No. 19-331

IN THE

Supreme Court of the United States

SEQUOIA CAPITAL OPERATIONS, LLC; TCV V, L.P.;

Petitioners,

v.

JESSICA GINGRAS, ON BEHALF OF HERSELF AND OTHERS SIMILARLY SITUATED; ANGELA C. GIVEN, ON BEHALF OF HERSELF AND OTHERS SIMILARLY SITUATED,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

The Second Circuit and the district court in this case bypassed a separate agreement to arbitrate—a delegation provision—upon simply noting that plaintiffs had alleged it is not enforceable. The lower courts then proceeded to rule on an issue that the arbitration agreements reserved for the arbitrator: whether the agreements as a whole are enforceable. The Fourth and Eleventh Circuits have held to the contrary that, in accordance with this Court's decision in *Rent-A-Center, Inc. v. Jackson*, 561 U.S. 63, 71 (2010), a court must actually *decide* whether a clear delegation provision is enforceable, "upon such grounds as exist at law or equity," 9 U.S.C. § 2, before it has the authority to proceed to address arbitrability issues reserved for an arbitrator.

While the brief in opposition acknowledges that, under *Rent-A-Center*, a delegation provision must be enforced unless it is specifically challenged *and* a court rules that it is unenforceable (Opp. 25), Plaintiffs deny the existence of a circuit split on this issue, on the ground that it concerns only "the amount of explanation the court of appeals must provide." Opp. 2. That cannot withstand scrutiny. This was a published decision, with precedential value in the Second Circuit, not a summary order. The Second Circuit noted only that Plaintiffs alleged that the delegation provision was "fraudulent" and then stated without further analysis that this allegation alone was "sufficient to make the issue of arbitrability one for a federal court." App. 21a–22a. Federal courts of appeals do not, in published decisions, rule on issues with such cursory observations, as manifested by the Second Circuit's own analysis of the enforceability of the arbitration

agreements as a whole. App. 22a–26a. Nor does it suffice, as Plaintiffs try to do, to bootstrap the Second Circuit's analysis of the arbitration agreements as a whole as valid grounds for refusing to enforce the delegation provision, specifically.

This circuit split should be resolved. The issue is important too, because the Second Circuit's approach will allow parties seeking to avoid arbitration to bypass separately enforceable arbitration agreements simply by uttering words to "challenge" it. That contravenes this Court's extensive jurisprudence emphasizing that, under the Federal Arbitration Act, arbitration agreements should be enforced according to their terms, just as other contracts are. Indeed, no court would properly endeavor to set aside an arbitration agreement on the merits—or any contract—simply because a party *alleges* it is not enforceable. And yet, that is what the lower courts did here in bypassing the delegation provision.

The brief in opposition injects considerable extra-record evidence concerning the merits of their claims and points to putative "vehicle" problems purportedly arising from these extra-record materials and other facts. But none of that can undermine the basic reality here that no court has actually ruled on the threshold issue—that precedes any consideration of the merits or the enforceability of the arbitration agreements as a whole—of whether the delegation provision in plaintiffs' arbitration agreements is enforceable. That important, threshold issue warrants review by the Court or, at a bare minimum, a GVR instructing the Second Circuit to determine, in accordance with *Rent-A-Center*, whether there is a valid legal basis for refusing to enforce the delegation provision.

ARGUMENT

I. The Second Circuit Did Not Rule On Plaintiffs' Challenge To The Delegation Provision, Thereby Creating A Circuit Split

The Petition explained that, pursuant to *Rent-A-Center, Inc. v. Jackson*, 561 U.S. 63, 68 (2010), a court should not be able to disregard a delegation provision merely because a party has "attacked" that clause as unenforceable. Rather, before bypassing a delegation clause in an arbitration agreement, the party seeking to avoid arbitration should have to show, "upon such grounds as exist at law or in equity," that the provision is not enforceable, *and* the court must proceed to *rule* upon that attack in the challenger's favor. *Id.* at 70 (quoting 9 U.S.C. § 2).

