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 WASHINGTON STATE SUPREME COURT

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

Table of Contents

TABLE OF CITED AUTHORITIES

Page

Cases

Cited Authorities

Page

Cited Authorities

Page

Page

Statutes & Other Authorities

ARGUMENTS IN REPLY

I. KeyBank's Substantive Arbitrability Argument is Irrelevant.

The issue presented is whether courts have primary jurisdiction to decide a condition precedent dispute when the condition is "not a condition precedent to arbitrability."[1] Atherton argues courts do not have that primary jurisdiction.

> When parties agree to arbitrate all questions arising under a contract, the Federal Arbitration Act (FAA), 9 U.S.C. § 1 et seq., supersedes state laws lodging primary jurisdiction in another forum, whether judicial or administrative.

Preston v. Ferrer, 552 U.S. 346, 359, 128 S.Ct. 978, 169 L.Ed.2d 917 (2008).

In Response, KeyBank argues courts have primary jurisdiction to decide condition precedent disputes that involve "substantive arbitrability." But the Washington courts properly determined the condition was not a condition precedent to arbitrability. KeyBank's argument is, therefore, inapposite.

Courts have primary jurisdiction to determine two "gateway" substantive arbitrability issues using a burden-shifting framework. First, they may decide whether there

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1. *Key Bank, N.A. v. Atherton*, 22 Wash. App. 2d 1059, *1 (2022), *review denied sub nom. Key Bank v. Atherton*, 200 Wash.2d 1024, 522 P.3d 48 (2023).

is a valid and enforceable agreement to arbitrate, which the arbitration proponent bears the burden to prove. *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 944, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995). Second, they may determine if the dispute is within the scope of the agreement, which the arbitration opponent must prove with all doubts being resolved in favor of arbitration. *First Options* at 945. These were not the issues here.

KeyBank agreed to arbitrate "any dispute related to or arising under" the 2019 Settlement Agreement; *see id*., ¶ 11. The Redemption Agreement, which is attached as Exhibit B to the 2019 Settlement Agreement, contains Atherton's contract Redemption right. In Recital C, it clearly and unequivocally incorporates the 2019 Settlement Agreement by reference. The 2019 Settlement Agreement is part of the Redemption Agreement. *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wash.2d 781, 801, 225 P.3d 213, 225 (2009).

The condition precedent dispute went to the merits of Atherton's arbitrable dispute. The condition precedent was contained in the Redemption Agreement's terms that stated Atherton's Redemption right began when KeyBank obtained fee simple title to the subject Property by sheriff's deed and ended on June 1, 2020. Atherton demonstrated KeyBank breached the Settlement Agreement by not timely delivering a fully executed Settlement Agreement and Redemption Agreement until two months after it was due, and KeyBank unreasonably delayed performing its obligation to obtain fee simple title to the Property by taking an additional two more to voluntarily dismiss a party who had died years earlier. This, she claims, was totally within KeyBank's control and its breaches

caused it to not be able to perform what it asserts is a condition precedent and Atherton asserts is its contractual obligation to acquire fee simple title to the Property prior to June 1, 2020. The Washington courts decided this issue in KeyBank's favor and decided Atherton has no right to rescind the Settlement Agreement.

The Washington courts construed Washington's Revised Uniform Arbitration Act, Ch. 7.04A RCW ("RUAA") and rejected Atherton's challenge to their primary jurisdiction. They disobeyed this Court's constructive preemption holding in *Preston* and violated the U.S. Constitution's Supremacy Clause. *Nitro-Lift Techs., L.L.C. v. Howard*, 568 U.S. 17, 21, 133 S.Ct. 500, 184 L. Ed. 2d 328 (2012); and *DIRECTV, Inc. v. Imburgia*, 577 U.S. 47, 53, 136 S.Ct. 463, 193 L. Ed. 2d 365 (2015).

Even if the condition precedent was as to arbitrability, it would have been one of the other "gateway procedural disputes" arising under the arbitration agreement-such as "*whether a prerequisite to arbitration has been fulfilled*" that are matters for arbitrators. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84–5, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002) They are disputes that "grow out of the dispute and bear on its final disposition" and "should be left to the arbitrator." *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557, 84 S.Ct. 909, 11 L. Ed. 2d 898 (1964). This Court echoed the same holdings in *BG Group PLC v. Republic of Arg.*, 572 U.S. 25, 34-35, 134 S.Ct. 1198, 188 L.Ed.2d 220 (2014).

