No. 24-1266

IN THE

Supreme Court of the United States

JUMP TRADING, LLC,

Petitioner,

v.

NICK PATTERSON, ET AL.,

Respondents.

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

BRIEF OF PROFESSOR TAMAR MESHEL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Page(s)

Cases [cont'd]

Cases [cont'd]

Cases [cont'd]

Cases [cont'd]

Statutes

Other Authorities

Other Authorities [cont'd]

INTEREST OF *AMICUS CURIAE*

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[1] Counsel of record for all parties received notice of the intention to file this brief in accordance with Rules 37.2 and 30.1. No counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae* or her counsel made a monetary contribution to the brief's preparation or submission.

SUMMARY OF THE ARGUMENT

This case provides the Court an opportunity to determine who—a court or an arbitrator—has the authority to decide whether a party who has *not* signed an arbitration agreement may enforce it in a dispute against a party who *has* signed it. The Court should grant the petition and settle this question.

Section 2 of the Federal Arbitration Act (FAA) allows parties to agree to settle by arbitration any "controversy." 9 U.S.C. § 2. Because such a "controversy" may include one relating to the arbitration agreement itself, parties can "'agree by contract that an arbitrator, rather than a court, will resolve threshold arbitrability questions as well as underlying merits disputes.'" *Coinbase, Inc. v. Suski*, 602 U.S. 143, 148 (2024) (quoting *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 U.S. 63, 65 (2019)). Such delegation clauses will send "threshold arbitrability questions to the arbitrator, so long as the parties' agreement does so by 'clear and unmistakable' evidence." *Henry Schein*, 586 U.S. at 69 (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)). The "gateway questions of arbitrability" that parties may delegate to the arbitrator include, for example, whether the parties' arbitration "agreement covers a particular controversy." *Id.* at 68 (quotation marks and citations omitted).

At the same time, however, "*before* referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement *exists*." *Henry Schein*, 586 U.S. at 69 (emphasis added; citing 9 U.S.C. § 2). That is, even where an arbitration agreement gives the arbitrator jurisdiction to answer arbitrability questions, a court—not an arbitrator—must first determine whether an arbitration agreement "'was ever concluded'" in the first place. *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 88 n.2 (2010) (quoting *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 n.1 (2006)).

Lower courts have struggled mightily to apply these principles in the often-arising context of nonsignatory enforcement of arbitration agreements. Whether or not a nonsignatory is able to compel arbitration turns on whether the nonsignatory is a "party" to the arbitration agreement under the governing jurisdiction's substantive contract law. *See* Black's Law Dictionary (11th ed. 2019) (defining "signatory" as "a person or entity that signs a document, personally or through an agent, and thereby becomes a party to an agreement"). And whether the nonsignatory is a party will depend on the language of the agreement, on the facts of the case, and on the contours of state-law rules that bind nonsignatories to contracts generally, such as "assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel." *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 631 (2009).

The critical federal-law question here is *who decides* whether the nonsignatory is a party to the arbitration agreement—the court or the arbitrator? The lower courts are hopelessly divided. Some have held that nonsignatory issues go to the *existence* of the arbitration agreement and thus require the court to determine whether the nonsignatory is a party. Other courts have held that, at least in some circumstances, nonsignatory issues are *arbitrability* questions that should be decided by the arbitrator where the agreement has a delegation clause (as it often does). And still others have held that the answer to the "who decides" question depends on whether the delegation clause *clearly and unmistakably applies to nonsignatories*.

The Court should resolve this lower-court confusion.

First, the Court's FAA precedents do not provide a clear resolution to this "who decides" issue. The Court's cases set out various categories of questions—some that courts decide, some that arbitrators decide—but have not made clear into which category nonsignatory questions should be placed.

Second, as a result of this lack of clear guidance, a three-way split has emerged among the federal courts of appeals and state courts of last resort. This split is broad and deeply entrenched. It can only be resolved by this Court.

Third, the question of who decides whether a nonsignatory can enforce an arbitration agreement arises frequently and "has a certain practical importance …. [t]hat can make a critical difference to a party resisting arbitration." *First Options*, 514 U.S. at 942. Uncertainty on such fundamental jurisdictional questions is "antithetical to efficient business decisionmaking." Albert Choi & George Triantis, *Strategic Vagueness in Contract Design: The Case of Corporate Acquisitions*, 119 Yale L.J. 848, 882 (2010). And litigation over this question imposes considerable costs on parties who have chosen arbitration for its "'lower costs'" and "'greater efficiency and speed.'" *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 348 (2011) (quoting *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010)). Uncertainty over who decides nonsignatory questions also undermines the "primary purpose" of the FAA—"to ensure that private agreements to arbitrate are enforced according to their terms," *Stolt-Nielsen*, 559 U.S. at 682 (quotation marks and citations omitted), including agreements to arbitrate arbitrability.

