No. 18-175

In The Supreme Court of the United States

APPLIED UNDERWRITERS, INC. ET AL.,

Petitioners,

v.

CITIZENS OF HUMANITY, LLC ET AL.,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The Nebraska Uniform Arbitration Act, Neb. Rev. Stat. § 25-2602.01(f)(4), prohibits Nebraska courts from enforcing agreements to arbitrate that are contained in insurance contracts. The Federal Arbitration Act ("FAA") generally preempts state-law rules that restrict the enforceability of agreements to arbitrate. But the McCarran-Ferguson Act says that the FAA does not apply to "any law enacted by any State for purposes of regulating the business of insurance." 15 U.S.C. § 1012.

In a decision separate from this case, the Nebraska Supreme Court concluded that the agreement to arbitrate at issue in this case was unenforceable under Neb. Rev. Stat. § 25-2602.01(f)(4). In the decision below, the California Court of Appeal held that § 25-2602.01(f) is a law enacted by Nebraska for purposes of regulating the business of insurance and that, as a result, the McCarran-Ferguson Act renders the FAA inapplicable to Neb. Rev. Stat. § 25-2602.01(f)(4).

The questions presented are:

1. Whether the FAA requires a state court interpreting a choice-of-law clause to ignore state-law rules that are excluded from the preemptive reach of the FAA by the McCarran-Ferguson Act.

2. Whether the FAA requires a state court to enforce a delegation clause in an arbitration agreement when applicable state law prohibits the clause from being enforced and the state law is excluded from the FAA by the McCarran-Ferguson Act.

CORPORATE DISCLOSURE STATEMENT

Respondent CM Laundry, LLC is a wholly owned subsidiary of Respondent Citizens of Humanity, LLC. Citizens of Humanity, LLC is a wholly owned subsidiary of Citizens of Humanity Holding Company, LLC, which is in turn a wholly owned subsidiary of COH Holding Company, LLC. No publicly held company owns 10% or more of either Respondent.

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STATUTORY PROVISIONS INVOLVED

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.
>
> . . .
>
> (d) Contract provisions agreed to by the parties to a contract control over contrary provisions of the act other than subsections (e) and (f) of this section.
>
> . . .
>
> (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.

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.

Section 2 of the McCarran-Ferguson Act, 15 U.S.C. § 1012, provides in pertinent part:

> (a) State regulation
>
> The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> (b) Federal regulation
>
> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for purposes of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance[.]

STATEMENT OF THE CASE

This is a case about whether a state court should enforce an arbitration agreement in an insurance dispute. The Nebraska Supreme Court has held that the arbitration agreement in this case violates a Nebraska

law prohibiting the use of arbitration in "any agreement concerning or relating to an insurance policy." Neb. Rev. Stat. § 25-2602.01(f)(4). The court below further held that the Nebraska law at issue was exempted from the FAA by the McCarran-Ferguson Act, 15 U.S.C. § 1012.

A. Statutory Background

As this Court has observed, an arbitration agreement is simply a private contract in which parties agree on a procedure to resolve legal claims outside of court. *See Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 67–69 (2010). In theory, parties could agree to resolve their claims however they want—whether by flipping a coin or by arm wrestling—and courts could enforce the resulting obligations just like any other contract.

But state and federal courts historically were reluctant to let private parties pick their own dispute resolution procedures and adopted special rules that made it harder to enforce agreements to arbitrate than it was to enforce other forms of contract. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011).

In response, most states have passed a version of the Uniform Arbitration Act, which directs state courts to enforce arbitration agreements by, inter alia, compelling arbitration when it is required by a valid contract. But these laws also have provisions that restrict or eliminate the use of arbitration agreements in

special cases. *See generally* Bruce E. Meyerson, *The Revised Uniform Arbitration Act: 15 Years Later*, 71 Disp. Resol. J. 1 (2016).

The Nebraska Uniform Arbitration Act ("NUAA") takes this approach. It requires that courts enforce an agreement to arbitrate as long as "the provision is entered into voluntarily and willingly." Neb. Rev. Stat. § 25-2602.01(b). But it bars courts from compelling arbitration based on "any agreement concerning or relating to an insurance policy." *Id.* § 25-2602.01(f)(4). This rule cannot be waived by the parties. *Id.* § 25-2602.01(d) ("Contract provisions agreed to by the parties to a contract control over contrary provisions of the act *other than subsections (e) and (f) of this section*.") (emphasis added).

