No. 23-661

In the Supreme Court of the United States

TUG HILL OPERATING, LLC,
Petitioner,
v.
LASTEPHEN ROGERS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF *AMICUS CURIAE* AMERICAN EXPLORATION AND PRODUCTION COUNCIL IN SUPPORT OF PETITIONER

Andrew B. Davis
LEHOTSKY KELLER COHN LLP
408 W. 11th Street, 5th Fl.
Austin, TX 78701

Steven P. Lehotsky
Counsel of Record
LEHOTSKY KELLER COHN LLP
200 Massachusetts Ave. NW
Washington, DC 20001
(512) 693-8350
steve@lkcfirm.com

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTEREST OF *AMICUS CURIAE*

Amicus curiae the American Exploration and Production Council ("AXPC") is a national trade association representing 34 of the largest independent upstream natural gas and crude oil exploration and production companies, most of which are publicly traded corporations.[1] As a group, AXPC's members are leaders in adding domestic energy reserves and among the most active in drilling natural gas and oil exploration and development wells in the United States, accounting for nearly one quarter of all wells drilled. AXPC's stated mission is "to work constructively for sound energy, environmental and related public policies that encourage responsible exploration, development and production of natural gas and crude oil to meet consumer needs and fuel our economy." AXPC and its member companies frequently rely on arbitration with arbitrators who are subject matter experts to resolve disputes that may arise in the course of operating their businesses. Members accordingly have an interest in ensuring that arbitration agreements are enforced in accordance with the law and industry expectations, including agreements to delegate questions of arbitrability to an arbitrator.

SUMMARY OF ARGUMENT

This Court's review is necessary to correct a lower court's erroneous application of the Federal Arbitration Act (the "Arbitration Act") and to reaffirm the "emphatic

---

[1] Pursuant to this Court's Rule 37.2, AXPC affirms that timely notice of intent to file this brief was provided to counsel of record for the parties. In accordance with Rule 37.6, no counsel for a party authored this brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than *amicus curiae*, its members, or its counsel made such a monetary contribution.

federal policy in favor of arbitral dispute resolution." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985). In deciding whether a party has agreed "to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims." *AT & T Techns., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986). The same is true for agreements that delegate issues of *arbitrability* to arbitration. Once a court concludes that a party agreed to arbitrate issues of arbitrability, "a court may not decide the arbitrability issue." *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 530 (2019).

The decision below nevertheless decided an issue of arbitrability in the face of Respondent's clear and unmistakable agreement to delegate all issues of arbitrability to the arbitrator: it decided whether Petitioner, a non-signatory to the agreement, could compel arbitration. That decision is erroneous, deepens a circuit split, and creates substantial uncertainty about the enforcement of arbitration agreements that AXPC's members routinely rely upon as part of their businesses. This Court should grant the petition for certiorari.

I. Review is necessary because the decision below contradicts this Court's precedents on an important question of federal law: when a court must enforce agreements to arbitrate issues of arbitrability.

A. The Arbitration Act is clear. Where a party agrees to arbitrate the merits of a dispute or issues of arbitrability, the courts must enforce that agreement. Congress enacted the Arbitration Act to counter judicial hostility to arbitration agreements. This Court has therefore instructed courts that the Act requires them to enforce arbitration agreements "rigorously" and "according to their terms." *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 506 (2018) (internal quotation marks and citation omitted). Critically for this

case, courts are required not only to rigorously enforce agreements to arbitrate the merits of disputes. They are required also to enforce clear and unmistakable agreements to arbitrate gateway issues of arbitrability. *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 70 (2010).

B. Gateway arbitrability issues include "whether the arbitration contract b[inds] parties who did not sign the agreement." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002). This is because whether a non-signatory is bound by an arbitration agreement is merely a question about the *scope* of the arbitration clause, and the scope of an arbitration clause is a core arbitrability question. *Rent-A-Center*, 561 U.S. at 68-69. In contrast, questions about the validity of an arbitrability provision are reserved for the court because the existence of an agreement is fundamental to compelling arbitration. *Id.* at 71. By reserving for itself the question whether a non-signatory is entitled to enforce an arbitration clause, the court of appeals implicitly and erroneously treated this question as one of validity going to whether an agreement was formed. There was no basis to do so.