Fourth, the downsides of uncertainty over who decides nonsignatory questions are amplified in the international arbitration context, as this case illustrates. This Court has long emphasized the importance of "sensitivity to the need of the international commercial system for predictability in the resolution of disputes." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629

(1985). But without clear guidance from the Court, this jurisdictional uncertainty threatens the stability of the international arbitration system.

For these reasons, the Court should grant the petition and provide the clarity that litigants and lower courts need.

ARGUMENT

I. The Court's Cases Have Left It Unclear Whether Courts or Arbitrators Should Decide Whether a Nonsignatory Can Enforce an Arbitration Agreement

In the one hundred years since the enactment of the FAA, this Court's precedents have identified four categories of questions that might be raised when a litigant seeks to enforce an arbitration agreement under the FAA.

First, there are questions that a court must answer. These are questions concerning whether any arbitration agreement *exists* in the first place—i.e., "whether any agreement between the alleged obligor and obligee was ever concluded." *Buckeye*, 546 U.S. at 444 n.1; *see also Suski*, 602 U.S. at 149 ("'[B]efore referring a dispute to an arbitrator, … the court determines whether a valid arbitration agreement exists.'" (alteration in original; quoting *Henry Schein*, 586 U.S. at 69); *Rent-A-Center*, 561 U.S. at 70 n.2 ("The issue of the agreement's 'validity' is different

from the issue whether any agreement between the parties 'was ever concluded' …." (quoting *Buckeye*, 546 U.S. at 444 n.1); *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 299 (2010) (explaining that "courts should order arbitration of a dispute only where the court is satisfied that … the formation of the parties' arbitration agreement" is not in issue). For example, courts have held that questions such as "whether the signor lacked the mental capacity to assent" go to the arbitration agreement's *existence* and thus must always be decided by a court. *Buckeye*, 546 U.S. at 444 n.1.

Second, there are questions a court presumptively will answer but that can be delegated to an arbitrator. An issue in this category is known as a "*question of arbitrability*" and "is an issue for judicial determination unless the parties clearly and unmistakably provide otherwise." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) (brackets, quotation marks, and citation omitted). Arbitrability questions are those the "parties would likely have expected a court to have decided," *id.* at 83—such as whether the arbitration "agreement covers a particular controversy," *Rent-A-Center,* 561 U.S. at 69, whether the "*entire* [arbitration] [a]greement is invalid," *id.* at 74, and whether the arbitration agreement is "enforceab[le]," *Granite Rock*, 561 U.S. at 299.

Third, to defeat the presumption that questions of arbitrability will be decided by a court, the arbitration

agreement must manifest the parties' "clear and unmistakable" intent to delegate the resolution of such questions to the arbitrator. *Rent-A-Center,* 561 U.S. at 69 n.1. The Court has indicated that an agreement manifests such intent when it includes a "delegation provision" giving the arbitrator "exclusive authority to resolve any dispute relating to the enforceability" of the agreement. *Rent-A-Center,* 561 U.S. at 68 (ellipsis, quotation marks, and citation omitted). And *that* question—whether the arbitration agreement does in fact manifest the requisite intent to delegate arbitrability questions to the arbitrator—is necessarily a question for the court. *See First Options*, 514 U.S. at 944 (noting clear-and-unmistakable rule is "applicable when courts decide whether a party has agreed that arbitrators should decide arbitrability").

Fourth, there are questions that the arbitrator will answer, of which there are two sub-categories. There are "'procedural questions which grow out of the dispute and bear on its final disposition.'" *Howsam*, 537 U.S. at 84 (quotation marks and citation omitted). Such questions may concern, for instance, "time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate," and are "presumptively" for the arbitrator to decide. *Id.* at 84–85 (quotation marks, citation, and emphasis omitted). There are also questions implicating "the contract generally" *rather than* the specific arbitration provision one party seeks to enforce. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404

(1967). Such questions may concern, for example, fraud in the inducement, *id.* at 404, or illegality, *Buckeye*, 546 U.S. at 444, regarding the parties' "entire contract," *Preston v. Ferrer,* 552 U.S. 346, 353 (2008). Where these questions do not "specifically" implicate the provision sought to be enforced, *Rent-A-Center,* 561 U.S. at 72, they are for the arbitrator to decide.[2]

In this case, the parties dispute whether a court or an arbitrator should decide whether Petitioner (who is a nonsignatory to the arbitration agreement) can compel arbitration against Respondents (who are signatories). The answer turns on how this question of nonsignatory enforcement is classified. And the Court's precedents do not resolve this classification conundrum.