In other words, as the Fourth and Eleventh Circuits have recognized, *Rent-A-Center* requires courts to engage in a two-step process when assessing a delegation provision: "[W]e first must decide whether [the party] lodged a challenge against the delegation provision . . ., in particular. Second, if we conclude that [the party] specifically challenged the enforceability of the delegation provision, *we then must decide whether the delegation provision is unenforceable* 'upon such grounds as exist at law or in equity.'" *Minnieland Private Day Sch., Inc. v. Applied Underwriters Captive Risk Assurance Co.*, 867 F.3d 449, 455 (4th Cir. 2017) (emphasis added) (quoting 9 U.S.C. § 2); *see also Jones v. Waffle House, Inc.*, 866 F.3d 1257, 1264 (11th Cir. 2017) (similar).

Plaintiffs do not disagree. Indeed, plaintiffs acknowledge that under *Rent-A-Center*, "a court must enforce the delegation clause unless it is specifically

challenged *and the court finds it unenforceable*." Opp. 25 (emphasis added); *see also* Opp. 26 ("All that law requires is consideration *and decision*, not explanation. (emphasis added)). Plaintiffs instead contend that the Second Circuit's approach in this case accords with the Fourth and Eleventh Circuits, when the Second Circuit stated that Plaintiffs' "specific attack on the delegation provision is sufficient to make the issue of arbitrability one for a federal court." App. 22a.

Plaintiffs are wrong, as the district court's and Second Circuit's opinions make clear. The "attack" on the delegation provision referred to by the Second Circuit is at Paragraph 131 of the Amended Complaint. App. 143a. Nothing in that paragraph identifies any legal basis—or alleged facts in support of any legal basis—for why the delegation provision itself is not enforceable. Rather, plaintiffs' entire "attack" is predicated on their argument that requiring Plaintiffs to arbitrate disputes—as the delegation provision provides with respect to disputes concerning arbitrability—is part of an alleged scheme to "shield Defendants' widespread fraudulent practices from federal court review." App. 143a.

This "attack," such as it is, is about the *merits* of plaintiffs' claims and is not a specific ground for refusing to enforce the delegation provision. (Indeed, every agreement to arbitrate—and delegation provision too—could be said to be "part of a scheme" to arbitrate and not litigate.) Both the district court and the Second Circuit seized upon this allegation—and this allegation alone—as a basis for bypassing the delegation provision. As the district court reasoned, because plaintiffs had *alleged* that the "delegation clause itself

is unconscionable," the plaintiffs had raised a "separate attack on the arbitration clause [that] satisfies the majority's test in *Rent-A-Center*." App. 64a. "Since Plaintiffs have made a specific attack on the delegation clause as unconscionable, the court, not the arbitrator, must determine whether the arbitration clause is valid." *Id.* The Second Circuit made the same observation. Citing to plaintiffs' Amended Complaint (and only to the Amended Complaint), it observed that plaintiffs' complaint "alleges that '[t]he delegation provision of the Purported Arbitration Agreement is also fraudulent,'" which the Second Circuit deemed "sufficient to make the issue of arbitrability one for a federal court." App. 21a–22a.

Nowhere, however, did either court actually *rule* on the merits of that "attack" through the consideration of extrinsic evidence or otherwise. Indeed, to the extent the Second Circuit expressed its view on the merits of plaintiffs' challenges, it did so only as to their attacks on the arbitration agreement itself; *not* on the delegation provision specifically, as this Court's precedents require. *Compare* App. 21a ("Plaintiffs mount a convincing challenge to the arbitration clause itself.") *with Rent-A-Center*, 561 U.S. at 72 ("Accordingly, unless [the plaintiff] challenged the delegation provision *specifically*, we must treat it as valid under § 2, and must enforce it under §§ 3 and 4, leaving any challenge to the validity of the Agreement as a whole for the arbitrator." (emphasis added)); *see also* App. 26a (where the Second Circuit refers to the arbitration agreement as a whole as the "arbitration clause"). Both the district court and the Second Circuit thus

failed to take the second step that *Rent-A-Center* requires before they proceeded to address the issue of arbitrability for themselves.