The FAA creates a second, stronger layer of protection for arbitration agreements. Congress enacted the FAA in 1925 to require that courts "place arbitration agreements on an equal footing with other contracts." *Concepcion*, 563 U.S. at 339. Like state Uniform Arbitration Acts, the FAA includes a set of procedural rules for compelling arbitration and enforcing arbitral awards. *See, e.g.*, 9 U.S.C. §§ 3, 4, 12.

Section 2 of the FAA provides that:

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

> save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

This Court has held that Section 2 "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). Because the FAA creates "federal substantive law," it preempts any conflicting state rules on arbitration and must be applied by state courts. *Southland Corp. v. Keating*, 465 U.S. 1, 14 (1984); *but see Preston v. Ferrer*, 552 U.S. 346, 363 (2008) (Thomas, J., dissenting) ("As I have stated on many previous occasions, I believe that the [FAA] does not apply to proceedings in state courts.").

This Court has held that the FAA preempts state-law rules that: impose heightened notice requirements for recognizing arbitration agreements, *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 688 (1996); restrict who may enter into an arbitration agreement, *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1429 (2017); or pose an obstacle to the streamlined nature of arbitration, *Concepcion*, 563 U.S. at 352.

The FAA also creates a federal standard for interpreting choice-of-law provisions in arbitration contracts. Parties are free to opt out of the FAA by selecting a state's arbitration rules if they do so with sufficient clarity. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995). But where the parties' agreement has provisions that point in conflicting

directions, this Court has concluded that the arbitration clause must be governed by the FAA. *Id.* at 62.

The FAA imposes a federal law of severability for arbitration contracts as well. Under this approach, an agreement to arbitrate is treated as a separate, severable agreement from the underlying agreement in which it appears. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445–46 (2006). Parties who argue that the underlying agreement is unlawful cannot invalidate the arbitration agreement unless they have preserved and presented a basis for invalidating the arbitration agreement directly. *Id.*

This rule of severability also applies to so-called delegation clauses. The enforceability of an arbitration agreement is presumptively for a court to decide. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). But the parties may enter into an additional agreement that delegates any dispute over the enforceability of an arbitration agreement to be decided by an arbitrator, so long as the delegation is "clea[r] and unmistakabl[e]." *Id.* This sort of delegation clause is also severable. If a party challenges only an arbitration requirement, but fails to raise a valid challenge to a clear and unmistakable delegation clause, the delegation clause will stand. *Rent-A-Ctr.*, 561 U.S. at 72.

While the FAA creates a strong federal policy favoring arbitration, it does not impose that policy on every contract and every law under the sun. The FAA does not apply to contracts arising only in intrastate commerce. 9 U.S.C. § 1. It does not apply to "contracts

of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." *Id.*[1] And the FAA does not apply when another federal statute restricts its application.

Of particular relevance here, twenty years after passing the FAA, Congress passed the McCarran-Ferguson Act, which blocks the application of the FAA to state laws with the "purpose of regulating the business of insurance." 15 U.S.C. § 1012(b).

The McCarran-Ferguson Act was enacted in 1945 as a reaction to this Court's decision in *United States v. South–Eastern Underwriters Association*, 322 U.S. 533 (1944):

> [I]n *South–Eastern Underwriters*, [the Court] held that an insurance company that conducted a substantial part of its business across state lines was engaged in interstate commerce and thereby was subject to the antitrust laws. This result, naturally, was widely perceived as a threat to state power to tax and regulate the insurance industry. To allay those fears, Congress moved quickly to restore the supremacy of the States in the realm of insurance regulation.

U.S. Dept. of Treasury v. Fabe, 508 U.S. 491, 499–500 (1993).

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[1] While the Court has granted review to address the scope of this exception in *New Prime v. Oliviera*, No. 17-340, this exception is not at issue in this case.

The McCarran-Ferguson Act protects a wide range of state laws related to insurance from preemption by other federal statutes. *Id.* at 504 (noting that "[t]he broad category of laws enacted 'for the purpose of regulating the business of insurance'" "necessarily encompasses more than just the 'business of insurance.'"). This Court has observed that "[s]tatutes aimed at protecting or regulating th[e] relationship between insurer and insured, directly or indirectly" qualify as "laws regulating the business of insurance" under the Act. *Id.* at 501 (internal quotation marks and alterations omitted).

