No. 23A-

IN THE
Supreme Court of the United States

HOMESERVICES OF AMERICA, INC., BHH AFFILIATES, LLC, AND HSF AFFILIATES, LLC,

Applicants,

v.

SCOTT BURNETT ET AL.,

Respondents.

APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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TO THE HONORABLE BRETT M. KAVANAUGH, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE EIGHTH CIRCUIT:

Pursuant to this Court's Rule 13.5, HomeServices of America, Inc., BHH Affiliates, LLC, and HSF Affiliates, LLC (collectively, "HomeServices")[1] respectfully request a 59-day extension of time, to and including Friday, February 2, 2024, within which to file a petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

The Eighth Circuit issued its decision on August 2, 2023. *Burnett* v. *National Association of Realtors*, 75 F.4th 975 (11th Cir. 2023). The Eighth Circuit denied HomeServices' timely petition for rehearing en banc (with panel rehearing) on September 6, 2023. The jurisdiction of this Court will be invoked under 28 U.S.C. § 1254(1). Unless extended, the time within which to file a petition for a writ of certiorari will expire on December 5, 2023.

A copy of the Eighth Circuit's opinion is attached hereto as Exhibit A. A copy of the Eighth Circuit's order denying rehearing en banc (with panel rehearing) is attached hereto as Exhibit B.

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[1] Pursuant to Rule 29.6 of this Court, undersigned counsel state that BHH Affiliates, LLC, is a subsidiary of HSF Affiliates, LLC, which is a subsidiary of HS Franchise Holding, LLC, which is a subsidiary of HomeServices of America, Inc., which is a subsidiary of Berkshire Hathaway Energy Company, which is a subsidiary of Berkshire Hathaway Inc.

No publicly traded entity owns 10% or more of the stock of HomeServices of America, Inc., HSF Affiliates, LLC, or BHH Affiliates, LLC.

1. This appeal arises from a class action filed by Scott Burnett, Rhonda Burnett, and others (collectively, "the plaintiffs") seeking leave to represent a class of home sellers alleging that the National Association of Realtors and certain national real estate brokerage franchisors, including HomeServices, engaged in anticompetitive conduct. The district court granted the plaintiffs' motion for class certification, *Burnett* v. *National Association of Realtors*, 2022 WL 1203100, at *1 (W.D. Mo. Apr. 22, 2022), and HomeServices moved to compel arbitration.

As part of their agreements with two non-party real estate brokerage companies, Reece & Nichols Realtors, Inc., and BHH KC Real Estate, LLC d/b/a/ Berkshire Hathaway HomeServices Kansas City Realty (BHH KC), the class members agreed to arbitrate any "controversy or claim between the parties" "under the rules of the American Arbitration Association . . . or such other neutral arbitrator agreed to by the parties." *Burnett*, 75 F.4th at 978 (emphasis omitted). HomeServices argued that this agreement required the unnamed class members[2] to arbitrate their disputes with HomeServices and, because of the adoption of the rules of the American Arbitration Association, required the arbitrator to decide the issue of arbitrability in the first instance. *See Henry Schein, Inc.* v. *Archer & White Sales, Inc.*, 139 S. Ct. 524, 528 (2019).

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[2] In a separate, prior appeal, the Eighth Circuit concluded that the named plaintiffs' claims were not subject to arbitration, resting on fact-specific issues that did not form part of the Eighth Circuit's holding in the appeal giving rise to this motion. *See Sitzer* v. *National Association of Realtors*, 12 F.4th 853, 857 (8th Cir. 2021).

The district court denied the motion to compel arbitration, *Burnett* v. *National Association of Realtors*, 615 F. Supp. 3d 948 (W.D. Mo. 2022), and the Eighth Circuit affirmed, *Burnett*, 75 F.4th at 984. The Eighth Circuit acknowledged that Missouri law, which governs the contract, "unquestionably permits contracting parties to make arbitration agreements that commit [arbitrability] to their chosen arbitrator." *Id.* at 982 (quotation marks omitted). And it further noted both that "[a] delegation provision is an additional, severable agreement to arbitrate threshold issues that is valid and enforceable unless a specific challenge is levied against the delegation provision" and that "the incorporation of the AAA Rules into a contract requiring arbitration" is "a clear and unmistakable indication the parties intended for the arbitrator to decide threshold questions of arbitrability." *Ibid.* (emphasis and quotation marks omitted).

