No. 22-968

In the
Supreme Court of the United States

GINGER ATHERTON,
Petitioner,

v.

KEY BANK, N.A.,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of Washington, Division 1

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Whether this Court should decline to exercise jurisdiction over the petition for certiorari ("Petition") where:

(i) the issues presented in the Petition were mooted by the foreclosure sale that occurred on April 28, 2023,

(ii) the federal question presented in the Petition was not properly raised by Atherton nor actually decided by the state courts below,

(iii) the unpublished Washington Court of Appeals' decision that Atherton asks this Court to review is based on an interpretation of a state statute,

(iv) the decision below does not fully and finally resolve this matter, as evidenced by two state court appeals that Atherton filed after she again sought arbitration of substantially similar issues in the same case after remand, and

(v) the supremacy clause and federal preemption fail to provide grounds for review because the Washington Court of Appeals' interpretation of Washington's Revised Uniform Arbitration Act ("RUAA") was fully consistent with, and indeed based on, federal case law interpreting the Federal Arbitration Act ("FAA")?

PARTIES TO THE PROCEEDING AND KEYBANK'S CORPORATE DISCLOSURE STATEMENT

Petitioner is Ginger Atherton, who was neither a plaintiff nor a defendant in the proceedings below and has never sought to intervene in this case, but claims an interest in the property subject to this dispute.

Respondent is KeyBank National Association ("KeyBank"), the plaintiff below. KeyBank is a wholly owned subsidiary of KeyCorp, a publicly held company. KeyCorp has no parent corporation and no publicly held corporation owns 10% or more of its corporate stock.

The other defendants in the trial court foreclosure proceedings include Petitioner's husband, Henry Dean, as trustee for the Sharon Graham Bingham 2007 Trust; the Estate of Scott Bingham; Kelly Bingham; Umpqua Bank; Opus Bank, as successor-in-interest to Cascade Bank; Washington Federal, N.A., itself and as successor-in-interest to Horizon Bank; Washington Federal, N.A.; Washington Trust Bank; First Citizens Bank & Trust Co., as successor-in-interest to Venture Bank; State of Washington Dept. of Revenue; Centrum Financial Services, Inc., MUFG; Union Bank, N.A., itself and as successor-in-interest to Frontier Bank; Pearlmark Real Estate Partners; Pearlmark Mezzanine Realty Partners II, LLC; and LVB-Ogden Marketing, Inc., LLC.

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OPINIONS AND ORDERS BELOW

The following opinions and orders relevant to the questions presented for review were entered in the case:

- *Key Bank v. Atherton*, 200 Wash.2d 1024, 522 P.3d 48 (2023); and
- *Key Bank v. Atherton*, 22 Wash. App. 2d 1059, 2022 WL 2915540 (2022) (Unpublished).

Relevant trial court orders include:

- Stipulated Judgment of Foreclosure Against Sharon Graham Bingham 2007 Trust entered by the King County Superior Court of Washington on December 18, 2019;
- Judgment and Decree of Foreclosure and of Sale entered by the King County Superior Court of Washington on August 10, 2021;
- Order Denying Ginger Atherton's Motions Related to Order and Decree of Foreclosure entered by the King County Superior Court of Washington on August 10, 2021.; and
- Order Denying Reconsideration entered by the King County Superior Court of Washington on August 31, 2021.

STATEMENT OF THE CASE

This is a foreclosure case with a long and complicated history, in which the state courts below decided a one-off, fact-specific issue of whether an arbitrable dispute existed under a unique settlement agreement.

The case arises from two unpaid home loans totaling $2.5 million that KeyBank made to Scott and Kelly Bingham in 2007. The loans were secured by deeds of trust on the Binghams' sprawling mansion located in Sammamish, Washington (the "Mansion").

KeyBank and the Binghams entered into a settlement agreement in 2011 that addressed the Binghams' debts to KeyBank and confirmed KeyBank's right to foreclose on the Mansion. Meanwhile, the 2007 Sharon Graham Bingham Trust ("Trust") recorded a quitclaim deed transferring the Mansion to the Trust. Since then, Atherton and her husband, Henry Dean, who serves as the Trust's trustee, have lived in the Mansion rent-free.

KeyBank initiated this judicial foreclosure action in March 2016, naming the Binghams, the Trust, and other junior creditors. The six-year history of this case is complex, but in 2019, the parties entered into a "Settlement Agreement" and companion "Redemption Agreement" in which Dean, as trustee of the Trust, confirmed KeyBank's right to foreclose and the procedure to be followed. Under those Agreements, KeyBank would receive a stipulated foreclosure judgment, obtain a decree of foreclosure and schedule a sheriff's sale of the Mansion, and credit-bid the full amount of its debt at

the sale. Then, if KeyBank acquired the Mansion at the sale, the Trust (or its proper assignee) had the right to redeem the Mansion by paying KeyBank $1.6 million. If a third party outbid KeyBank, KeyBank would retain $3 million and pay the Trust the surplus proceeds.

Pursuant to the Settlement and Redemption Agreements, the trial court entered a stipulated foreclosure judgment against the Trust on December 18, 2019. The Trust has never contested entry of that stipulated judgment, nor sought to vacate it.

Key Bank could not immediately take action on the stipulated foreclosure judgment due to an emergency foreclosure moratorium enacted in early 2020 in response to the COVID-19 pandemic. Once the COVID-19 foreclosure moratorium was lifted, KeyBank filed a motion for a final decree of foreclosure on June 29, 2021. The motion was served on all counsel of record, including Dean's counsel. Nobody filed a timely objection.