In sum, since Neb. Rev. Stat. § 25-2602.01(f)(4) contains a special rule that would prohibit arbitration clauses in contracts relating to insurance, that section would normally be preempted by the FAA. But if § 25-2602.01(f)(4) is a law "enacted for the purpose of regulating the business of insurance," it is excluded from the reach of the FAA by the McCarran-Ferguson Act.

B. The Parties' Dispute

Applied Underwriters Captive Risk Assurance Company ("AUCRA") sells a type of workers' compensation insurance called EquityComp® that is effectively a hybrid between fixed-cost insurance and self-insurance. An employer who bought EquityComp® insurance paid a fixed cost for workers' compensation insurance. The employer and AUCRA then entered into a separate Reinsurance Participation Agreement ("RPA") with AUCRA, which allowed the employer to

share in the profits or losses that resulted from its workers' compensation policy.

Petitioners in this case are three affiliates of AUCRA who helped administer EquityComp®, the parent company of AUCRA, and three employees of Petitioners. Petitioners are not parties to the RPA.

The RPA contains an arbitration clause that is not a model of clarity. The clause states that "this section is only intended to provide a mechanism for resolving accounting disputes in good faith." Pet. App. 37a. It also states that the parties agree to arbitrate any dispute relating to "(1) the execution and delivery, construction or enforceability of this Agreement, (2) the management or operations of the Company, or (3) any other breach or claimed breach of this Agreement or the transactions contemplated herein[.]" Pet. App. 37a.

The agreement requires that any claims be arbitrated in the British Virgin Islands. Pet. App. 40a. It prohibits disclosure of the award unless required by law or to enforce the award. *Id.* It waives punitive damages. Pet. App. 41a. It allows the arbitrator to shift fees to an unsuccessful claimant regardless of whether the underlying cause of action allows such fee shifting. *Id.* And it requires that, unless AUCRA agrees otherwise, all arbitrators must be active or retired officers of insurance companies. Pet. App. 39a.

The RPA contains a choice-of-law clause stating that the Agreement "shall be exclusively governed by and construed in accordance with the laws of Nebraska." Pet. App. 41a. It also contains a separate

provision requiring that the parties submit to the "exclusive jurisdiction of the Courts of Nebraska" in order to enforce any arbitration award and "all other purposes related to this Agreement." Transcript on Appeal at 69, *Citizens of Humanity et al. v. AUCRA*, No. A-17-178 (Neb. Feb. 24, 2017).

After Respondents purchased EquityComp®, a dispute arose between the parties over the RPA. Pet. App. 4a. Respondents initially filed suit in California against both AUCRA and Petitioners. Pet. App. 9a. But consistent with the RPA's requirement that Nebraska courts have "exclusive jurisdiction" over all disputes, Respondents subsequently dismissed AUCRA from the California suit and filed their claim against AUCRA in Nebraska state court. *Id.* Since Petitioners were not parties to the RPA, Respondents continued to litigate against them in California, which gave rise to this petition. *Id.* AUCRA has filed a separate petition, No. 18-174, raising the same questions presented as in this case and have asked that the two cases be reviewed together. Pet. 9, n.1.

C. The Decision Below

In response to Respondents' suit, Petitioners moved to compel arbitration under the FAA. Pet. App. 4a. According to Petitioners, the FAA required the court to enforce the parties' agreement to arbitrate their underlying dispute about the insurance contract. And the FAA independently required the court to enforce the delegation clause.

Respondents opposed the motion to compel on the ground that Nebraska law made both agreements invalid and unenforceable. In particular, Respondents argued that § 25-2602.01(f)(4) was not preempted by the FAA because it was a rule that existed for the purpose of regulating insurance. It was therefore excepted from the FAA by the McCarran-Ferguson Act.

The trial court agreed with Respondents and the Court of Appeal affirmed. The court began by observing that Respondents had specifically preserved and raised a basis for challenging the delegation clause. Namely, that Neb. Rev. Stat. § 25-2602.01(f)(4) was incorporated by the parties' agreement, that it rendered the delegation clause invalid, and that this application of Nebraska law was excluded from the FAA by the McCarran-Ferguson Act. Pet. App. 9a-15a. The court concluded it could address this question because "the threshold issue is whether the FAA applies, thereby authorizing the court to compel arbitration of the dispute, or whether such authority is lacking because the FAA is preempted by the McCarran-Ferguson Act and the NUAA." Pet. App. 14a. Any argument that the FAA barred the court from considering whether the FAA applied therefore "put[] the cart before the horse." Pet. App. 14a-15a.