C. The line between delegable arbitrability questions going to the scope of the agreement and non-delegable issues about validity is rooted in the Arbitration Act and ensconced in this Court's precedent. The decision below, however, would create a new category of arbitrability questions reserved for courts that cannot be logically cabined. If the decision below were to stand, it would serve as an invitation for courts hostile to arbitration to decide core arbitrability questions despite a party's agreement to arbitrate those questions.

II. Review is also necessary because the decision below disrupts reasonable expectations from businesses across the country—and specifically AXPC's members—that courts will enforce according to their terms both

arbitration agreements and provisions requiring arbitrators to resolve issues of arbitrability.

A. Businesses, entities, and individuals often agree to arbitrate not only merits issues but issues of arbitrability because delegating decision-making authority to arbitrators is frequently beneficial to all interested parties. Arbitration is a way to resolve disputes more expeditiously, more cost-effectively, and more predictably than litigation without compromising fairness or substantive rights. This is as true with respect to merits issues as it is to issues of arbitrability. And the benefits do not evaporate when a dispute, as here, is between a business and an individual.

B. The decision below, by arrogating to courts the authority to interpret arbitration clauses in the face of provisions delegating issues of arbitrability, introduces harmful uncertainty into the enforcement of arbitration agreements that are essential to AXPC's members. AXPC's members rely heavily on independent contractors because of the nature of the oil and gas production and exploration industry. And it is critical for reasons of cost-efficiency, timeliness, and predictability that when disputes arise between members and independent contractors that those disputes be resolved by an arbitrator, along with any attendant questions of arbitrability. The decision below, however, encourages those who seek to avoid arbitration to engage in forum shopping. Even without forum shopping, the circuit split deepened by the Fourth Circuit's decision is especially damaging to AXPC's members because the circuits that have reserved the non-signatory issue for themselves are the circuits in which disputes are most likely to arise.

ARGUMENT

I. COURTS DO NOT HAVE AUTHORITY TO IGNORE A CLEAR DELEGATION PROVISION.

A. The Federal Arbitration Act requires courts to enforce arbitration agreements that delegate questions of arbitrability.

"The [Arbitration Act] was enacted in 1925 in response to widespread judicial hostility to arbitration agreements." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). Prior to that time, "English and American common law courts routinely refused to enforce agreements to arbitrate disputes." *Epic Sys.*, 584 U.S. at 505. Congress overrode this common-law refusal with a new instruction to "treat arbitration agreements as 'valid, irrevocable, and enforceable.'" *Id.* (quoting 9 U.S.C. § 2). In doing so, Congress's "preeminent concern" was that courts across the country "enforce private agreements into which parties had entered." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985).

This concern with enforcement is reflected throughout the Act. Not only does Section 2 of the Act provide that "an agreement in writing to submit to arbitration an existing controversy arising out of . . . a contract . . . shall be valid, irrevocable, and enforceable," but other provisions give this instruction functional force. 9 U.S.C. § 2. Section 3, for instance, protects parties from having to litigate issues in court that they agreed to arbitrate by providing that the court "shall . . . stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement." *Id.* § 3. Similarly, Section 4 allows a "party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration" to "petition" for "an order directing that

such arbitration proceed in the manner provided for in [the] agreement." *Id.* § 4.

This Court has accordingly instructed that the Act "requires courts 'rigorously' to 'enforce [arbitration] agreements according to their terms.'" *Epic Sys.*, 584 U.S. at 506 (quoting *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013)). This instruction "reflect[s] both a liberal federal policy favoring arbitration and the fundamental principle that arbitration is a matter of contract." *Concepcion*, 563 U.S. at 339 (internal quotation marks and citations omitted).