The day KeyBank's motion was noted for decision, Atherton filed an "emergency" motion to compel arbitration and stay the court case and KeyBank's foreclosure. Atherton claimed she had been assigned the Trust's rights under the Redemption Agreement in an assignment dated April 18, 2020 (four months ***after*** the trial court entered the stipulated foreclosure judgment against the Trust), and argued she was entitled to arbitration and a stay of foreclosure under the Settlement Agreement's arbitration clause. Atherton sought to arbitrate whether KeyBank's "delay" in foreclosing

on the Mansion breached the Settlement and Redemption Agreements and impinged on her redemption rights because rising real estate values made it less likely that KeyBank would be the high bidder at the foreclosure sale. In her motion papers, Atherton clearly stated that her request for arbitration was governed by the RUAA and did not allude to any possibility that the FAA might apply.

In response, KeyBank argued that Atherton's assertion of any right to arbitration was "premature because the condition precedent to Atherton's option/redemption right—KeyBank's acquisition of the property after the sheriff's sale—ha[d] not yet occurred."

The trial court issued an order denying Atherton's "emergency" motion (the "Arbitration Order") and granted KeyBank a $4.4 million judgment and decree of foreclosure on August 10, 2021. The trial court indicated in the Arbitration Order that its denial was "without prejudice, pending completion of a sheriff's sale of the Property." Atherton filed a Motion for Reconsideration, which was also denied. Atherton then appealed, arguing that the trial court's decision was incorrect under the RUAA.

To stay the foreclosure sale pending this appeal, Dean and Atherton posted $1 million cash with the court registry.

On July 25, 2022, the Washington Court of Appeals issued an unpublished decision affirming the trial court's foreclosure decree and the Arbitration Order. *Key Bank, N.A. v. Atherton,* No. 83104-6-I,

2022 WL 2915540 (Wash. Ct. App. July 25, 2022) (unpublished). The Court of Appeals held that the trial court did not usurp the arbitrator's role under the RUAA in deciding that the request for arbitration was premature. *Id.* at *1.

In particular, the Court of Appeals explained that while an arbitrator must decide any conditions precedent to arbitrability, that RUAA section "contemplates arbitration provisions that have procedural prerequisites that must be satisfied before the trial court compels arbitration." *Id.* at *2. The Court of Appeals recognized that under the RUAA, similar to decisions under the FAA, whether there is an actual dispute within the scope of an arbitration provision is an issue that should be decided by the court, not the arbitrator:

> In *Townsend v. Quadrant Corp.*, our Supreme Court noted a comment to the [R]UAA which explains that the ***provisions of RCW 7.04A.060 are intended to "incorporate the holdings of the vast majority of state courts and the law that has developed under the [Federal Arbitration Act] that,*** in the absence of an agreement to the contrary, ***issues of substantive arbitrability, i.e., whether a dispute is encompassed by an agreement to arbitrate, are for a court to decide*** and issues of procedural arbitrability, i.e., whether prerequisites such as time limits, notice, laches, estoppel, and other conditions

> precedent to an obligation to arbitrate have been met, are for the arbitrators to decide."

Id. at *2 (quoting *Townsend v. Quadrant Corp.*, 173 Wash. 2d 451, 457, 268 P.3d 917 (2012)) (emphasis added).

Because the issue decided by the trial court in this case was not a procedural condition precedent to arbitrability but rather a question of substantive arbitrability, the Court of Appeals held the issue was properly decided by the trial court (and did not need to be decided by an arbitrator). *Id.* at *3. As explained by the Court of Appeals:

> KeyBank prevailing at the foreclosure sale is a condition precedent to the trust or Atherton exercising the right to redeem the property from KeyBank for $1.6 million. But this is distinct from the type of condition precedent that section .060(3) contemplates because this condition precedent has no procedural effect on arbitrability. Rather, the condition here solely relates to when or whether Atherton can "exercise the Redemption."

Id. In other words, the Court of Appeals held that there was no dispute within the scope of the arbitration clause because Atherton's rights as the purported assignee of the Redemption Agreement were contingent on KeyBank becoming the high bidder at a foreclosure sale that had not yet occurred. "[A] trial court faced with a motion to compel

arbitration of a dispute that is grounded in the assertion of Atherton's right to redeem" before the foreclosure sale occurs is being asked to compel arbitration of a "hypothetical, premature, unripe, or tentative claim[]." *Id.* at *4.

Atherton filed a motion for reconsideration, which was denied by the Court of Appeals on August 18, 2022.

After losing in the trial court and the Court of Appeals on her Washington state law arguments, Atherton finally asserted, in a petition for review to the Washington Supreme Court filed over thirteen months after the Arbitration Order, that the FAA applied. Atherton's petition for review included two pages of argument generally asserting that the Court of Appeals' decision violated the Supremacy Clause because the arbitration provision in the Settlement Agreement was subject to the FAA, but failed to include most of the arguments and authorities she now relies on in her Petition to this Court. On January 4, 2023, the Washington Supreme Court denied the petition for review without opinion. *Key Bank v. Atherton*, 200 Wash. 2d 1024, 522 P.3d 48 (2023).

The case was then remanded, and at KeyBank's request, the trial court issued a renewed order of sale. Atherton filed another motion to compel arbitration, which was denied. Atherton has appealed that decision, and also filed a separate appeal from the trial court's renewed order of sale. These two now-pending state court appeals raise similar issues to those presented in the Petition.