The court reasoned that since "it is undisputed" that the FAA does not apply to any state law covered by the McCarran-Ferguson Act, the "determinative inquiry is whether section 25-2602.01(f) of the NUAA was enacted for the purpose of regulating the business

of insurance within the meaning of the McCarran-Ferguson Act." Pet. App. 16a. The court observed that the McCarran-Ferguson Act protects from preemption a " 'broad category' " of laws that are " 'aimed at protecting or regulating th[e] relationship between insurer and insured, directly or indirectly.' " Pet. App. 16a-17a (quoting *Fabe*, 508 U.S. at 501, 505). It then agreed with the Nebraska Supreme Court as well as the four federal Courts of Appeals, all of which had all held that § 25-2602.01(f), has the purpose of regulating insurance and is therefore exempt from the FAA. Pet. App. 17a-18a.

Finally, the court rejected the argument that, under *Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52 (1995), the contract's choice-of-law clause should not be read to incorporate § 25-2602.01(f)(4). In *Mastrobuono*, the parties' contract contained "two provisions [New York law and the arbitral rules of the National Association of Securities Dealers] that on their face pointed to . . . conflicting rules regarding the availability of punitive damages." Pet. App. 19a. In order to "give effect" to both provisions, this Court read the contract as incorporating only New York's "substantive principles" of law and not as incorporating "special rules limiting the authority of arbitrators." *Mastrobuono*, 514 U.S. at 64. In this case, the Court of Appeal reasoned, "the RPA has a single provision that unambiguously provides that the RPA 'shall be exclusively governed by and construed in accordance with the laws of Nebraska.' " Pet. App. at 19a. Moreover, "[a]lthough the RPA does refer to the AAA rules, those

rules—unlike the competing arbitration rules in *Mastrobuono*—do not conflict with Nebraska law." Pet. App. 19a-20a.

REASONS FOR DENYING THE PETITION

Petitioner seeks review to establish two principles regarding how courts should interpret contracts under the FAA. First, Petitioner would have the Court conclude that a general choice-of-law clause cannot be read to incorporate state-law rules that are inconsistent with the FAA. Second, Petitioner would have the Court conclude that the FAA requires courts to enforce a delegation clause when a party does not properly raise a valid basis under the FAA for avoiding the delegation clause.

I. This is an exceedingly poor vehicle for certiorari because it does not implicate the questions presented. In fact, neither Respondents nor the decision below disputed the above points.

Respondents did not dispute below and the California Court of Appeal did not question that the FAA precludes courts from reading a general choice-of-law clause to incorporate a state-law principle that conflicts with the FAA. Respondents' position, and the holding of the court below, is simply that the rule at issue in this case (Neb. Rev. Stat. § 25-2602.01) does *not* conflict with the FAA because it is placed beyond the reach of the FAA by the McCarran-Ferguson Act. There is no basis in federal law to conclude that the

FAA requires state courts to ignore an applicable state law that is not subject to the FAA.

Respondents likewise did not dispute below and the Nebraska Supreme Court did not question that the FAA requires courts to defer to an arbitrator when a party attempts to avoid a delegation clause but does not raise a valid basis under the FAA for avoiding that clause. Respondents' position, and the holding of the court below, is simply that Respondents properly raised a valid basis for avoiding the delegation clause in this case—that the delegation clause is unenforceable under § 25-2602.01(f)(4)—and this provision is not subject to the FAA because of the McCarran-Ferguson Act.

To be sure, Petitioner argued below that the McCarran-Ferguson Act did not protect Neb. Rev. Stat. § 25-2602.01(f)(4) from preemption by the FAA, and that the RPA is not an "agreement concerning or relating to insurance" under the state statute. Those are the disputes on which the whole case turned. But the scope of § 25-2602.01(f)(4) is a matter of state law. And Petitioner has not asked the Court to review the scope of the McCarran-Ferguson Act as applied to the specific facts of this case, let alone identified compelling reasons to do so.

