be interpreted to incorporate the same Nebraska anti-arbitration rule at issue in this case. *Id.* at 631; *see* Petition for a Writ of Certiorari, *Applied Underwriters, Inc. v. Citizens of Humanity, LLC* (filed Aug. 6, 2018) ("AUCRA Pet."). Remarkably, the Nebraska Supreme Court's decision did not even reference this Court's opinion in *Mastrobuono*.

The acknowledged split is thus firmly entrenched and can only be resolved by this Court.

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

Particularly in light of this Court's holdings in *Moses H. Cone* and *Mastrobuono*, the California Court of Appeal's decision is plainly wrong. As the Court held in *Moses H. Cone*, the FAA "create[s] a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." 460 U.S. at 24. Federal substantive law requires that "questions of arbitrability," including questions about "the construction of the contract itself," "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 California Court of Appeal did exactly the opposite, reading the choice-of-law clause to obliterate the arbitration provision rather than attempting to "harmonize" the two.

Moreover, the California Court of Appeal interpreted the agreement in a manner that evinced open hostility to arbitration. Put simply, the California court's reading of the contract makes no sense. Given the inclusion of a broad arbitration provision in the agreement, the parties clearly intended to arbitrate at least *some* claims.[2] Yet under the state court's holding, the arbitration clause serves no purpose at all.

Such a counterintuitive reading of the contract not only contravenes *Mastrobuono*, but also evinces hostility to arbitration for another reason: a court applying Nebraska law would *never* read another, non-arbitration contract in such a senseless manner. As this Court has held, when a lower court fails to apply ordinary rules of construction to an arbitration agreement and

---

[2] This conclusion is reinforced by the text of the choice-of-law clause itself, which expressly acknowledges that some cases will properly be subject to arbitration. *See* App. 41a–42a ("This Agreement shall be exclusively governed by and construed in accordance with the laws of Nebraska and any matter concerning this Agreement *that is not subject to the dispute resolution provisions of Paragraph 13 hereof* [i.e., the arbitration provision] shall be resolved exclusively by the courts of Nebraska without reference to its conflict of laws.") (emphasis added). It is exceedingly odd—and contrary to the FAA—to read a choice-of-law provision that explicitly acknowledges the necessity of arbitration under the contract to at the same time prohibit arbitration entirely.

instead adopts a special, suspect interpretive approach that disfavors arbitration, that decision contravenes the FAA. *See DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 469 (2015) ("[N]othing in the Court of Appeal's reasoning suggests that a California court would reach the same interpretation of 'law of your state' [to encompass an otherwise invalid law] in any context other than arbitration."). Under Nebraska law,[3] which the California court held applied here, "a contract must receive a reasonable construction and [the] court must construe it as a whole and, if possible, give effect to every part of the contract." *Labenz v. Labenz*, 866 N.W.2d 88, 92 (Neb. 2015); *accord Timberlake v. Douglas Cty.*, 865 N.W.2d 788, 795 (Neb. 2015) ("[A] court should avoid interpreting contract provisions in a manner that leads to unreasonable or absurd results that are obviously inconsistent with the parties' intent."); *Kuhn v. Wells Fargo Bank of Neb., N.A.*, 771 N.W.2d 103, 115 (Neb. 2009) (refusing to read an indemnification clause out of a contract because "a contract must receive a reasonable construction" and "the language at issue quite clearly requires the Bank to indemnify [the defendant] for something").

The California Court of Appeal's effort to distinguish *Mastrobuono* underscores its hostility to the parties' arbitration agreement. The court claimed that, unlike the contract in *Mastrobuono*, the RPA does not contain "competing provision[s]" that must both be given effect. 226 Cal. Rptr. 3d at 10. But under the

[3] The court expressly disclaimed any reliance on California law. App. 20a n.4.

lower court's interpretation, there clearly *are* "competing" provisions: on the lower court's reading, the RPA's choice-of-law provision renders the RPA's entire arbitration agreement a nullity. That interpretation is even more perverse and hostile to arbitration than the one rejected by *Mastrobuono*. In other words, far from being distinguishable from *Mastrobuono*, the decision here is an *a fortiori* case.

Nor does the McCarran-Ferguson Act take this case outside the reach of *Mastrobuono*. The effect of that Act is, at most, to save the Nebraska anti-arbitration rule from federal preemption. But as the California Court of Appeal itself recognized, even if the McCarran-Ferguson Act does indeed have that effect, that is relevant only *if* the Nebraska law applies to the arbitration clause—and, therefore, only *if* the contract is interpreted to incorporate Nebraska's anti-arbitration law as the result of the contract's general choice-of-law provision. App. 14a–15a, 18a–20a. Simply put, under *Mastrobuono*, the court never gets to Nebraska's anti-arbitration statute. As to that antecedent question (which is the question presented here), the FAA and *Mastrobuono* clearly govern, given that the RPA is a contract involving interstate commerce. And *Mastrobuono* clearly teaches that a general choice-of-law provision does not silently—and perversely—operate to obliterate the sophisticated contracting parties' explicit, detailed, and robust arbitration provision. The California court's bootstrapping justification vividly highlights the erroneous nature of the decision below

reflecting continuing hostility to arbitration and thus the need for this Court's review.