For a time, it was somewhat unsettled whether the Act required courts to enforce agreements to arbitrate only the merits of disputes or whether it also required courts to enforce agreements to arbitrate questions of arbitrability themselves. This Court, however, resolved any uncertainty nearly 30 years ago in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995). *First Options* held that "[j]ust as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, so the question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about *that* matter." *Id.* at 943 (internal citations omitted). If "the parties agree[d] to submit the arbitrability question itself to arbitration," then it is the Court's duty to enforce that agreement in the same manner that it would enforce an agreement to arbitrate the merits of a dispute. *Id.* Only if "the parties did *not* agree to submit the arbitrability question itself to arbitration" should the court "decide that question." *Id.* And although the presumption is that a court will decide questions of arbitrability, where there is "clear and unmistakable" evidence that there is an

agreement to delegate those issues to the arbitrator, that delegation is valid. *Id.* at 944 (alterations adopted).[2]

Parties often provide this "clear and unmistakable" evidence that questions of arbitrability are for the arbitrator through delegation provisions. "The delegation provision is an agreement to arbitrate threshold issues concerning the arbitration agreement." *Rent-A-Center*, 561 U.S. at 69. And since *First Options*, this Court has twice held that delegation provisions are enforceable under the Act. It held in *Rent-A-Center* that a party "can agree to arbitrate 'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." *Id.* at 69-70. This is because "[a]n agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce." *Id.* at 70. Likewise, in *Henry Schein*, this Court explained that "if a valid agreement exists, and if the agreement delegates the arbitrability issue to an arbitrator, *a court may not decide the arbitrability issue*." 139 S. Ct. 524, 530 (emphasis added).

This Act is thus unmistakable: Courts *must* enforce agreements to arbitrate issues of arbitrability.

---

[2] This is consistent with the separate but related question of whether an arbitration agreement includes class arbitration. As with questions of arbitrability, the presumption is that courts will resolve the class arbitration question, but that parties *can* assign that question to the arbitrator through clear and unmistakable language. *See, e.g.*, *20/20 Commc'ns, Inc. v. Crawford*, 930 F.3d 715, 718-19 (5th Cir. 2019); *Reed Elsevier, Inc. v. Crockett*, 734 F.3d 594, 599 (6th Cir. 2013). This is because "it cannot be presumed the parties consented to [classwide arbitration] by simply agreeing to submit their disputes to an arbitrator." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010). An agreement, however, may delegate to an arbitrator questions of arbitrability—such as who is bound by the agreement—without delegating the class question.

B. Whether a party to litigation is entitled to invoke an arbitration clause is a gateway issue that can be delegated to an arbitrator.

The decision below conflicts with the Arbitration Act's requirement that courts enforce agreements to arbitrate issues of arbitrability according to their terms. The court of appeals accepted that Respondent agreed to delegate questions of arbitration to an arbitrator through a contractual provision stating that "the arbitrator has exclusive authority to resolve any dispute relating to the interpretation, applicability, or enforceability of this binding arbitration agreement." App.5-6. Nevertheless, it declined to enforce that agreement according to its terms because it concluded that whether a non-party to the contract is entitled to enforce an arbitration agreement is a question solely for the court. *Rogers v. Tug Hill Operating, LLC*, 76 F.4th 279, 288 (4th Cir. 2023). The court of appeals had no authority to ignore the delegation provision in this case and take this arbitrability question out of the arbitrator's hands.

A delegation provision—including the delegation provision in this case—delegates virtually all gateway disputes to an arbitrator. These gateway disputes include, but are by no means limited to, the enforceability, scope, applicability, and interpretation of the arbitration agreement. *Rent-A-Center*, 561 U.S. at 68-69. *See also Henry Schein*, 139 S. Ct. at 529 (stating that "whether the parties have agreed to arbitrate" is a question of arbitrability that may be delegated to an arbitrator). Relevant here, one of the gateway disputes that a delegation provision delegates to an arbitrator is "whether the arbitration contract b[inds] parties who did not sign the agreement." *Howsam*, 537 U.S. at 84. *See also* 13D Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 3569 n.53 (3d ed.) (stating that "whether an arbitration clause binds persons who did not sign it[]" is a gateway arbitration issue).

This is because, at base, whether a non-signatory may enforce an arbitration clause is merely a question about the *scope* of the arbitration clause. *See Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630 (2009) (referring to "the scope of [arbitration] agreements (*including the question of who is bound by them*)" (emphasis added)).