Atherton petitioned for certiorari on April 4, 2023, challenging the Arbitration Order by arguing that the FAA—not the RUAA—applies to the arbitration provision and required the trial court to compel arbitration of Atherton's "hypothetical, premature, unripe, or tentative" claim.

Pursuant to the renewed order of sale, the sheriff's office reset the Mansion foreclosure sale. On April 28, 2023, the foreclosure sale took place as scheduled and KeyBank was the high bidder. Accordingly, Atherton now has the redemption right she claimed KeyBank's "delayed" sale in a rising real estate market would deprive her of. And on May 1, 2023, Atherton notified the sheriff that she intended to redeem under the Redemption Agreement.

ARGUMENT

Supreme Court Rule 10 provides that a "petition for writ of certiorari will be granted only for compelling reasons." It "is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." *Id.* In state court cases, the writ is generally granted only where the court has decided "an important federal question" that (a) "has not been, but should be, settled by this Court," or (b) conflicts with decisions of other courts. Sup. Ct. R. 10(b)-(c).

None of these considerations is satisfied here. First, now that the foreclosure sale of the Mansion has taken place, the issues presented in the Petition are moot. Second, no Washington court decided a federal question in this case—much less an important one—because Atherton failed to timely

raise the federal issues presented in the Petition. Third, the decisions below were based on interpretation of a Washington state statute and thus supported by independent and adequate state grounds. Fourth, as demonstrated by Atherton's two subsequent state court appeals and the recent foreclosure sale, the Washington Court of Appeals' decision at issue lacks finality. Finally, Atherton has failed to show a conflict between the Washington Court of Appeals' decision and the FAA or decisions that construe it.

Each one of these reasons is sufficient on its own to deny the Petition, and combined they strongly militate against accepting certiorari in this highly local, factually specific, and procedurally unique case. This Court should either refuse to grant certiorari or summarily affirm the decision below.

I. The Issues Raised in the Petition Were Mooted by the Foreclosure Sale that Occurred on April 28, 2023.

Article III limits this Court to deciding live "Cases" and "Controversies." *Already, LLC v. Nike, Inc.,* 568 U.S. 85, 91 (2013). "A case becomes moot—and therefore no longer a 'Case' or 'Controversy' for purposes of Article III—'when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome.'" *Id.* (quoting *Murphy v. Hunt,* 455 U.S. 478, 481 (1982)). Because an "actual controversy must be extant at all stages of review," *Steffel v. Thompson*, 415 U.S. 452, 460 n.10 (1974), and the foreclosure sale resolved the issues

presented by the Petition, there is no longer a controversy for this Court to resolve.

Where the dispute that a party seeks to have arbitrated is resolved during the pendency of the litigation, the case is mooted. *See e.g., Textile Workers v. Lincoln Mills,* 353 U.S. 448, 459 (1957) (union's suit to compel arbitration was held moot as to whether certain job assignments should be reinstated because employer ceased operations). Similarly, where circumstances change and a party ends up receiving the "ultimate relief" sought in the lawsuit, the case is also moot. *Taylor v. McElroy,* 360 U.S. 709, 711 (1959) (case became moot where employee denied clearance on security grounds was granted clearance during his appeal).

Atherton's argument for arbitration was that KeyBank's "delay" in holding a foreclosure sale for the Mansion in a rising real estate market made it less likely that KeyBank would prevail at the sale (and thus less likely that Atherton would get the right to redeem the Mansion under the Redemption Agreement). The trial court and Washington Court of Appeals refused to compel arbitration because, until the foreclosure sale took place, Atherton's redemption right, and hence the purported dispute, was "hypothetical." For that reason, the trial court denied the motion to arbitrate (and the Court of Appeals upheld that denial) "without prejudice, pending completion of a sheriff's sale of the Property." Now the foreclosure sale has occurred and KeyBank did prevail as the highest bidder. So Atherton's hypothetical dispute never materialized; any delay in holding the foreclosure sale did not

impinge on Atherton's rights as assignee of the Redemption Agreement.

Because the issues presented by the Petition were mooted by the foreclosure sale on April 28, 2023, there is no live dispute left for this Court to decide.

II. The Federal Question Belatedly Manufactured by Atherton Was Neither Timely Presented to Nor Actually Decided by the State Courts.

A petition for certiorari must show that the petitioner timely raised a substantial federal question below. 28 U.S.C. § 1257(a). "With 'very rare exceptions,'" this Court "will not consider a petitioner's federal claim unless it was either addressed by or properly presented to the state court that rendered the decision [it has] been asked to review." *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (quoting *Yee v. Escondido*, 503 U.S. 519, 533 (1992)).

"When the highest state court is silent on a federal question" this Court will "assume that the issue was not properly presented, and the aggrieved party bears the burden of defeating this assumption, by demonstrating that the state court had 'a fair opportunity to address the federal question that is sought to be presented.'" *Id.* at 86-87 (quoting *Webb v. Webb,* 451 U.S. 493, 501 (1981) (internal citations omitted)). To do so, a petition must establish that the federal claim was raised, "at the time and in the manner required by the state law." *Webb,* 451 U.S. at 501. But if the petitioner cannot show that reasonable state procedural requirements were

observed, this Court will decline to exercise jurisdiction. *See Mutual Life Ins. Co. v. McGrew,* 188 U.S. 291, 309, 313 (1903).