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

The choice-of-law question presented by this Petition is recurring. It has arisen repeatedly in both state and federal court. *See* pp. 16–26, *supra*.

The question is also important, affecting many contracts across the country. As courts have noted, "[c]hoice-of-law clauses are ubiquitous in commercial agreements" because such clauses typically provide certainty about what laws will be applied to a given dispute. *Roadway Package Sys., Inc.*, 257 F.3d at 293. And "[c]ommercial parties often also bargain for arbitration clauses, hoping to benefit from arbitration's purported advantages over litigation." *Id.* Consequently, "many commercial contracts include both choice-of-law and arbitration clauses." *Id.*

Because of the existing split of legal authority, parties cannot know in advance how a contract with an arbitration clause and a choice-of-law clause will be interpreted—resulting in a sort of arbitration roulette and concomitant race to file. The interpretation of the contract will depend entirely on the jurisdiction in which the case is filed. The same contract with the same language—including a choice-of-law clause meant to *reduce* interpretive uncertainty—would be interpreted differently in courts on either side of the divide. Such a division of authority will inevitably

"encourage and reward forum shopping." *Southland Corp. v. Keating*, 465 U.S. 1, 15 (1984). The existing split creates deep and pervasive uncertainty for commercial parties, like the sophisticated corporations in this case, seeking to structure their affairs and agreements with predictability.

Moreover, states continue to invent "new devices and formulas" evincing "antagonism toward arbitration." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1623 (2018). Absent the Supreme Court's intervention, those devices will continue to be unwittingly "incorporated" into contracts and (in some cases) immunized from the FAA's reach through general choice-of-law clauses.

Although anti-arbitration "devices" are a problem in many types of contracts, *see*, *e.g.*, *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421 (2017) (considering a state anti-arbitration rule that applied to contracts made using power of attorney), this case illustrates that the failure to apply *Mastrobuono* properly creates a particular danger in the insurance context. At least ten states have adopted express anti-arbitration rules (like the Nebraska provision at issue here) that apply specifically to insurance agreements.[4]

---

[4] *See*, *e.g.*, Cal. Health & Safety Code § 1363.1 (West 1994) (listing disclosure requirements applicable only to insurance contracts with arbitration agreements); Ga. Code. Ann. § 9-9-2 (2013) (providing that arbitration provisions are not valid in "[a]ny contract of insurance"); Haw. Rev. Stat. Ann. § 431:10-221 (West 1987) (providing that no insurance contract may "[d]epriv[e] the courts of this State of the jurisdiction of action against the insurer"); Ky. Rev. Stat. Ann. § 417.050 (West 1996) (excepting

Although parties are free to expressly agree in their contracts to incorporate these laws, *Mastrobuono* instructs that a general choice-of-law provision like the boilerplate one here does not have that effect. Parties who expressly *have* agreed to arbitrate insurance-related disputes should not be deemed to have implicitly done the opposite by way of an otherwise innocuous choice-of-law clause.

The fact that this case arises in the insurance context therefore makes this case an especially apt vehicle for addressing the question presented. The California Court of Appeal squarely addressed the *Mastrobuono* issue. That issue was case-dispositive, preventing the enforcement of the RPA's arbitration provision entirely.

"[i]nsurance contracts" from state law allowing arbitration provisions to be enforced); La. Stat. Ann. § 22:868 (2011) (stating that no insurance contract shall "[d]epriv[e] the courts of this state of the jurisdiction of action against the insurer"); Mo. Ann. Stat. § 435.350 (West 1996) (permitting arbitration provisions to be enforced "except contracts of insurance"); Neb. Rev. Stat. Ann. § 256-2602.01(f)(4) (discussed above); Okla. Stat. Ann. tit. 12, § 1855 (West 2008) ("The Uniform Arbitration Act shall not apply to collective bargaining agreements and contracts which reference insurance, except for those contracts between insurance companies."); Va. Code Ann. § 38.2-312 (West 2017) (stating that no insurance contract shall "[d]epriv[e] the courts of this Commonwealth of jurisdiction in actions against the insurer"); Wash. Rev. Code Ann. § 48.18.200 (West 2018) (stating that no insurance contract may "depriv[e] the courts of this state of the jurisdiction of action against the insurer"); *see also* Mariana Isabel Hernández-Gutiérrez, *The Remaining Hostility Towards Arbitration Shielded by the McCarran-Ferguson Act: How Far Should the Protection to Policyholders Go?*, 1 U. P.R. Bus. L.J. 35 (2010).