The court of appeals failed to treat the non-signatory question as a gateway question that can be delegated to the arbitrator. It instead treated that question as one reserved for the court, reasoning that courts must "'determine[] whether a valid arbitration agreement exists' '*before* referring a dispute to an arbitrator.'" *Rogers*, 76 F.4th at 286 (quoting *Henry Schein*, 139 S. Ct. at 530). That statement of the law is correct insofar as it goes: courts must determine whether a valid agreement to arbitrate exists before referring a dispute to an arbitrator. *Rent-A-Center*, 561 U.S. at 71 ("If a party challenges the validity under § 2 of the precise agreement to arbitrate at issue, *the federal court* must consider the challenge before ordering compliance with that agreement under § 4." (emphasis added)). But *who may enforce an agreement* is not a question about the *validity* of the agreement.

Whether an agreement is valid turns on principles of contract law. As this Court explained in *Arthur Andersen*, "State law . . . is applicable to determine which contracts are binding under [FAA] § 2 and enforceable under § 3[.]" 556 U.S. at 630-31 (cleaned up). And under no state's law of which AXPC is aware is the question of who may enforce an agreement relevant to whether a valid agreement was made. Rather, the question of whether a valid contract was formed turns on questions such as whether there was an offer, whether there was acceptance, whether there was a meeting of the minds or mutual assent, whether there was consideration, and whether the parties were competent to enter into an agreement. *E.g.*, *In re Capco Energy, Inc.*, 669 F.3d 274, 279-80 (5th Cir. 2012) (listing

element of a binding contract under Texas law); *Dan Ryan Builders, Inc. v. Nelson,* 737 S.E.2d 550, 556 (W. Va. 2012) (discussing West Virginia law); *Starke v. SquareTrade, Inc.*, 913 F.3d 279, 288-89 (2d Cir. 2019) (discussing New York law); *Homestyle Direct, LLC v. Dep't of Hum. Servs.*, 311 P.3d 487, 492-93 (Or. 2013) (en banc) (discussing Oregon law).

The court of appeals failed to grapple with what it means for a delegation provision to be valid. Had it done so, its recognition that Respondent "agreed to arbitrate issues—including threshold issues"—would have ended the matter. *Rogers*, 76 F.4th at 288. But the court of appeals instead reasoned that "whether 'an arbitration agreement exists *between the parties*'" is somehow a question akin to validity or formation of an agreement reserved for the courts. *Id.* at 286 (quoting *Hightower v. GMRI, Inc.*, 272 F.3d 239, 242 (4th Cir. 2001)). It is true, of course, that courts must decide whether an arbitration agreement exists between the parties *to the alleged agreement* because that goes to whether a valid agreement was formed. But whether there is an agreement between the parties *to the litigation* is entirely irrelevant to that issue. In *Arthur Anderson*, for example, there was no arbitration agreement between the parties to the litigation. 556 U.S. at 629-32. Yet the Court never so much as suggested that this invalidated the arbitration agreement. Indeed, it would be absurd for the validity of an agreement to rise and fall with the parties *to the litigation*. The same agreement could be valid in one suit and invalid in another solely based on the parties to the litigation.

That absurdity is not tempered by the court of appeals' recognition that "there are circumstances in which a nonparty to a contract may nonetheless be entitled to enforce it under standard contract principles." *Rogers*, 76 F.4th at 286-87 (citing *Arthur Andersen*, 556 U.S. at 631). Again, the only question for a court where there is a delegation

provision is whether that provision is valid. Whether a non-party may enforce a valid arbitration agreement has no relevance to whether the delegation provision itself is valid, because it does not speak to any of the elements of contract formation. To the contrary, questions about *who* may enforce an agreement are questions about the scope of that agreement. This is made clear by the court of appeals' own analysis of the question. When analyzing whether the arbitration provision at issue contemplated third-parties compelling arbitration, the court of appeals had to *interpret* the agreement. This included "read[ing]" the delegation provision "in the context of the arbitration clause as a whole" to determine whether Respondent "agreed to arbitrate issues—including threshold issues." *Id.* at 288. This is not analyzing whether the agreement is *valid*. It is analyzing a "gateway question[] of arbitrability" that was delegated to the arbitrator. *Henry Schein*, 139 U.S. at 529 (cleaned up).