Exxon Corp. v. Eagerton, 462 U.S. 176 (1983) is illustrative. There, the appellants made a federal preemption argument for the first time in their briefing to the Supreme Court of Alabama, but that court did not pass on the issue and had a policy of not considering issues raised for the first time on appeal. *Id.* This Court, therefore, concluded that it lacked jurisdiction to consider the preemption argument on appeal because it was not properly raised in the state courts. *Id.* at 181 n.3.

Like the appellants in *Exxon*, Atherton did not even suggest that the arbitration provision at issue in this case was governed by the FAA, or that the RUAA was preempted by or violates the FAA, until she petitioned the Washington Supreme Court for review.[1] This is too late under Washington law. Under Washington law, issues and contentions not raised by the parties nor considered by the trial court will not be considered for the first time on appeal. *See, e.g., Green v. Normandy Park,* 137 Wash. App. 665, 687, 151 P.3d 1038 (2007); *see also* Wash. R. App. Proc. 2.5(a) ("the appellate court may refuse to review any claim of error which was not raised in the trial court"). Because a federal question was presented for the first time in Atherton's petition for review to the Washington Supreme Court, and the

[1] Additionally, even in Atherton's petition for review to the Washington Supreme Court she did not cite most of the federal FAA caselaw that she now relies on in the Petition.

Washington Supreme Court refuses to consider any issue not presented to the trial court, and neither of the Washington appellate courts actually decided the federal question, this Court should decline certiorari.

Atherton misstates in the Petition that "the parties timely and properly raised the federal questions arising under the Federal Arbitration Act and the United States Constitution" during the state court proceedings. Petition at 9. Atherton's Petition violates Supreme Court Rule 14 by failing to specify the "stages of the proceedings, both in the state court of first instance and in the state appellate courts, when the federal questions sought to be reviewed were raised," along with "pertinent quotations of specific portions of the record. . . where the matter appears. . . so as to show that the federal question was timely and properly raised . . . ." Sup. Ct. R. 14.1(g)(i).

Atherton attempts to circumvent the rule in a variety of ways, but none of them should succeed.

First, Atherton argues that KeyBank "was the party that initially asserted the FAA applied to the parties' relationship and their settlement agreements." Petition at 16. To support this false statement, Atherton relies on a 2016 "motion to compel arbitration." Petition at 9, 16. But KeyBank never filed a motion to compel arbitration in this matter. KeyBank did, however, file a motion to stay court proceedings in 2016 while arbitration was pending, arguing that the parties' agreements were governed by the RUAA. *See* KeyBank's 2016 Motion

to Stay Pending Arbitration at 3-4 (seeking a stay under RCW 7.04A.050).

Atherton also claims she raised the federal question in her 2021 motion to compel arbitration by citing a Washington Supreme Court case, *Zuver v. Airtouch Commc'ns, Inc.,* 153 Wash.2d 293, 103 P.3d 753 (2004), that involved the FAA. But that case was only cited to support the assertion that "Arbitration is strongly favored in this state [i.e., Washington]." Atherton's Emergency Motion at 8. Indeed, the motion specifically requested that "[a]rbitration … be compelled pursuant to RCW 7.04A.070(1)." *Id.*

Atherton next claims she raised the federal question by citing a Seventh Circuit case in a footnote of her opening brief to the Washington Court of Appeals, but that brief cites the case only for the proposition that an order denying a motion to compel arbitration is appealable under Washington state law (specifically RCW 7.04A.280(1)(a)). Atherton's Opening Brief at 18. Similarly, Atherton's reply brief to the Court of Appeals did not raise a federal question and argued only that arbitration must be compelled under *Washington* statutes. While Atherton's reply brief included the words "Federal Arbitration Act," the reference merely explained the Washington statute's legislative history:

> When construing the WRUAA, this Court should consult the official comments to the RUAA at the outset "because 'RCW 7.04A.901 requires that [i]n applying and construing this uniform act, consideration must be

> given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.'" The Conference intended to "incorporate the holdings of the vast majority of state courts and the law that has developed under the [Federal Arbitration Act, 9 USC §§ 1-16]." The Conference, therefore, reviewed arbitrability disputes reported in most state and federal courts during the 44 years between the time it drafted the UAA in 1956 and the RUAA in 2000.

Atherton's Appellate Reply Brief at 13. Atherton's Petition egregiously misrepresents this argument as an assertion that the FAA applied.

Finally, Atherton argues that KeyBank cited certain federal cases in its Answering brief on appeal. But like Atherton, KeyBank never argued that the FAA applied or cited federal cases for that purpose. For example, a U.S. Supreme Court case was cited in a parenthetical because it was quoted in a Washington Supreme Court opinion. *See* KeyBank's Answering Brief at 34.

In sum, the Petition fails to show that the federal question now presented was adequately raised below. *C.f. Howell v. Mississippi*, 543 U.S. 440, 443-44 (2005) (rejecting argument that citation to one case in briefing below was sufficient to raise a federal question).

Indeed, Atherton concedes that she did not timely raise a federal question, arguing that her

convoluted preemption argument did not arise until the Washington Court of Appeals decision was issued. At that point, she contends, she learned that "the Court of Appeals would construe" the RUAA in such a way "that it is now impossible to comply with both the federal and state acts at the same [time]." Petition at 13. But an arbitration provision is either subject to the FAA or not. If Atherton believed that the arbitration provision she was attempting to invoke was subject to the FAA, then she should have made that argument in her initial motion to compel before the trial court. Instead, over and over again in her filings, she invoked only the RUAA.