There is also no merit to plaintiffs' suggestion that it can simply be inferred that the Second Circuit ruled upon the merits of plaintiffs' challenge to the validity of the delegation provision when it affirmed the district court. *See* Opp. 25–26. As already explained, the district court itself did not address the merits of plaintiffs' "attack" on the delegation clause, noting instead only that such an attack had been made. App. 64a. The Second Circuit not only affirmed that ruling, it also repeated the district court's reasoning: "Their complaint alleges that '[t]he delegation provision of the Purported Arbitration Agreement is also fraudulent.' That specific attack on the delegation provision is sufficient to make the issue of arbitrability one for a federal court." App. 21a–22a (internal citations omitted). Nothing in that published opinion—an opinion which, unlike a summary order, is binding on all future Second Circuit panels, *see* Second Cir. Local R. 32.1.1(a) and *United States v. Moore*, 949 F.2d 68, 71 (2d Cir. 1991)—suggests that the Second Circuit went further than the district court and actually ruled upon the merits of plaintiffs' "attack" on the delegation provision.

In short, this is not a case where the Petitioners are dissatisfied with the lack of "explanation" provided by an appellate court, as plaintiffs claim. Opp. 26. Rather, Petitioners seek this Court's review because the Second Circuit's holding that a delegation provision can be disregarded anytime a plaintiff simply *alleges* it is unenforceable creates a split with the Fourth and Eleventh Circuit's respective decisions

in *Minnieland Private Day School* and *Jones* and cannot be squared with this Court's ruling in *Rent-A-Center*. This Court should grant the Petition to resolve this circuit split.

II. The Question Presented—The Proper Procedure For Disregarding A Delegation Provision—Is An Important One

The Petition further explained that this Court's review is particularly warranted because the Second Circuit's precedential decision—which allows a party seeking to avoid arbitration to bypass a delegation provision by alleging it is unenforceable—is a return to the old era of judicial antipathy towards arbitration that Congress explicitly rejected when it passed the FAA and that this Court has been at pains to eradicate in its FAA jurisprudence. Pet. 11–13.

As the Petition set forth, consistent with Congress' choice to end the "widespread judicial hostility to arbitration agreements" by "plac[ing] arbitration agreements on an equal footing with other contracts," this Court has repeatedly instructed lower courts to "enforce [arbitration agreements] according to their terms." *E.g.*, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (citations omitted); *see also* Pet. 12 (collecting cases). That includes delegation provisions. As this Court most recently recognized in *Henry Schein, Inc. v. Archer & White Sales, Inc.*:

> When the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract. In those circumstances, a court possesses no power to decide the arbitrability issue. That is true even if the

> court thinks that the argument that the arbitration agreement applies to a particular dispute is wholly groundless.

139 S. Ct. 524, 529 (2019); *see also Rent-A-Center*, 561 U.S. at 72 (similar).

That mandate—issued by Congress and repeatedly enforced by this Court—is violated if a party can disregard a bargained-for arbitration agreement by simply alleging in a complaint that it is unenforceable. No court would any longer rule in good faith that a party may avoid an arbitration agreement simply by *claiming* it is not enforceable. And yet, that is the precise procedure that the Second Circuit blessed here with respect to a delegation provision by deeming plaintiffs' allegation of unenforceability, standing alone, as a sufficient basis to refuse to enforce it. That result cannot be squared with the underlying purpose of the FAA.

Plaintiffs do not dispute any of these points, either, arguing only that this case is unimportant because the Petition quibbles with the "level of explanation that a court of appeals must give in dismissing an attempt by a non-party to enforce an arbitration agreement with a delegation clause." Opp. 27. As already established *supra* in Part I, that argument grossly mischaracterizes the Petition: the question presented here is whether a court must actually *rule* upon a challenge to a delegation provision before bypassing it—something that the Second Circuit did not do. It is not enough for a court to simply take note of a party's challenge to the enforceability of a delegation provision, and then move on to address arbitrability questions. This Court should grant certiorari to address this vital question.