Finally, it is no rebuke to say that, unless a court interprets the agreement to determine who may enforce it, "a party with no contractual right to compel arbitration might be permitted to do just that." *Rogers*, 76 F.4th at 287. For one, this argument assumes that there is no right to compel arbitration—the exact question the arbitrator is tasked with answering. For another, that parties may have to resolve disputes about the meaning of an arbitration clause is the entire point of a delegation clause. Courts accordingly and routinely send parties to arbitration to resolve disputes about whether one issue or another is properly before the arbitrator. *See, e.g.*, *Attix v. Carrington Mortg. Servs., LLC*, 35 F.4th 1284, 1302 (11th Cir. 2022) ("[T]he arbitrability dispute in this case—*i.e.*, whether the parties' agreement to arbitrate Attix's claims is enforceable under the Dodd-Frank Act—is a question for the arbitrator."). In those circumstances, as here, the party compelled to arbitration may argue that there is no

contractual right to compel arbitration. But that argument is for the arbitrator, not for the court. In any event, even if there were a concern about an arbitrator interpreting a contract to determine who may enforce its provisions, that is a "policy argument" that cannot override the Federal Arbitration Act's command to enforce arbitration agreements as written. *Henry Schein*, 139 S. Ct. at 531.

C. The court of appeals' holding cannot be cabined to circumstances where a non-party to the contract seeks to enforce an arbitration provision.

Not only is the court of appeals' decision contrary to this Court's precedents, but it cannot be cabined. As explained above, whether an arbitration clause may be enforced by a non-party is a question about the scope of the agreement. *See supra* at 9 (citing *Arthur Andersen*, 556 U.S. at 630). In that sense, it is no different than any other question going to the scope of the agreement, and thus there is no basis on which to treat it differently.

The court of appeals nevertheless tried to carve the non-signatory question out and place it into what Petitioner rightly calls "an oddball super-category of nondelegable issues which would always require the court to interpret the agreement for itself no matter how clearly the agreement delegates interpretive questions to the arbitrator." Petr.'s Stay Application Reply at 5. But it is even worse than that. Because there are no other similar nondelegable issues, this super-category would at least initially be a category of one.

The only questions that cannot be delegated to the arbitrator are those that go to the formation and validity of the agreement to arbitrate. *Henry Schein*, 139 S. Ct. at 530 (citing 9 U.S.C. § 2). But that is because issues of validity and formation speak to whether there is an agreement to arbitrate *at all*. For the reasons explained,

whether a non-signatory may enforce a valid agreement is a different question altogether. The court of appeals' "purported distinctions are little more than exercises in the art of *ipse dixit*." *FERC v. Mississippi*, 456 U.S. 742, 762 n.27 (1982). And if allowed to stand, the decision below would only invite other unprincipled distinctions by courts that are disinclined to enforce arbitration clauses.

II. The Decision Below—And the Circuit Split That It Deepens—Creates Harmful Uncertainty As to Whether Delegation Provisions Will Be Enforced.

A. Businesses, entities, and individuals reasonably want arbitrators to decide issues of arbitrability.

Businesses across the country, including AXPC's members, have good reason to arbitrate disputes—including disputes about arbitrability—with individuals who work with them as independent contractors. As this Court has recognized, arbitration is a way to resolve disputes faster and at lower expense than litigation without compromising fairness or substantive rights. Those benefits accrue to both parties and drive the prevalence of arbitration provisions.