In short, Atherton has failed to rebut the presumption that arises when the state court does not address federal law that the federal question was not properly presented. *See Adams*, 520 U.S. at 86-87. Because Atherton did not adequately raise a federal question before the Washington courts, nor did those courts actually decide a federal question, this Court should deny certiorari.

III. The Washington Court of Appeals' Decision is Based on Independent and Adequate State Grounds.

This Court has held since "the time of its foundation" that it "will not review judgments of state courts that rest on adequate and independent state grounds." *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945). Here, the Washington Court of Appeals' decision was based solely on that court's interpretation of the RUAA, a Washington state statute.

As an initial matter, Atherton does not adequately support her belated argument that the FAA applies. Atherton relies solely on an analogy to this Court's decision in *Citizens Bank of Alafabco, Inc.*, 539 U.S. 52 (2003). In *Citizens Bank*, this Court held that debt restructuring agreements, although executed in Alabama by Alabama residents, "involv[ed] commerce" and were thus subject to the FAA because *inter alia* the customer used restructured debt funds to finance large projects throughout the southeastern United States. *Id.* at 57. Because the loans at issue "had been used in part to finance large construction projects in North Carolina, Tennessee, and Alabama," the agreement "involv[ed] commerce" and the FAA applied. *Id.* In contrast, the Settlement Agreement that contains the arbitration clause, which was negotiated in Washington and specified Washington law, relates solely to foreclosure of a single property in Washington.

In any event, Washington courts have authority to interpret the RUAA without regard to FAA principles. Whether the RUAA conflicts with the FAA only matters if the FAA applies to the arbitration agreement at issue. As Washington courts have recognized in the past, arbitration agreements governed by state law may be subject to differing standards than agreements subject to the FAA. *Tjart v. Smith Barney, Inc.*, 107 Wash. App. 885, 900, 28 P.3d 823, 831 (2001) (distinguishing a prior case by explaining that it was "not an FAA case" and thus "[i]t is possible that the [court], in not addressing FAA issues . . . used state law grounds

that would be inapplicable in the FAA context."). In this case, the parties selected Washington law to apply to their Settlement Agreement, and that's what the court applied.

Atherton relies on this Court's decision in *Nitro-Lift Technologies, L.L.C. v. Howard,* 568 U.S. 17 (2012), but that case is easily distinguishable. First, unlike in this case, the federal arbitrability question was both "properly presented to" and "addressed by" the state court. *Id.* at 19-20. Second, in *Nitro-Lift,* the Oklahoma Supreme Court negated the arbitration clause by ruling the entire contract unenforceable—a decision the FAA (and, for that matter, the RUAA) reserves to the arbitrator. *Id.* at 19. Unlike the Washington Court of Appeals here, the Oklahoma court did not rely on a state arbitration statute to decide that no arbitrable dispute was presented, but on a substantive state law to decide the arbitrable dispute itself.

In sum, at Atherton's urging, the Washington Court of Appeals based its decision solely on its interpretation of Washington's arbitration statute; accordingly, adequate and independent state law grounds support the decision below.

IV. The Petition Seeks Review of Decisions that Are Not Sufficiently Final to Warrant Certiorari.

This Court does not review state court nonfinal or interlocutory rulings. *See* 28 U.S.C. § 1257(a). The test for finality "is not whether under local rules of practice the judgment is denominated final . . . but rather whether the record shows that the order of the

appellate court has in fact fully adjudicated rights and that that adjudication is not subject to further review by a state court." *Dep't of Banking, Nebraska v. Pink*, 317 U.S. 264, 268 (1942) (internal citations omitted).

Here, the matter presented in the Petition is not final, as evidenced by the fact that (1) the underlying motion to compel arbitration was denied *without prejudice*, (2) Atherton is currently attempting to raise these same issues in two new appeals filed with the Washington Court of Appeals, and (3) the foreclosure sale for the Mansion has now occurred and is subject to further statutory procedures and contractual remedies under the Redemption Agreement, which Atherton is now pursuing.

Just as the Court of Appeals decided that the foreclosure sale must happen in order for this dispute to become ripe and thus fall within the scope of the arbitration provision, this Court should reject Atherton's Petition for lack of finality. Like Atherton's request for presale arbitration of her potential redemption rights, Atherton's Petition presents only a "hypothetical, premature, unripe, or tentative claim." *See Key Bank,* 2022 WL 2915540 at *4.

V. Atherton Has Failed to Show a Conflict Between the Washington Court of Appeals' Decision and the FAA or Decisions that Construe it.

Even if Atherton had raised a federal question that was decided by the courts below, and the decision was not based on the independent and adequate Washington RUAA, and the decision was sufficiently final to warrant review, and subsequent events had not mooted the dispute, Atherton's Petition should be denied because Atherton has failed to show that the Court of Appeals' decision would have been inconsistent with the FAA if the FAA applied. Both the RUAA and FAA allow courts to determine threshold issues of substantive arbitrability, and the Court of Appeals relied on FAA case law in determining that the "hypothetical" dispute presented by Atherton was not arbitrable. Despite Atherton's efforts to manufacture a conflict, she has been unable to point to any decisions from other courts that conflict with the Court of Appeals' well-reasoned, unpublished decision in this case.

A. Under Both the RUAA and the FAA, Courts Have the Power to Determine Issues of Substantive Arbitrability.

Atherton's strained preemption argument is based on a false premise: that the Court of Appeals' decision interpreting the RUAA conflicts with the FAA, but there is no conflict. Both the RUAA and the FAA charge the arbitrator, not the courts, with deciding the merits of an arbitrable dispute. *Compare*

RCW 7.04A.070(3) ("The court may not refuse to order arbitration because the claim subject to arbitration lacks merit or grounds for the claim have not been established.") *with AT & T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 649-50 (1986) (court may not "rule on the potential merits of the underlying" claim that is assigned by contract to an arbitrator "even if it appears to the court to be frivolous").