II. The fact that the decision below does not implicate either question presented is more than enough reason to deny the petition. But this is an even worse vehicle because it arises from state court. At least one Justice has consistently maintained that the FAA

merely announces a rule of federal procedure inapplicable to state-court proceedings. Therefore, if the Court were to grant review, there would likely be, at most, eight Justices available to opine on the questions presented, creating the distinct possibility of a fractured decision that would sow confusion rather than clarity on the questions presented.

III. Because the decision below does not implicate either question presented, the Court should deny review no matter how substantial the split of authority is and no matter how important. It is worth noting, however, that the questions presented have not actually generated a meaningful split of authority. And they are not important.

On the first question presented, the petition does not cite any case decided in the last nineteen years that even arguably conflicts with Petitioner's position. The petition cites only three cases in the past ten years that raise the issue at all. This likely reflects that modern arbitration agreements are drafted to eliminate the first question presented entirely. On the second question presented, the alleged split is illusory and simply reflects that different parties have raised different challenges to delegation clauses in different cases.

I. THIS CASE IS A POOR VEHICLE BECAUSE IT DOES NOT IMPLICATE THE QUESTIONS PRESENTED

Both of the questions presented ask the Court to expound on the requirements imposed by the FAA. The first question asks the Court to address whether the FAA allows courts to read a general choice-of-law clause to incorporate a state-law rule that is inconsistent with the FAA. The second question asks the Court to address the extent to which the FAA requires courts to enforce a delegation clause.

The California Court of Appeal's holding below does not implicate either of these questions. The Court held that (a) Nebraska law prohibits the enforcement of the arbitration and delegation requirements in the parties' agreement and (b) that this Nebraska law is not subject to the FAA in light of the McCarran-Ferguson Act. Petitioner does not seek review regarding the scope of Nebraska law or the McCarran-Ferguson Act. And for good reason. The first is a question of state law and non-reviewable by this Court. The second turns on the narrow question of whether the application of Neb. Rev. Stat. § 25-2602.01(f)(4) has a sufficient nexus to the business of insurance to fall within the coverage of the McCarran-Ferguson Act.

These conclusions—that the arbitration and delegation clauses in this case are illegal under Nebraska law and not subject to the FAA—must therefore be accepted as the starting point for this case. This creates

a fatal vehicle problem: this case does not implicate Petitioner's questions presented.

Petitioner asks this court to hold that a general choice-of-law clause should not be read to incorporate state-law rules that are inconsistent with the FAA.[2] But Respondents have never disputed that point. Rather, Respondents' argument was that the state law at issue here, while clearly a restriction on arbitration, is *not* inconsistent with the FAA. Rather, the McCarran-Ferguson Act eliminates the application of the FAA to this provision. Accordingly, this is not a case where the normal interpretive rules of the FAA apply.

For the same reason, the FAA does not govern how courts should interpret and enforce a delegation clause where the delegation clause is prohibited by state law, and that law is not subject to the FAA. By analogy, if this same contract were used for an agreement involving only intrastate commerce, it would be passing strange to say that, under the FAA, a general choice-of-law clause should not be read to incorporate state rules that restrict arbitration. Just as the FAA has nothing to say about state laws that are hostile to arbitration in contracts involving intrastate commerce,

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[2] The petition states the rule a bit more broadly, saying that, under the FAA, a general choice-of-law clause should not be read to incorporate state rules that "evinc[e] hostility to arbitration." Pet. ii. But, as described above, the FAA does not preempt hostility to arbitration where such hostility is expressly authorized by federal law. And where the FAA does not preempt state law, the petition offers no reason why a court should not revert to the law of the state chosen by the parties.

the FAA likewise has nothing to say about state laws that restrict arbitration in the course of regulating insurance contracts.

Stated differently, the cases Petitioner points to as creating a need for this Court's review involved questions about whether to apply state-law rules that were inconsistent with the FAA. None of them involved the scenario in this case, where the state law in question is *exempt* from the FAA due to the McCarran-Ferguson Act. This case therefore turns on the application of the McCarran-Ferguson Act and does not implicate the FAA questions raised by those other cases.

Petitioner presumably disagrees that the application of Neb. Rev. Stat. § 25-2602.01(f)(4) to the arbitration and delegation clauses in this case is excluded from the FAA by the McCarran-Ferguson Act. It argued this point vigorously below. Pet. App. 19a. But the petition does not seek review on that question or attempt to explain why it warrants review. Because the petition does not seek review on the only point about which the parties really disagreed below, this case is an exceedingly poor candidate for certiorari.