1. The Arbitration Act's "emphatic federal policy in favor of arbitral dispute resolution," *KPMG LLP v. Cocchi*, 565 U.S. 18, 21 (2011) (quoting *Mitsubishi Motors*, 473 U.S. at 631), is rooted in Congress's recognition that arbitration provides significant benefits. Specifically, Congress enacted the Arbitration Act because, "in [its] judgment[,] arbitration had more to offer than courts [had to that point] recognized—not least the promise of quicker, more informal, and often cheaper resolutions for everyone involved." *Epic Sys.*, 584 U.S. at 505. One motivating factor behind passing the Arbitration Act was the recognition that arbitration alternatives were needed due to

increasingly costly and plodding litigation. The House Report on the Arbitration Act, for example, stated: "It is practically appropriate that the action [the Arbitration Act] should be taken at this time when there is so much agitation against the costliness and delays of litigation. These matters can be largely eliminated by agreements for arbitration, if arbitration agreements are made valid and enforceable.'" H.R.Rep. No. 96, 68th Cong., 1st Sess., 1-2 (1924) (quoted by *Dean Witter Reynolds*, 470 U.S. at 220).

The need for arbitration has only grown since then. The litigation process "exacts heavy costs in terms of efficiency and expenditure of valuable time and resources." *Ashcroft v. Iqbal*, 556 U.S. 662, 685 (2009). *See also City of San Antonio v. Hotels.com, L.P.*, 141 S. Ct. 1628, 1631 (2021) ("Civil litigation in the federal courts is often an expensive affair[.]"). And "in many cases civil litigation has become too expensive, time consuming, and contentious." Chief Justice John Roberts, *2015 Year-End Report on the Federal Judiciary* 4 (Dec. 31, 2015) https://perma.cc/CYK3-UUKC.

Arbitration offers an alternative. Arbitration offers significant benefits, including "lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1416 (2019) (quoting *Stolt-Nielsen*, 559 U.S. at 685). This is because arbitration can be designed to fit the parties' needs. In fact, "[t]he point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute." *Concepcion*, 563 U.S. at 344. This often results in less formal proceedings that are "desirable" precisely because they "reduc[e] the cost and increas[e] the speed of dispute resolution." *Id.* at 345. *See also 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 257 (2009) ("Parties generally favor arbitration precisely because of

the economics of dispute resolution."); Steven Shavell, *Alternative Dispute Resolution: An Economic Analysis*, 24 J. Legal Stud. 1, 2 (1995) (arguing that arbitration improves efficiency for all parties concerned).

Arbitration, moreover, is particularly beneficial for quickly and efficiently resolving disputes like the one in this case. This Court has described arbitration's cost effectiveness as "a benefit that may be of particular importance" in litigation between a business and an individual that "involves smaller sums of money than disputes concerning commercial contracts." *Cir. City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001). Although the *Circuit City Stores* decision was addressing employment litigation specifically, its reasoning applies equally to this case and those like it, where an independent contractor is asserting under the Fair Labor Standards Act ("FLSA") that the defendant was required to treat him as an employee. *Cf. Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (enforcing agreement to arbitrate claims brought in the employment context).

2. These benefits apply not only to arbitrating the merits of disputes, but also to arbitrating arbitrability itself. Litigating arbitration issues can take significant time and resources. This case is an example. Respondent filed his complaint in federal court two years ago, yet the parties have not made any real progress on the merits of the dispute because they have been tied up litigating arbitration issues. *See Rogers v. Tug Hill Operating, LLC*, 598 F. Supp. 3d 404, 411 (N.D. W. Va. 2022) (stating complaint was filed December 3, 2021). And in the grand scheme of things, this two-year delay is relatively expeditious. This Court's last foray into delegation issues before this term involved a matter that was tied up in litigation over the threshold question of arbitrability for nearly a decade. *Compare Henry Schein, Inc. v. Archer White Sales, Inc.*, 592 U.S. 168, 168 (2021) (dismissing second grant of

certiorari as improvidently granted) *with* Complaint, *Archer & White Sales, Inc. v. Henry Schein, Inc.*, No. 12-CV-572 (E.D. Tex. August 31, 2012), ECF No 1.