And both the RUAA and the FAA charge the courts, not the arbitrator, with determining whether there is an arbitrable dispute in the first place. The relevant provision of the RUAA, RCW 7.04A.060 provides:

> (2) The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.
>
> (3) An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable.

RCW 7.04A.060(2)-(3). RCW 7.04A.060 codified the rule that substantive arbitrability is for a court to decide based on FAA caselaw. This Court has long held that, unless otherwise stated in the parties' arbitration agreement, it is for the court to determine whether there is a valid agreement to arbitrate and whether the dispute falls within the arbitration provision's scope. *See e.g., BG Grp., PLC v. Republic of Argentina,* 572 U.S. 25, 34 (2014). As the

Washington Court of Appeals explained in the decision below, the FAA case law on that point was the genesis for RCW 7.04A.060:

> In *Townsend v. Quadrant Corp.*, [the Washington] Supreme Court noted a comment to the [R]UAA which explains that ***the provisions of RCW 7.04A.060 are intended to "incorporate*** the holdings of the vast majority of state courts and ***the law that has developed under the [Federal Arbitration Act] that***, in the absence of an agreement to the contrary, ***issues of substantive arbitrability, i.e., whether a dispute is encompassed by an agreement to arbitrate, are for a court to decide*** and issues of procedural arbitrability, i.e., whether prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met, are for the arbitrators to decide."

Key Bank, 2022 WL 2915540 at *2 (quoting *Townsend*, 173 Wash. 2d at 457) (emphasis added).

Accordingly, the law regarding which issues a court may decide on a motion to compel arbitration is the same under the RUAA and the FAA. There is no conflict.

B. The Washington Court of Appeals' Distinction Between Substantive Arbitrability and a Procedural Condition Precedent to Arbitration Was Proper under the RUAA and Did Not Conflict with the FAA.

Atherton takes issue with the Washington Court of Appeals' construction of RCW 7.04A.060, which she characterizes as "granting [Washington] state courts jurisdiction to determine conditions precedent if they have 'no procedural effect on arbitrability.'" Petition at 19-20. But the decision below falls neatly into line with this Court's FAA case law recognizing that courts decide issues of substantive arbitrability, including specifically *BG Group, PLC v. Republic of Argentina,* 572 U.S. 25 (2014).

1. This Court's Decision in *BG Group* Demonstrates that the Court of Appeals' Construction of the RUAA in this Case is Consistent with the FAA.

In *BG Group*, this Court held that unless an arbitration clause specifies otherwise, courts decide "disputes about 'arbitrability' . . . such as 'whether the parties are bound by a given arbitration clause,' or 'whether an arbitration clause in a concededly binding contract applies to a particular type of controversy.'" *BG Grp.,* 572 U.S. at 34 (quoting *Howsam v. Dean Witter Reynolds, Inc.,* 537 U.S. 79, 84 (2002)). In contrast, it is presumed that

arbitrators determine procedural gateway matters to arbitrability. *Id.*

The arbitration provision in *BG Group* required international arbitration if a party requested it within a certain timeframe after the dispute was submitted to a local court. This Court held that satisfaction of that condition was an issue of a "procedural variety" that should be decided by an arbitrator. *Id.* at 35. The *BG Group* Court contrasted that type of procedural precondition with more substantive questions about arbitrability, such as whether an arbitration clause applied to a party who "had not personally signed" the document containing it and whether an arbitration provision survived a corporate merger, which are reserved for the court. *Id.* at 34. Here, the court decided that there was no substantively arbitrable dispute because Atherton, as the purported assignee of the redemption right, could not enforce the arbitration clause in the Settlement Agreement until there was something to redeem—that is, until the foreclosure sale had occurred. Until then, Atherton's claims were "hypothetical, premature, unripe, or tentative" and therefore did not constitute an arbitrable dispute.

Atherton argues that the Washington Court of Appeals decided a procedural precondition because the possibility that Atherton may have an arbitrable dispute after the foreclosure sale means the court decided *when* the right to arbitration arises. Petition at 26. But the decisions below are not founded on purely procedural prerequisites to arbitration, but on whether there was an actual dispute, as opposed to a "hypothetical, premature, unripe, or tentative" one,

to be arbitrated at all. *Key Bank,* 2022 WL 2915540 at *4. Whether there is a ripe dispute within the scope of the arbitration agreement is a substantive determination for the court under *BG Group*.

2. Atherton Advances an Overly Narrow Interpretation of the Federal Case Law Employing a "Look Through" Approach, which was Properly Used by the State Courts to Ensure Jurisdiction.

The Washington Court of Appeals cited a Fifth Circuit decision interpreting the FAA in support of its conclusion that the trial court properly "looked through" Atherton's motion to compel arbitration in determining that a condition precedent—the foreclosure sale—must be met before either a trial court or an arbitrator could reach the merits of her claims. 2022 WL 2915540 at *4, n.17 (quoting *Lower Colorado River Authority v. Papalote Creek II, LLC,* 858 F.3d 916, 922 (5th Cir. 2017)). Atherton argues that the "look through approach is limited to federal courts that must determine whether there is an independent basis for federal jurisdiction to establish their subject matter jurisdiction." Petition at 20, 26-28. But none of the cases cited by Atherton precludes a court from taking a "look through" the dispute to determine substantive arbitrability. On the contrary, as recognized by this Court in *BG Group*, courts can and should do so. *See BG Grp.,* 572 U.S. at 34.