II. THIS CASE IS A POOR VEHICLE BECAUSE IT ARISES FROM A STATE COURT

There is a substantial argument that the FAA should not be read to apply to state courts. As Justice Thomas has explained:

> At the time of the FAA's passage in 1925, laws governing the enforceability of arbitration agreements were generally thought to deal purely with matters of procedure rather than substance, because they were directed solely to the mechanisms for resolving the underlying disputes. As then-Judge Cardozo explained: "Arbitration is a form of procedure whereby differences may be settled. It is not a definition of the rights and wrongs out of which differences grow." *Berkovitz v. Arbib & Houlberg, Inc.*, 230 N.Y. 261, 270, 130 N.E. 288, 290 (1921) (holding the New York arbitration statute of 1920, from which the FAA was copied, to be purely procedural). It would have been extraordinary for Congress to attempt to prescribe procedural rules for *state* courts.

Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265, 286–88 (1995) (Thomas, J., dissenting).

The structure of the FAA is consistent with this understanding. While § 2 of the FAA does not speak one way or another to its application in state court, the remaining provisions of the Act "clearly rest on the assumption that federal courts have jurisdiction to enforce arbitration agreements only when they would have had jurisdiction over the underlying dispute." *Id.* at 291. That is, § 2 does not confer federal-question jurisdiction, which suggests that it does not truly create substantive federal rights. *Id.*

Finally, to the extent that the FAA is ambiguous, federalism principles suggest that the Court should

demand a clear statement before reading a federal statute as dictating the procedures employed by state courts. *Id.* at 292.

To be sure, the Court has held otherwise, and six members of the Court have applied the FAA to state courts in light of that precedent. *See, e.g.*, *Kindred Nursing Ctrs.*, 137 S. Ct. at 1424. However, Justice Thomas has consistently declined to engage in any interpretation of how the FAA applies in cases arising out of state courts. *See Preston*, 552 U.S. at 363 (dissenting opinion); *Allied-Bruce Terminix Cos.*, 513 U.S. 265, 285–97 (1995) (same); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449 (2006) (same); *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 460 (2003) (same); *Casarotto*, 517 U.S. at 689 (same). Justice Gorsuch has not, to Respondents' knowledge, had occasion to decide whether the application of the FAA to state courts is so inconsistent with the original understanding of the statute and principles of federalism that the contrary precedent should be followed.

Granting review in this case would therefore result in briefing and argument regarding the applicability of the FAA to state courts. And it could lead to a fractured decision in which one or more Justices may not feel it appropriate to opine on the standards for applying the FAA.[3] Even if the questions raised by the

[3] To the extent the Court were inclined to revisit the question of whether the FAA applies to state courts, this case would be a poor vehicle to address that question as well. Because the McCarran-Ferguson Act already renders the FAA inapplicable in this

petition warranted review (and they do not), the Court would be better served by waiting for a case arising out of federal court, in which the full Court could opine on the questions presented.

III. THE QUESTIONS PRESENTED ARE NOT SUBJECT TO A MEANINGFUL SPLIT OF AUTHORITY AND ARE NOT IMPORTANT

Because the decision below does not implicate either question presented, the Court should deny review no matter how substantial the split of authority is and no matter how important the issue. It is worth noting, however, that the questions presented have not generated a meaningful split of authority. And they are not important.

1. On the first question presented, the petition identifies nineteen cases that, consistently with *Mastrobuono*, read a general choice-of-law clause to not incorporate a state-law rule that is preempted by the FAA. Pet. 16–19.

The petition identifies only three cases that ostensibly read a choice-of-law clause as incorporating rules that conflict with the FAA. Pet. 19. All three were decided at least nineteen years ago and all three are arguably consistent with *Mastrobuono*.

In *Mastrobuono*, this Court considered an agreement that specifically called for arbitral rules that the

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case, there is no reason to reach the question of whether the FAA binds state courts.

Court read as allowing punitive damages. But the agreement also contained a general choice-of-law cause selecting New York law, which does not allow punitive damages to be awarded in arbitration. The Court resolved this apparent conflict in favor of allowing arbitration of the punitive damages claim.