Even if the condition was as to substantive arbitrability, the Federal Arbitration Act (FAA) requires courts to abstain from exercising their primary jurisdiction because

the issue is intertwined with the merits. When a court is called upon to decide "whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims." *AT & T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649, 106 S. Ct. 1415, 89 L. Ed. 2d 648 (1986); *Howsam* at 84; and *John Wiley* at 557.

Factual disputes whether a substantive arbitrability condition has been fulfilled is also a matter that arbitrators — not courts — are to decide. *Howsam* holds "*whether a prerequisite to arbitration has been fulfilled*" is a matter for the arbitrator, and "[a]ny attempt by a court to resolve *the satisfaction of a condition precedent issue* would require precisely the sort of factual inquiry the Supreme Court foreclosed in *John Wiley*." *Howsam* at 84 citing *John Wiley* at 557. *Howsam* cites the Revised Uniform Arbitration Act of 2000, §6, 7 U.L.A. 13 (Supp.2002). Comment 2 to §6 includes within procedural arbitrability, "*satisfaction of…other conditions* precedent to an obligation to arbitrate." And it also cites §6(c), which states, "An arbitrator shall decide whether a condition precedent to arbitrability has been *fulfilled*."

The Fourth Circuit Court of Appeals interpreted *John Wiley*, *Howsam*, and *BG Group* to hold "arbitrators — not courts — must decide whether a condition precedent to arbitrability has been fulfilled." *Chorley Enterprises, Inc. v. Dickey's Barbecue Restaurants, Inc.*, 807 F.3d 553, 565 n.14 (4th Cir. 2015). The First Circuit held arbitrators should determine whether a provision in an agreement to arbitrate in fact establishes a condition precedent to arbitration. *Dialysis Access Ctr., LLC v. RMS Lifeline, Inc.*, 638 F.3d 367, 383 (1st Cir. 2011). The Eleventh Circuit

has held arbitrators decide whether the arbitrable dispute can be litigated at all. *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1107, 1109 (11th Cir.2004).

Finally, any substantive arbitrability condition must be a condition to arbitrate, not a substantive condition in the other parts of the contract. "[A]attacks on the validity of an entire contract, as distinct from attacks aimed at the arbitration clause itself, are within the arbitrator's den." *Preston* at 353; *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403–404, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967); and *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 447–448, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006).

II. KeyBank Cannot Distinguish *Preston* Based on Primary Jurisdiction was lodged in a State Agency.

KeyBank acknowledges *Preston* prohibits states from lodging primary jurisdiction in their state agencies, and distinguishes the opinion below, which construed the RUAA to lodge primary jurisdiction in its courts. *Preston*, however, clearly and unambiguously disapproved of "the distinction between judicial and administrative proceedings." 552 U.S. at 359.

III. Washington State's Constitution and RUAA Accommodate a Primary Subject Jurisdiction Analysis.

Washington's State Constitution embraces this primary subject matter jurisdiction doctrine. First, it acknowledges the U.S. Constitution is the law of the land. Wash. St. Const., Art II. Second, Art. I, §6 states, in part

> The superior court shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction *shall not have been by law vested exclusively in some other court*; …. They shall have such appellate jurisdiction in cases arising in justices' and other *inferior courts in their respective counties as may be prescribed by law.*
>
> (emphasis added).

This clause has been interpreted to allow its subject matter jurisdiction to be divested "when it is explicitly limited by the Legislature *or Congress*." *In re Marriage of Major*, 71 Wash. App. 531, 534, 859 P.2d 1262 (1993). Here, the FAA has limited the Superior Court's subject matter jurisdiction when it enacted the FAA. It constructively preempts states from enforcing any obstacle to enforcing agreements to arbitrate. *Satomi*, 167 Wash.2d at 806.

In Washington, "[a]n arbitration proceeding is judicial in nature." *Puget Sound Bridge & Dredging Co. v. Lake Washington Shipyards*, 1 Wash.2d 401, 407, 96 P.2d 257 (1939). Arbitrations are "a little court" set up by the parties. *Id*. at 407, *quoting Dickie Mfg. Co. v. Sound Construction & Engineering Co.*, 92 Wash. 316, 159 P. 129 (1916); and *Boyd v. Davis*, 127 Wash.2d 256, 263, 897 P.2d 1239 (1995).