Moreover, even if a "look through" approach is only allowed to address jurisdictional concerns, the

trial court's "look through" in this case was necessary and proper because Washington courts do not have jurisdiction to decide hypothetical issues. *See e.g., To-Ro Trade Shows v. Collins*, 144 Wash. 2d 403, 411, 27 P.3d 1149, 1153 (2001) (explaining that to invoke the court's jurisdiction there must be "an actual, present and existing dispute . . . as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement"). Inherent in the question of whether a dispute is within the scope of an arbitration agreement is whether an actual dispute exists at all. Thus, the trial court took a "look through" Atherton's motion to compel arbitration to determine if it presented a real, as opposed to hypothetical, dispute. This was consistent with both federal "look through" precedent and FAA substantive arbitrability jurisprudence.

3. The Washington Court of Appeals' Decision Does Not Conflict with Decisions from this Court, Other State Supreme Courts, or the Federal Courts of Appeal.

a. There is No Conflict with this Court's Decisions in *Preston, Nitro-Lift*, or *First Options*.

Atherton repeatedly cites to this Court's decisions in *Preston* and *Nitro-Lift* for the uncontroversial proposition that "state statutes cannot place primary jurisdiction to decide the merits" of an arbitrable dispute in the hands of the

court. *See e.g.,* Petition at 19-20. KeyBank does not disagree. Contrary to Atherton's characterization, however, the Court of Appeals' decision does not open the flood gates for courts to "usurp" merits decisions from arbitrators; rather, the Court of Appeals held only that courts may decide whether there is a ripe dispute within the scope of an arbitration clause. Neither *Preston*[2] nor *Nitro-Lift*[3] decided that issue, and decades of FAA cases specifically charge the courts with deciding, as a threshold matter, whether an arbitrable dispute exists.

Atherton's argument that whether KeyBank breached the settlement agreement is a question for the arbitrator (*see* Petition at 29) is irrelevant because neither the trial court nor the Court of Appeals decided that merits-based issue in this case. Instead, the decisions below determined that Atherton's breach allegations did not raise an arbitrable dispute because they were founded on a purported assignment of a redemption right that,

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[2] *Preston* held that when parties agree to arbitrate all questions arising under a contract, and the FAA applies, it supersedes state laws lodging primary jurisdiction in an administrative agency. *Preston v. Ferrer,* 552 U.S. 346, 352 (2008). The law at issue in *Preston* was the California Talent Agencies Act, which granted the state Labor Commissioner exclusive jurisdiction to decide whether the parties' contract was invalid due to one of the contracting parties acting as a talent agent without a license. This Court held that the TAA was incompatible with the FAA because under the FAA the validity of a contract (as opposed to the validity and applicability of the arbitration clause itself) is a question for the arbitrator. *Id.* at 350-51, 356.

[3] As discussed in Section III, *supra*, the reasoning in *Nitro-Lift* was similar to *Preston*.

until the sale occurred, was "hypothetical, premature, unripe, [and] tentative," and might never arise.

The Court of Appeals' decision is also fully consistent with *First Options* in which this Court recognized that courts generally have the primary power to decide whether a dispute is arbitrable. *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 942 (1995). Under *First Options*, the court decides whether an arbitration clause applies to a party who "ha[s] not personally signed" the document containing it. *First Options,* at 941, 943-47.

Here, the court decided that Atherton's hypothetical, tentative, and contingent right to redeem failed to raise a dispute within the Settlement Agreement's arbitration provision. The Trust did not assign the Settlement Agreement to Atherton. And by the time the Trust assigned "the Redemption" to Atherton, it had already stipulated to the foreclosure judgment and agreed to the foreclosure sale. Atherton's rights were limited by the Trust's prior agreements. Moreover, because the assignment was limited to the "Redemption," which was expressly contingent on the sale results, Atherton did not acquire any pre-sale rights. And Atherton's assignor—the Trust—did not oppose the sale or seek arbitration. Thus, as *First Options* directs, the court determined that Atherton, who was not a party to or assignee of the Settlement Agreement, did not have standing to enforce its arbitration clause based on the contingent—and as yet hypothetical, tentative, unripe, and premature—redemption rights that the Trust had assigned her.

This is exactly the kind of issue that this Court, in *First Options*, held that courts, not arbitrators, should decide.

b. There is No Conflict with Decisions from the Federal Courts of Appeal.

Atherton's relies primarily on two federal court of appeals decisions in an attempt to manufacturer a conflict with the decision below: *Solymar Investments, Ltd. v. Banco Santander S.A.*, 672 F.3d 981 (11th Cir. 2012) and *Pro Tech Industries, Inc. v. URS Corp.*, 377 F.3d 868 (8th Cir. 2004). But her reliance on both cases is misplaced, as each recognizes the rule that courts decide substantive arbitrability issues.