Each of the cases cited by the petition is distinguishable from *Mastrobuono*. In *Frizzell Const. Co. v. Gatlinburg, L.L.C.*, 9 S.W.3d 79 (Tenn. 1999), the court applied a Tennessee rule barring arbitration of fraudulent inducement claims, but the decision gives no indication that the parties' agreement adopted arbitral rules to the contrary, as was the case in *Mastrobuono.* In *Ekstrom v. Value Health, Inc.*, 68 F.3d 1391, 1396 (D.C. Cir. 1995), the court applied a Connecticut rule imposing a 30-day limitation period for challenging arbitral awards in court. But there was no indication that the arbitral rules referenced in the contract imposed a different review period.

In *State Farm Mut. Auto. Ins. Co. v. George Hyman Const. Co.*, 715 N.E.2d 749, 756 (Ill. App. Ct. 1999), an intermediate appellate court considered an Illinois rule that a party may waive the right to arbitrate by pursuing claims for too long in court. This created tension with the AAA rule that parties cannot waive the right to arbitrate. *Id.* But the court resolved this tension by applying the rule that "an ambiguous contract should be construed against the drafter." *Id.* at 755. This Court applied the same rule as a valid canon under the FAA in *Mastrobuono* itself. 514 U.S. at 62–63.

The first question presented is also not important because the problem the petition identifies is trivially easy to avoid. A party that wants the FAA to apply to the arbitration clause in its contract can say so expressly. Indeed, this appears to be standard practice in arbitration agreements these days. *See, e.g.*, *Epic Systems v. Lewis*, No. 16-285, Pet. App. 35a ("I agree that this agreement is made pursuant to and shall be governed under the Federal Arbitration Act."); *AT&T Mobility Servs. LLC v. Payne*, No. 3:17-cv-00649, 2018 WL 935441, at *2 (W.D. Ky. Feb. 16, 2018) ("The Agreement at issue in this case expressly states that it is 'governed by the Federal Arbitration Act[.]'"); *Hanson v. Prime Commc'ns LP*, No. 1:17-cv-161-VEH, 2017 WL 1035679, at *2 (N.D. Ala. Mar. 17, 2017) (same); *Telecom Decision Makers, Inc. v. Birch Commc'ns, Inc.*, No. 3:14-cv-613, 2015 WL 5722817, at *2 (W.D. Ky. Sept. 29, 2015) (same); *Langlois v. Amedisys, Inc.*, No. 15-cv-835, 2016 WL 4059670, at *2 (M.D. La. July 27, 2016) (same); *Dearmon v. Bestway Rent-To-Own*, No. 3:14-cv-0900, 2014 WL 1961911, at *2 (M.D. Tenn. May 15, 2014) (same). That may be why, out of the 22 cases that Petitioner cites as having addressed this issue, only three were decided in the last ten years. This is an issue that courts rarely need to address, is virtually always decided correctly, and can be avoided entirely through properly drafted contracts.

2. The second question presented asks the Court to address how the FAA requires courts to sever and enforce a delegation clause. As explained above, this case is not an appropriate vehicle for addressing that

question because the court below found that the McCarran-Ferguson Act rendered the FAA inapplicable. However, even if the Court could reach the question, it would find no split of authority.[4]

There are two separate reasons for rejecting a challenge to a delegation clause. First, courts must enforce a delegation clause where a party claims that the arbitration agreement is invalid, but the reason for invalidating the underlying agreement does not also apply to the delegation clause. *See Rent-A-Center*, 561 U.S. at 73 (finding that the arguments preserved by defendant "clearly did not go to the validity of the delegation provision"). This reflects that, under the FAA, a delegation clause must be treated as severable from the underlying arbitration agreement. Second, when a party makes an argument on appeal that *does* speak directly to a delegation clause, courts may find that the argument was not properly preserved below. *Id.* at 72 (finding one of plaintiff's arguments waived because "nowhere in his opposition to [defendant's] motion to compel arbitration did he even mention the delegation provision"). This simply reflects the normal rules of waiver in civil litigation.

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[4] While there are multiple threshold issues that would prevent the Court from ever reaching the issue, Respondents note for the sake of completeness that this case is also a poor vehicle because Petitioners are not parties to the arbitration agreement. This fact "fundamentally alters the relevant analysis" of the delegation clause because it "requires that the Court decide the issue of equitable estoppel" before it can enforce the delegation clause. *In re Toyota Motor Corp.*, 838 F. Supp. 2d 967, 984-85 (C.D. Cal. 2012).