IV. The Primary Subject Matter Jurisdiction Arguments will Assist this Court in Deciding *Coinbase*.

Accepting review will assist this Court in properly determining *Coinbase.* Analyzing whether a U.S. District

Court has subject matter jurisdiction to decide an alleged arbitrable dispute after it denies a motion to compel arbitration is affected by a decision that determines the FAA divests courts of primary subject matter jurisdiction to decide the merits of arbitrable disputes. This Court should grapple with the analogy between denying a motion to compel arbitration and denying a Fed. R. Civ. P. 12(b)(1) motion to dismiss for lack of subject matter jurisdiction. The denial of a Fed. R. Civ. P. 12(b)(1) motion to dismiss "ordinarily does not constitute an immediately appealable order." *Thomas ex rel. D.M.T. v. Sch. Bd. St. Martin Par.*, 756 F.3d 380, 383 (5th Cir. 2014). They fall under 28 U.S.C. §1292(b). *See*, *e.g.*, *Tanglewood East Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568, 1571 (5th Cir. 1988). Pursuant to 28 U.S.C. § 1292(b), an appeal does not stay proceedings.

The two situations are not identical because the FAA does grant an appeal as of right when a motion to compel arbitration is denied and the parties who have not agreed to arbitrate and assert lack of subject matter jurisdiction as a defense contemplate litigation rather than arbitration. This Court may desire to consider the differences when deciding *Coinbase*. For example, a presumption favoring a stay if a party appeals a decision denying arbitration and placing the burden on the party opposing the stay to show prejudice and harm, differentiating the two based on the automatic appeal right in the FAA, or leaving it to Congress to enact legislation regarding stays when arbitration is compelled.

V. KeyBank First Asserted the FAA Applies to the Settlement.

KeyBank was the first to assert the FAA applied when it stayed the litigation in favor of arbitration. It should be estopped from now asserting the contrary.

The 2019 Settlement Agreement springs from a dispute in a 2012 Settlement Agreement that settled claims related to multiple cross collateralized loans KeyBank advised the entire Bingham family to take out so they could continue investing in a nationwide hard money lending scheme perpetrated by Thomas Hazelrigg III ("Hazelrigg"). When Hazelrigg's scheme collapsed, KeyBank swept all the Binghams' accounts and began pursuing additional recovery by marshalling and selling the collateral for the loans.

When KeyBank commenced an action to seize David and Sharon Graham Bingham's vessel in *KeyBank, N.A. v. Bingo, Coast Guard Official No. 1121913*, in the U.S. District Court for the Western District of Washington, 09-00849-RSM, the Binghams asserted counterclaims against KeyBank, including breach of fiduciary duty, alleging KeyBank's management of their assets did not meet minimum standards of care and that KeyBank failed to properly liquidate Bingham assets and was liable to the Binghams for $231 million in direct and consequential damages.

Those claims were settled in the 2012 Settlement Agreement. The 2012 Settlement Agreement released the Binghams from all liability, except for a carveout allowing KeyBank to foreclose a second $500,000 deed of

trust on Scott and Kelly Bingham's home. It also contained an agreement to arbitrate that KeyBank characterized as "broad." It expressly provided it was "governed by the Federal Arbitration Act, 9 U.S.C. §1 *et seq.*," it incorporated the American Arbitration Association's rules, and provided that "All issues regarding the arbitrability of disputes among the parties shall be determined by the arbitration panel."

Pursuant to the release carveout in the 2012 Settlement Agreement, KeyBank commenced foreclosure proceedings against Scott and Kelly Bingham's home. KeyBank's delay in commencing this action, however, caused the foreclosure proceedings to have commenced after the six-year statute of limitations expired. KeyBank also sought to foreclose not only the $500,000 second deed of trust, but also the larger first deed of trust that was released. Accordingly, the Binghams alleged release and statute of limitations defenses.

KeyBank initiated arbitration pursuant to the 2012 Settlement Agreement and it moved to stay the foreclosure proceedings. During the arbitration, the parties settled their disputes in the 2019 Settlement Agreement. Like the 2012 Settlement Agreement, the 2019 Settlement Agreement provided a designated specialist would arbitrate any disputes related to or arising from the Agreement. It further provided if that arbitrator was unwilling or unable to serve as arbitrator, then the successor arbitrator would be selected in accordance with 2012 Settlement Agreement.