In *Solymar,* the party resisting arbitration argued that it was not bound to an arbitration agreement in a contract because certain conditions precedent to the agreement were never fulfilled. 672 F.3d at 991. But the conditions precedent at issue were not included in the text of the contract. *Id.* at 996. The *Solymar* court held that whether such unexpressed conditions have been satisfied should be decided by the arbitrator, not the court, because "alleged conditions precedent that are not expressly adopted by the underlying contract are not appropriate for . . . court consideration." *Id.* at 996-97. The *Solymar* court distinguished cases dealing with ***express*** conditions precedent. In those cases, "the inquiry into whether a contract was formed necessarily hinge[s] upon whether those conditions ha[ve] been satisfied." and thus the court decides the

issue as a matter of substantive arbitrability. *Id.* at 997. Indeed, *Solymar* confirms that "arbitration of a dispute should only be ordered where 'the court is satisfied that neither the formation of the parties' arbitration agreement nor ... its enforceability or applicability to the dispute is in issue. Where a party contests either or both matters, the court must resolve the disagreement.'" 672 F.3d at 989 (quoting *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 300 (2010)).

Solymar stands only for the proposition that courts should not decide conditions precedent issues where the alleged condition is not included in the text of the contract. That holding has no bearing on the dispute here because the Settlement Agreement, which contains the arbitration clause, specifies that the Trust's redemption right springs into being if and only if KeyBank prevails at the foreclosure sale. And the only right the Trust assigned to Atherton was this contingent redemption right.

Next, Atherton cites to *Pro Tech Industries* for the proposition that "issues of procedural arbitrability" including whether "conditions precedent to an obligation to arbitrate have been met, are for the arbitrators to decide." *See* Petition at 32-33 (quoting 377 F.3d at 871-72). *Pro Tech Industries* dealt with a provision requiring a certain notice to invoke arbitration. 377 F.3d at 869. The *Pro Tech Industries* court held that whether the party invoking an arbitration complied with this provision was a procedural issue reserved to the arbitrator. *Id.* at 872. But the court recognized that "[w]hether the parties have submitted a particular

dispute to arbitration, i.e., the 'question of arbitrability,' is 'an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise.'" *Id.* at 871 (quoting *Howsam v. Dean Witter Reynolds, Inc.,* 537 U.S. 79, 83 (2002)). Thus *Pro Tech Industries* relies on exactly the same distinction between procedural conditions precedent to arbitration and substantive arbitrability as the Washington Court of Appeals' decision.

While Atherton includes cursory citations to other federal court of appeals cases, they merely hold that courts should not decide the merits of an arbitrable dispute. Even if the Washington Court of Appeals had decided this case under the FAA, there would be no conflict between its decision and the federal court of appeals decisions cited by Atherton that would warrant certiorari.

c. There is No Conflict with Decisions from State Supreme Courts.

Atherton also fails to show a conflict between the decision below and decisions from the supreme court of any state. Atherton's bulk citation to state cases holding that courts should not decide the merits of an arbitrable issue is neither helpful nor probative here. The only state supreme court case cited by Atherton that is even tangentially relevant is *Brasfield & Gorrie, L.L.C. v. Soho Partners, L.L.C.*, 35 So. 3d 601 (Ala. 2009). The construction contract in *Brasfield* provided that two conditions precedent must be satisfied before invoking arbitration: claims submitted to the architect, and a written request for

mediation. *Id.* at 603. The Supreme Court of Alabama explained that because these two conditions were procedural, the arbitrator should determine whether they had been satisfied. *Id.* at 606. Like the other cases Atherton cites, this case recognizes the same distinction between procedural prerequisites and substantive arbitrability that the Court of Appeals relied on when it affirmed the Arbitration Order on the ground that Atherton's claim was "hypothetical, premature, unripe" and "tentative." There is no conflict between any of the cases cited by Atherton and the Court of Appeals' decision for this Court to resolve.

C. Accepting the Petition Will Not Assist in Deciding the Coinbase Cases.

Atherton's argument that granting certiorari in this case will somehow assist the Court in deciding the pending Coinbase cases argued on March 21, 2023 is farfetched. Timing-wise, the Coinbase cases are under consideration right now, months before any merits briefing could occur in this case. More importantly, the Coinbase cases have nothing to do with the issues presented in the Petition except that they involve the FAA. The issue in the Coinbase cases is whether a non-frivolous appeal from the denial of a motion to compel arbitration divests the district court of jurisdiction and automatically stays proceedings in the district court. There is no dispute in this case about whether Atherton's appeal of the Arbitration Order should have stayed the underlying foreclosure judgment. In fact, Atherton successfully

used Washington state law procedures to stay the foreclosure judgment pending her first state appeal.

CONCLUSION

Atherton, who brought the motion to compel arbitration, was neither a party to the foreclosure action below, nor a party to the Settlement Agreement that contained the arbitration clause. The trial court properly examined the "Redemption" assignment upon which her motion was based and determined that the dispute she sought to arbitrate was premature because the rights she had been assigned would not arise until after the foreclosure sale. As urged by Atherton, both the trial court and the Court of Appeals applied the RUAA to resolve this substantive arbitrability issue. Belatedly and falsely asserting that the decision conflicted with the FAA, Atherton unsuccessfully sought review by the Washington Supreme Court and now seeks certiorari here. Atherton's Petition, however, fails to comply with this Court's rules in that it does not (and cannot) show that the federal question was timely presented to the state courts below. And, in any event, now that the foreclosure sale has occurred and Atherton is invoking the redemption right she claimed to need arbitration to protect, the Petition is moot.

KeyBank respectfully requests that this Court deny Atherton's Petition for Writ of Certiorari. In the alternative, KeyBank requests that the Court summarily affirm the judgment below.

KeyBank further requests the Court award damages under Supreme Court Rule 42.2. Because

Atherton misstates the proceedings below and seeks review of a state law question that this Court does not have jurisdiction to decide, Atherton's Petition is frivolous.

Respectfully submitted,

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