II. THE DELEGATION CLAUSE QUESTION WARRANTS REVIEW.

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

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.

Like any other issue, parties may delegate questions of arbitrability to the arbitrator, because "it is up to the parties to determine whether a particular matter is primarily for arbitrators or for courts to decide." *BG Grp. PLC v. Republic of Argentina*, 134 S. Ct. 1198, 1206 (2014). Under the FAA, if a contract's delegation provision is valid, the validity of the remainder of the arbitration contract is for the arbitrator to decide. *See Nitro-Lift Techs., LLC v. Howard*, 568 U.S. 17 (2012). In *Rent-A-Center*, the Court held that a delegation clause must be enforced unless a plaintiff raises a challenge "specific to the delegation provision." 561 U.S. at 74.

Courts are split as to whether such a challenge can be made merely by including the delegation provision in a general challenge, or whether a litigant must raise a challenge unique to the delegation clause—that is, a

legal argument that would not apply equally to 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. *Citizens of Humanity, LLC v. Applied Underwriters Captive Risk Assurance Co., Inc.*, 909 N.W.2d 614, 630 (Neb. 2018); *see also* AUCRA Pet.[5]

In the context of this very contract, "the Third and Sixth Circuits concluded that when a challenge could apply equally to the arbitration agreement as a whole and the delegation provision, the challenge is not specific to the delegation provision and the delegation provision must be enforced." *Citizens of Humanity*, 909 N.W.2d at 630 (citing *S. Jersey Sanitation Co. v. Applied Underwriters Captive Risk Assurance Co*., 840 F.3d 138 (3d Cir. 2016), and *Milan Express Co. v. Applied Underwriters Captive Risk Assurance Co.*, 590 F. App'x 482 (6th Cir. 2014)). A New Jersey appellate court reached a similar conclusion. *See Jade Apparel, Inc. v. United Assurance, Inc.*, No. A-2001-14T1, 2016 WL 5939470, *6 (N.J. Super. Ct. App. Div. Oct. 13, 2016) (unpublished

[5] Because the two cases stem from the same underlying facts and involve the same questions presented, Petitioners request that both this Petition and the AUCRA Petition be granted, and the cases consolidated for briefing and argument. *See* note 1, *supra*.

opinion). In sharp contrast, the Fourth Circuit has held, with regard to this very agreement, that a party may challenge a delegation clause based on the same legal ground on which it argues that the entire arbitration clause is void. *Minnieland Private Day Sch., Inc. v. Applied Underwriters Captive Risk Assurance Co.*, 867 F.3d 449 (4th Cir. 2017), *cert. denied*, *Applied Underwriters Captive Risk Assurance Co. v. Minnieland Private Day Sch., Inc.*, 138 S. Ct. 926 (2018). The California Court of Appeal in this case agreed with the Fourth Circuit, as did the Nebraska Supreme Court in the companion case brought by Respondents, *Citizens of Humanity, LLC*, 909 N.W.2d at 630; *see also Ramar Prod. Servs., Inc. v. Applied Underwriters, Inc.*, No. D071443, 2017 WL 6546317 (Cal. Ct. App. Dec. 22, 2017) (unpublished opinion).

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 when the parties so specify.

C. The Delegation Clause Question Is Important And Recurring.

The decision of the California Court of Appeal in this case—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 hostility, as manifested by the circuit split over *Rent-A-Center*, is important, recurring, and warrants this Court's review.

Judicial hostility toward delegation clauses is pervasive. For example, this Court recently agreed to review a widespread practice exhibiting possible hostility to delegation clauses. *See Henry Schein, Inc. v. Archer & White Sales, Inc.*, No. 17-1272, 2018 WL 1280843, at *1 (U.S. June 25, 2018) (granting certiorari to review whether a delegation clause must be enforced when the claim of arbitrability is "wholly groundless"). Yet, as the Court has acknowledged, delegation provisions are no more suspect than any other agreement to arbitrate and should be treated with the same respect. As Justice Scalia explained on behalf of the Court in *Rent-A-Center*, "[A]n agreement to

arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other." 561 U.S. at 70.

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 presents a perfect vehicle 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.

Respectfully submitted,

GREGORY G. GARRE
ROMAN MARTINEZ
GRAHAM E. PHILLIPS
LATHAM & WATKINS LLP
555 Eleventh St., NW
Suite 1000
Washington, DC 20004
(202) 637-2207

CLIFFORD M. SLOAN
Counsel of Record
SYLVIA O. TSAKOS
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Ave., NW
Washington, DC 20005
(202) 371-7000
cliff.sloan@skadden.com

August 6, 2018