The nonsignatory question here could arguably fall in any of the first three categories listed above (it is plainly not in the last category, since it is not a "procedural" question and does concern the provision

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[2] This "specificity" requirement is based on *Prima Paint*'s holding that under the FAA an arbitration provision is "separable" from the contract in which it is contained. 388 U.S. at 403. Thus, "a federal court may consider only issues relating to the making and performance of the agreement to arbitrate" itself. *Id.* at 404. *Rent-A-Center* later held that the severability principle applies to delegation clauses as well. 561 U.S. at 72. Accordingly, the "severability principle establishes that a party seeking to avoid arbitration must directly challenge the arbitration or delegation clause, not just the contract as a whole." *Suski*, 602 U.S. at 150–51.

that Petitioner seeks to enforce). It could be characterized as an *existence* question that must always be answered by the court. It could be characterized as an *arbitrability* question that a delegation clause will send to the arbitrator. Or a court might say the "who decides" question depends on whether the delegation clause *clearly and unmistakably applies to nonsignatories*.

II. The Lower Courts Are Intractably Split

The lower courts have collectively reached *each* of these three possible conclusions. Some have said nonsignatory questions are always for the court; some have said a delegation clause may send such questions to the arbitrator; and still others have said it depends on whether the delegation clause clearly and unmistakably applies to nonsignatories.

The Fifth Circuit and Supreme Court of Nevada take the first approach and treat nonsignatory issues as *existence* questions. These courts have held that nonsignatory issues implicate the existence or formation of the arbitration agreement and are thus always for courts to decide, even if the arbitration agreement includes a valid delegation provision.

In contrast, the First, Second, Third, Sixth, and Tenth Circuits, as well as the Supreme Court of Alabama, take the second approach and treat nonsignatory issues as *arbitrability* questions: At least in some circumstances, these courts will apply a

standard delegation provision to give the arbitrator the authority to decide whether the agreement can be enforced by a nonsignatory.

Finally, the Fourth, Eighth, and Ninth Circuits, as well as the Supreme Court of Texas, take the third approach and effectively treat nonsignatory issues as implicating the "clear and unmistakable" standard: They have held that a nonsignatory issue is for the court to decide where the delegation provision does not *clearly and unmistakably apply to nonsignatories*.

A. The first approach—nonsignatory issues are always for the court to decide

The Fifth Circuit and the Supreme Court of Nevada have held that courts should always decide nonsignatory issues. According to these courts, "[w]hen parties dispute whether a 'non-signatory can compel arbitration pursuant to an arbitration clause,' their dispute 'questions the existence of a valid arbitration clause between specific parties and is therefore a gateway matter for the court to decide.'" *Halliburton Energy Services, Inc. v. Ironshore Specialty Ins. Co.*, 921 F.3d 522, 530 (5th Cir. 2019) (quoting *In re Rubiola*, 334 S.W.3d 220, 224 (Tex. 2011)).

The Fifth Circuit recently reiterated that it "is up to us—not an arbitrator—to decide whether [a nonsignatory] can enforce the … arbitration agreement," rejecting the argument that this "is a

second-step, arbitrability question." *Newman v. Plains All American Pipeline, L.P.*, 23 F.4th 393, 399–400 (5th Cir. 2022). In doing so, it expressly limited an earlier Fifth Circuit decision—*Brittania-U Nigeria, Ltd. v. Chevron USA, Inc.*, 866 F.3d 709 (5th Cir., 2017)—that instead seemed to view the "who decides" question through the lens of the "clear and unmistakable" standard. *See Brittania-U*, 866 F.3d at 715 (holding court must "first determine whether claims against [nonsignatories] were ... clearly and unmistakably delegated to the arbitrator"). *Newman* held that "even if *Brittania-U* could not be reconciled with our decision today, we would still be bound to" reach the same result under a yet-earlier Fifth Circuit decision that likewise treated nonsignatory enforcement as an existence issue. 23 F.4th at 400 & n. 28 (citing *Sherer v. Green Tree Servicing LLC*, 548 F.3d 379, 382 (5th Cir. 2008)).