Nevertheless, the Eighth Circuit declined to compel arbitration. Instead, it observed that, while a wholly owned HomeServices subsidiary was a signatory to the arbitration agreement, HomeServices itself was not. *Burnett*, 75 F.4th at 978, 983. Therefore the Eighth Circuit concluded that HomeServices' attempt to invoke the arbitration agreement was an attempt "to compel arbitration between a signatory and a nonsignatory," which raised "a threshold question of arbitrability." *Id.* at 982 (emphasis omitted). That threshold question, in the Eighth Circuit's view, was governed by "[s]tate contract law." *Ibid.* And, without explanation, the Eighth Circuit assumed the power to decide this threshold question of arbitrability, rejecting HomeServices' argument that the question of arbitrability was delegated to the arbitrator.

The Eighth Circuit then concluded, applying Missouri law, that HomeServices could not enforce the arbitration agreements against the unnamed class members because it was "neither a party nor a third-party beneficiary" of the agreements. *Id.* at 984.

2. This Court's review would be sought on the ground that the Eighth Circuit's decision, which assumes for the court the power to determine, under state law, the arbitrability of a dispute purportedly governed by an arbitration agreement incorporating rules delegating arbitrability, conflicts with the Federal Arbitration Act, with this Court's decisions applying the Act, and with the decisions of other circuits.

This Court has made clear that the Federal Arbitration Act "allows parties to agree by contract that an arbitrator, rather than a court, will resolve threshold arbitrability questions as well as underlying merits disputes." *Henry Schein*, 139 S. Ct. at 527 (citing *Rent-A-Center, West, Inc.* v. *Jackson*, 561 U.S. 63, 68-70 (2010); *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 943-44 (1995)). When an arbitration agreement includes such a delegation, the "court possesses no power to decide the arbitrability issue." *Id.* at 529.

Other Circuits, faithfully following the Act and this Court's guidance, have thus held that arbitrability must be decided by the arbitrator under an agreement with a delegation clause even when there is a dispute over whether the movant seeking to compel arbitration is a party to the arbitration agreement. For example, in *Zirpoli* v. *Midland Funding, LLC*, the Third Circuit compelled arbitration notwithstanding the parties' disagreement over the validity of an assignment to the movant because the movant's disputed "status as a contractual party to the arbitration

agreement does not go to the enforceability of the *delegation clause*." 48 F.4th 136, 144-45 (3d Cir. 2022). Similarly, in *Blanton* v. *Domino's Pizza Franchising LLC*, the Sixth Circuit required the parties to arbitrate a dispute over arbitrability where a franchisor sought to enforce an arbitration agreement (to which it was not a signatory) between the plaintiff and the movant's franchisee. 962 F.3d 842, 847-48 (6th Cir. 2020). By reserving the question of arbitrability for itself, the Eighth Circuit put itself in conflict with the FAA, this Court's precedents, and the decisions of its sister circuits.

3. "For good cause, a Justice may extend the time to file a petition for a writ of certiorari for a period not exceeding 60 days." Sup. Ct. R. 13.5. HomeServices has good cause for a 59-day extension of time to file a petition for certiorari. HomeServices retained Gibson, Dunn & Crutcher LLP as appellate counsel earlier this month after a $1.8 billion verdict, which the plaintiffs will seek to treble, was returned against HomeServices in the underlying antitrust case. Part of that new retention is identifying issues for certiorari on the arbitration ruling and preparing a petition for a writ of certiorari. Due to the complexity of this case and the press of obligations in other existing matters, newly retained counsel would benefit from additional time to review the record and consider the issues that may be suitable for this Court to consider. Gibson, Dunn & Crutcher has not previously represented HomeServices in this litigation. HomeServices is not aware of any party that would be prejudiced by a 59-day extension.

Accordingly, HomeServices respectfully requests that the time for filing a petition for a writ of certiorari in this case be extended by 59 days, to and including February 2, 2024.

Respectfully submitted,

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