Assigning arbitrability to arbitrators minimizes these costs and delays in the same manner that agreeing to arbitrate on the merits minimizes costs and delays attributable to litigating the merits. In fact, this Court highlighted the comparison in *Henry Schein*. 139 S. Ct. at 530. There, the plaintiff argued that courts were not required to compel arbitration according to the terms of a delegation clause "when an argument for arbitration of a particular dispute is wholly groundless." *Id.* at 531 But this Court was "dubious" that "it is easy" to make that determination. *Id.* Instead, this Court recognized that an "exception" for "wholly groundless" arbitrability arguments "would inevitably spark collateral litigation (with briefing, argument, and opinion writing) over whether a seemingly unmeritorious argument for arbitration is *wholly* groundless, as opposed to groundless." *Id.* The exception for non-signatory enforcement issues created by the decision below poses similar problems. Rather than sending the question of who may enforce an arbitration provision to an arbitrator who may decide that question in a cost-effective and expeditious manner, parties will be stuck briefing and arguing about who is entitled to enforce and the scope of the arbitration clause.

3. Businesses employ arbitration not only because of cost and time savings that accrue to everyone involved, but because arbitrators are often more familiar with the relevant industry and issues. Arbitration provisions often allow or even require "the decisionmaker to be a specialist in the relevant field." *Concepcion*, 563 U.S. at 345. "The most sought-after" arbitrators "are those who are prominent and experienced members of the specific business community in which the dispute to be arbitrated arose." *STMicroelectronics, N.V. v. Credit Suisse Sec. (USA)*

LLC, 648 F.3d 68, 77 (2d Cir. 2011) (internal quotation marks and alterations omitted). *See also Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n*, 820 F.3d 527, 536 (2d Cir. 2016) (recognizing in labor relations context that arbitrators are "chosen by the parties because of their expertise in the particular business and their trusted judgment")

This expertise and experience help ensure that arbitration awards are correct and consistent with the law. In the experience of AXPC's members, some awards will be in their favor, while others will favor the individual who brought the claim. This is because there is no reason to believe that an arbitrator, especially one chosen for expertise in the relevant business area, "'will be unable or unwilling'" to be "'competent, conscientious, and impartial.'" *Gilmer*, 500 U.S. at 30 (quoting *Mitsubishi*, 473 U.S. at 634). And individuals lose no substantive rights by arbitrating their claims—or the arbitrability of their claims—as compared to litigating those rights in federal or state court. *Id.* at 26 (explaining that "'a party does not forgo the substantive rights afforded by the statute'" by arbitrating a claim; "'it only submits to [the claim's] resolution in an arbitral, rather than a judicial, forum.'" (quoting *Mitsubishi*, 473 U.S. at 628)). Critically, arbitrators not only "can efficiently dispose of frivolous cases by quickly ruling that a claim is not in fact arbitrable," but "under certain circumstances, arbitrators may be able to respond to frivolous claims for arbitration by imposing fee-shifting and cost-shifting sanctions." *Henry Schein*, 139 S. Ct. at 531.

B. The court of appeals' decision creates significant uncertainty regarding the enforcement of delegation provisions for AXPC's members.

AXPC's members rely heavily on independent contractors. The United States is the world's largest producer of

oil and natural gas, and AXPC represents the largest independent onshore producers of oil and natural gas in the United States. Meeting ever-increasing energy demands requires a substantial amount of skilled labor, which often comes from independent contractors who handle discrete tasks and projects in production fields and facilities. On any given day for many of AXPC's members, a majority of on-site work is performed by independent contractors.

Accordingly, AXPC's members and other businesses in the industry often rely on outside brokers to connect them with workers experienced in various aspects of oil and gas production. That is what happened in this case: Petitioner Tug Hill Operating, LLC, an oil and natural gas exploration and production company, partnered with RigUp, Inc., a broker, to connect it with skilled independent contractors. For the reasons discussed above (*see supra* at 16), AXPC's members ensure that the relevant contract between the broker and the independent contractor includes an arbitration agreement and a delegation clause that allows the AXPC member (the entity for whom the work is performed) not only to compel arbitration on the merits but for that arbitration to include gateway issues such as whether the entity is entitled to enforce arbitration.