But the petition is wrong to suggest that, where an argument is properly preserved, a court must refuse to invalidate a delegation clause simply because "objections to arbitration . . . apply equally to the delegation clause itself." Pet. ii. If a plaintiff opposed a motion to compel arbitration on the ground that the defendant forced him to sign the contract at gunpoint, he could potentially waive any challenge to the delegation clause by failing to raise it in court. But nobody would seriously contend that a plaintiff who properly preserved a duress defense to the delegation clause would be forced into arbitration because the defense "applies equally to" both the arbitration clause and the delegation clause.

Indeed, in *Rent-A-Center* itself, the Court acknowledged that the plaintiff could have raised the same defense to the delegation clause as he had raised to the arbitration clause if only he had properly preserved it. *Id.* at 74 ("It may be that had Jackson challenged the delegation provision by arguing that these common procedures *as applied* to the delegation provision rendered *that provision* unconscionable, the challenge should have been considered by the court."). There is nothing magical about delegation clauses that creates special rules for challenging them. If a party properly raises and preserves an argument as to why the agreement is invalid, there is no basis in contract law or this Court's precedents to say that a court may not decide that threshold question.

When understood in this light, there is no split of authority on the second question presented. There is

simply variation in what arguments the parties in each case have raised. In each case cited by Petitioner in which the court enforced a delegation clause, the court concluded that a party either waived its argument against the delegation clause or presented an argument that addressed only the validity of the underlying arbitration agreement.

In *South Jersey Sanitation v. Applied Underwriters*, 840 F.3d 138 (3d Cir. 2016), the plaintiff argued only that the RPA was procured by fraudulent representations about the price of the insurance, but suggested no fraud regarding the delegation clause. *Id.* at 144 ("It is plain from these paragraphs that South Jersey alleges no arbitration provision-specific fraud. . . .").

In *Milan Express Co. v. Applied Underwriters Captive Risk Assur. Co.*, 590 F. App'x 482 (6th Cir. 2014), the plaintiff never presented or preserved the argument that § 25-2602.01(f)(4) independently invalidated the delegation clause. Rather, the plaintiff *only* claimed that "Pursuant to Nebraska Revised Statute § 25-2602.01(f)(4), the arbitration clause in the Agreement between Milan and Applied Underwrite[r]s is unenforceable." Motion to Stop Arbitration, Dkt. 5 at 11, *Milan Express Co. v. Applied Underwriters Captive Risk Assurance Co.*, No. 1:13-cv-01069 (W.D. Tenn. Mar. 14, 2013). *See also Jade Apparel, Inc. v. United Assurance, Inc.*, No. A-2001-14T1, 2016 WL 5939470 (N.J. Super. Ct. App. Div. Oct. 13, 2016) (relying on *Milan Express* with no indication that the plaintiff preserved

an independent argument challenging the delegation clause).

Conversely, the cases that invalidate delegation clauses all find that a party has preserved a valid basis to show that the delegation clause is itself invalid.

In *Minnieland Private Day Sch., Inc. v. Applied Underwriters Captive Risk Assurance Co., Inc.*, the plaintiff "expressly asserted that, under Section 38.2–312, '*the court must resolve* the validity of the arbitration provision,' an argument relevant only to the enforceability of the delegation provision." 867 F.3d 449, 456 (4th Cir. 2017). This Court subsequently denied review. *Applied Underwriters Captive Risk Assurance Co. v. Minnieland Private Day Sch., Inc.*, 138 S. Ct. 926 (2018).

Likewise, in *Ramar Prod. Servs., Inc. v. Applied Underwriters, Inc.*, the plaintiff "argued that both the delegation clause and the arbitration agreement were unconscionable." No. D071443, 2017 WL 6546317, at *5 (Cal. Ct. App. Dec. 22, 2017) (unpublished opinion). The court therefore concluded that because the plaintiff "made a specific challenge to the delegation clause, the trial court was required to resolve the merits of that challenge." *Id.*

Thus, even if the Court could reach the second question presented in this case without becoming mired in the question of whether the McCarran-Ferguson Act exempts the delegation clause from the

FAA (and it cannot), it would still find no split of authority.

CONCLUSION

The petition for a writ of certiorari should be denied.

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Respectfully submitted,

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