III. This Case Presents An Ideal Vehicle To Address The Question Presented

Plaintiffs also raise a number of issues that they claim render this case a "poor vehicle for considering the issue petitioners seek to present." Opp. 27. All of those points are unavailing and should be disregarded.

1. First, there is no merit to Plaintiffs' suggestion that the fact that Sequoia and TCV are not themselves parties to the underlying arbitration agreements poses an impediment to this Court's review. *See* Opp. 27–28. Neither the district court nor the Second Circuit ruled below that only signatories to the arbitration agreements could enforce those contracts. For very good reason: the agreements to arbitrate executed by plaintiffs expressly state that "ANY DISPUTE YOU HAVE WITH LENDER *OR ANYONE ELSE* UNDER THIS AGREEMENT WILL BE RESOLVED BY BINDING ARBITRATION." *E.g.*, Joint Appendix, Vol. I, at A-149, Dkt. No. 102, *Gingras v. Rosette*, No. 16-2019(L) (2d Cir. 2016) (emphasis added).

It is also well-established that "circuits have been willing to estop a signatory from avoiding arbitration with a nonsignatory when the issues the nonsignatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed." *Choctaw Generation Ltd. P'ship v. Am. Home Assurance Co.*, 271 F.3d 403, 406 (2d Cir. 2001) (quoting *Thomas-CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773, 779 (2d Cir. 1995) (emphasis removed)). There can be no serious question here that plaintiffs' claims are not only intertwined with but arise from

their lending agreements—which contain the arbitration agreements—as the Amended Complaint itself makes clear in alleging that these lending agreements caused plaintiffs' injuries. App. 124a–130a. Indeed, plaintiffs are the parties who chose to sue not only their lenders for injuries allegedly arising under their loans, but also a series of additional parties that, they allege, are affiliated with or are otherwise involved with their lenders. Sequoia's and TCV's status as non-signatories to the lending agreements that give rise to Plaintiffs' claims thus does not pose any "vehicle" problem for the Petition.

2. Second and equally unavailing is plaintiffs' contention that certiorari is unwarranted because the arbitration agreement did not delegate the issue of arbitrability of class-wide claims. Opp. 28.

That argument makes no sense. There is no dispute that the arbitration agreements here contain a delegation provision which provides that "any Dispute"—defined to include "'any issue concerning the validity, enforceability, or scope' of the loan agreement itself or the arbitration provision specifically"—"will be resolved by arbitration in accordance with Chippewa Cree tribal law." App. 5a. Plaintiffs contended that the arbitration agreement was not enforceable, and the threshold question presented by this Petition is who should decide that question: an arbitrator or a court?

The arbitration agreements also contain class-action lawsuit and arbitration waivers. App. 5a. But plaintiffs did not challenge the validity of that class-action waiver, or argue that, even if those waivers were unenforceable, that determination would some-

how provide a basis for avoiding arbitration altogether. In any event, there can be no serious dispute here that the class-action waivers in the arbitration agreement are enforceable, as this Court held in *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, 236–37 (2013).

Accordingly, the existence of a class-action waiver in the lending agreements simply has no bearing on whether the delegation clause was enforceable and presents no vehicle problem for this Petition.

3. Third and finally, that the district court granted plaintiffs leave to amend their complaint does not pose any hurdles to this Court's review. If anything, plaintiffs' claim (at Opp. 29) that they now possess additional facts bolstering their allegation that the delegation clause is unenforceable confirms that this Court should, at a bare minimum, issue a GVR order on this Petition. Doing so would permit the district court (and then the Second Circuit) to consider plaintiffs' challenge to the delegation provision and then actually rule on whether that provision, specifically, is enforceable in light of any such challenge, as required by *Rent-A-Center* and its progeny.

CONCLUSION

The Court should grant the Petition for writ of certiorari.

December 10, 2019

Respectfully submitted,

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