AXPC's members have relied on this Court's precedents making clear that questions such as "whether the arbitration contract b[inds] parties who did not sign the agreement," can be delegated to an arbitrator through a provision such as the one at issue in this case. *Howsam*, 537 U.S. at 84. The court of appeals' decision contravenes that reliance. Unless certiorari is granted and the decision below is reversed, courts in the Fourth Circuit will not refer to the arbitrator questions about whether a non-signatory may invoke an arbitration clause. They will instead decide the issue themselves. This injects additional costs and delay into the process. Moreover, it injects great

uncertainty as to whether courts in that circuit will enforce even the requirement to arbitrate the merits of disputes where businesses are non-signatories to the arbitration agreement.

Worse, there are now three circuits—the Fifth, Ninth, and now Fourth—that take the same view. *See* Pet. 12-15 (citing *Newman v. Plains All Am. Pipeline, L.P.*, 23 F.4th 393, 398 (5th Cir. 2022); *Kramer v. Toyota Motor Corp.*, 705 F.3d 1122, 1127 (9th Cir. 2013)). This poses stark risks to AXPC's members for two distinct reasons.

First, the current circuit split Petitioner identifies encourages strategic behavior by plaintiffs who want to circumvent their binding arbitration agreements. Plaintiffs who do not want to arbitrate have an incentive to seek relief in the Fourth, Fifth, or Ninth Circuit, where they not only can litigate arbitrability issues before the court instead of before the arbitrator, but may potentially avoid arbitration altogether.

Second, the arbitration provisions that AXPC's members rely upon are most likely to be at issue in the jurisdictions where they are least likely to be enforced. This is because the Fifth and Ninth circuits, which the Fourth Circuit follows with the decision below, include the states that account for most of the oil production activity in the United States. Specifically, in 2022, nearly 64 percent of U.S. oil production came from Texas, the Gulf of Mexico, Alaska, and California. U.S. Energy Information Administration, *Oil and Petroleum Products Explained* (Sept. 21, 2023), https://perma.cc/DHD4-2AH9.

And the concern about future litigation in this area is not hypothetical. Cases in which the issue of non-signatories compelling arbitration has been presented have often arisen out of the oil and gas industry or the energy industry more broadly. Indeed, many of these cases involve claims under the FLSA. This case, for example, arises

from work performed for a natural gas exploration and production company and involves FLSA claims. The Fifth Circuit's decision in *Newman* likewise arose from work performed by pipeline inspectors for a pipeline company where the plaintiff brought FLSA claims. *Newman*, 23 F.4th at 397. The Sixth Circuit's decision involved a "downstream energy company" where the plaintiff was seeking to avoid arbitration on FLSA claims. *Becker v. Delek US Energy, Inc.*, 39 F.4th 351 (6th Cir. 2022). And at least two decisions out of the Eastern District of Pennsylvania involved energy companies and plaintiffs asserting claims under the FLSA. *See Robertson v. Enbridge (U.S.) Inc.*, No. CV 19-1080, 2020 WL 5754214, at *1 (W.D. Pa. July 31, 2020) ("energy delivery company that employs oilfield personnel to carry out its work" sought to compel arbitration of an FLSA suit), *report and recommendation adopted*, No. 2:19-CV-1080, 2020 WL 5702419 (W.D. Pa. Sept. 24, 2020); *Altenhofen v. Energy Transfer Partners, LP.*, No. CV 20-200, 2020 WL 7336082, at *1 (W.D. Pa. Dec. 14, 2020) (similar).

Unless this Court grants review, this will continue. Plaintiffs like Respondent will continue to file suits against businesses like Petitioner and AXPC's members in which they run up costs by litigating arbitrability issues and seek to avoid their arbitration agreements entirely.

CONCLUSION

The Court should grant the petition for a writ of certiorari and reverse the judgment of the Fourth Circuit.

Respectfully submitted,

Andrew B. Davis
LEHOTSKY KELLER COHN LLP
408 W. 11th Street, 5th Fl.
Austin, TX 78701

Steven P. Lehotsky
Counsel of Record
LEHOTSKY KELLER COHN LLP
200 Massachusetts Ave. NW
Washington, DC 20001
(512) 693-8350
steve@lkcfirm.com

Counsel for Amicus Curiae
American Exploration and Production Council

JANUARY 18, 2024