The FAA applies. The FAA encompasses a wider range of transactions than those actually "'in commerce'

— that is, 'within the flow of interstate commerce,'" *Citizens Bank v. Alafabco, Inc.*,. 539 U.S. 52, 56, 123 S.Ct. 2037, 156 L.Ed.2d 46 (2003) (citation omitted). "Congress' Commerce Clause power 'may be exercised in individual cases without showing any specific effect upon interstate commerce' if in the aggregate the economic activity in question would represent 'a general practice... subject to federal control.'" *Id*. at 56–57 (citations omitted). "No elaborate explanation is needed to make evident the broad impact of commercial lending on the national economy or Congress' power to regulate that activity pursuant to the Commerce Clause." *Id*. at 58. KeyBank is a federally chartered bank that owned over $186 Billion in assets.[2]

VI. The Issue is not Moot.

A. It is the law of the case.

On April 13, 2023, the trial court again denied arbitration of an arbitrable dispute and stated, "the decision issued by the Court of Appeals…is the law of this case and will be enforced by the trial court."

B. KeyBank was Awarded Attorney Fees.

Atherton's Petition also challenges the Court of Appeals order awarding KeyBank its appellate attorney fees. The Redemption Agreement required post-judgment attorney fees to be included in the foreclosure judgment

2. 10-K filed with the U.S. Securities and Exchange Commission on February 22, 2022. *https://www.sec.gov/ix?doc=/Archives/edgar/data/91576/000009157622000029/key-20211231.htm#i271239fcf0574ab18fd466e6ba6d668d_208*

and that no deficiency judgment be entered. Atherton demanded this issue be arbitrated. Reply at 29. The Court of Appeals refused to allow arbitration on this issue by construing the Redemption Agreement. *Atherton*, *5.

KeyBank has also moved to have Atherton's supersedeas bond pay not only the attorney fees the Appellate Court awarded but also KeyBank's carrying costs incurred during the time Atherton appealed the denial of her motion to compel arbitration. The Redemption Agreement provides all post-judgment carrying costs are to be included in the foreclosure judgment. Atherton demanded arbitration, but her request was denied and the trial court construed the Redemption Agreement against her.

C. Atherton Requested the Settlement Agreement be Rescinded.

Atherton has sought rescission of the 2019 Settlement Agreement based on KeyBank's breach. This is her last chance to obtain that relief.

VII. Atherton timely and properly raised her primary subject matter jurisdiction arguments.

"[A] litigant wishing to raise a federal issue can easily indicate the federal law basis for his claim in a state-court petition or brief... by citing in conjunction with the claim the federal source of law on which he relies *or a case deciding such a claim on federal grounds*."

Nitro-Lift, 568 U.S. at 20. Atherton's Opening Brief on appeal was limited to whether the trial court erred

by not staying the foreclosure action until there was a final decision on her motion to compel arbitration. Not satisfied with one limited issue, KeyBank improperly raised the merits-based condition precedent argument in its Response Brief. Resp. at 37–38.

In Reply, Atherton requested the Court of Appeals not consider KeyBank's condition precedent arguments because it lacked authority. Reply at 7. Supporting her argument, Atherton cited *Howsam*. Reply at 13 and 15. The Washington Court of Appeals rejected Atherton's argument.

Atherton then sought reconsideration and explicitly cited *Henry Schein, Inc. v. Archer & White Sales, Inc.*, __ U.S. __, 139 S. Ct. 524, 530, 202 L.Ed.2d 480 (2019); *BG Group* at 35, *Howsam*, 537 U.S. at 84-85, and *District No. 1, Pacific Coast District, Marine Engineers' Beneficial Assoc. AFL-CIO v. Liberty Maritime Corp.*, 330 F. Supp.3d 451, 459 (2018). Her motion was denied.

Atherton then sought review by the Washington State Supreme Court complaining she presented a subject matter jurisdiction argument that she could raise at any time, and the court had a duty to consider even if it was not raised. *Dux v. Hostetter*, 37 Wash.2d 550, 555, 225 P.2d 210 (1950). Atherton argued the FAA applied and Washington's courts lacked subject matter jurisdiction to decide the condition precedent issue. Pet. for Rev. at 4 and 22–24. Atherton seeks a writ of certiorari directed to the Washington State Supreme Court's denial of her Petition for Review, where she specifically addressed her FAA argument.

KeyBank's reliance on *Howell v. Mississippi*, 543 U.S. 440, 443–44, 125 S.Ct. 856, 160 L.Ed.2d 873 (2005) is misplaced. There, the citations to authority were too attenuated to squarely raise the issue. The Court called it a "daisy chain." Atherton has presented no such "daisy chain" and there is no attenuation, and so it is more akin to *Nitro-Lift* than to *Howell*.

Respectfully submitted,

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