The Nevada Supreme Court has adopted the same approach. In *RUAG Ammotec GmbH v. Archon Firearms, Inc.*, it held that "[w]here a nonsignatory is involved in a motion to compel arbitration under a contract, there is a question as to the very *existence of an agreement involving the nonsignatory*." 538 P.3d 428, 433 (Nev. Sup. Ct. 2023). Accordingly, "it remains with the courts to decide whether such an agreement exists." *Id.* at 434. And this result holds even where the arbitration includes a delegation provision: "[E]ven the most sweeping delegation cannot send the contract-formation issue to the arbitrator, because, until the court rules that a

contract exists, there is simply no agreement to arbitrate." *Id.* (quotation marks and citation omitted).[3]

B. The second approach—delegation clauses send nonsignatory issues to the arbitrator

The First, Second, Third, Sixth, and Tenth Circuits, as well as the Supreme Court of Alabama, have held that nonsignatory issues are arbitrability questions that standard delegation clauses will authorize the arbitrator to resolve, at least in some circumstances. In particular, the First and Second Circuits send nonsignatory issues to the arbitrator, but only after making a preliminary determination that the nonsignatory is a party to the arbitration agreement; the Third and Sixth Circuits send nonsignatory issues to the arbitrator, at least where the nonsignatory is seeking, rather than opposing, arbitration; and the Tenth Circuit and Alabama

[3] The Supreme Court of Colorado has taken a similar approach, at least where the nonsignatory is the party *opposing* enforcement of the arbitration agreement: It has held that even where the "contracting parties empower an arbitrator to determine issues of arbitrability," the court must decide the nonsignatory issue because the contracting parties' agreement cannot "bind a nonparty to a contract, absent a legal or equitable basis for doing so." *N.A. Rugby Union LLC v. U.S.A. Rugby Football Union*, 442 P.3d 859, 865 (Colo. 2019).

Supreme Court send nonsignatory issues to the arbitrator without qualifications.

In an early case addressing this "who decides" question, the First Circuit held that once the nonsignatory to the arbitration agreement has made a "*prima facie*" showing that it had been assigned a signatory's rights under the contract, including the right to compel arbitration, "[t]he arbitrator should decide whether a valid arbitration agreement exists between [the signatory] and the [nonsignatory] under the terms of the contract." *Apollo Computer, Inc. v. Berg*, 886 F.2d 469, 473–74 (1st Cir. 1989). The court drew this "*prima facie*" standard from the arbitration rules of the International Chamber of Commerce, which governed the arbitration agreement in *Apollo*. *Id.* at 473.[4] The First Circuit recently reaffirmed this "*prima facie*" standard, explaining that *Apollo* did *not* hold that a party "may force its opponent to arbitrate threshold issues regarding the arbitrability of their dispute so long as that party's opponent is a signatory to some arbitration agreement containing a delegation provision." *Morales-Posada v. Cultural Care, Inc.*, 2025 WL 1703513, at *5–6 (1st Cir. June 18, 2025).

[4] These rules provided that if the Court of Arbitration was "satisfied of the *prima facie* existence of such an [arbitration] agreement," it could "decide that the arbitration shall proceed," with "any decision as to the arbitrator's jurisdiction … taken by the arbitrator himself." *Apollo*, 886 F.2d at 473.

The Second Circuit has "explicitly adopt[ed]" the "reasoning of *Apollo*" and thus also characterizes nonsignatory issues as arbitrability questions that can be delegated to the arbitrator—at least where "the parties have a sufficient relationship to each other and to the rights created under the agreement." *Contec Corp. v. Remote Sol., Co.*, 398 F.3d 205, 211 (2d Cir. 2005) [5] In *Contec*, a limited partnership had signed an arbitration agreement and later changed form and merged with a corporation; the nonsignatory corporation subsequently moved to compel arbitration against the counterparty that had signed the arbitration agreement. *Id.* at 207. The Second Circuit reasoned that because the counterparty had signed a contract containing an arbitration clause and delegation clause, it could not "now disown its agreed-to obligation to arbitrate *all* disputes, including the question of arbitrability." *Id.* at 211. Accordingly, it held that the counterparty was compelled to arbitrate this "question of arbitrability"—i.e., whether the "non-signatory can compel [the] signatory to arbitrate." *Id.* at 209.

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[5] The First and Second Circuits' insistence on making preliminary determinations regarding the nonsignatory's status as a party to the arbitration agreement is inconsistent with this Court's subsequent decision in *Henry Schein*, which held that delegation clauses send arbitrability questions to the arbitrator "even if the court thinks that the argument that the arbitration agreement applies to a particular dispute is wholly groundless." 586 U.S. at 68.

The Third Circuit agrees that whether a nonsignatory is a party to the arbitration agreement "goes directly to whether [the nonsignatory] can *enforce* arbitration as the agreement provides, not whether the agreement *exists*." *Zirpoli v. Midland Funding, LLC*, 48 F.4th 136, 144 (3rd Cir. 2022). "Accordingly, if the parties to the … agreement clearly and unmistakably intended to delegate the issue of enforceability of the contract (or any other issue) to an arbitrator," such as by including a delegation clause, "the challenge to the enforceability of the arbitration agreement must be decided by the arbitrator, not by a court." *Id.* at 145. Notably, the Third Circuit does not employ the "preliminary determination" approach taken by the First and Second Circuits. It has, however, suggested a distinction between cases where the nonsignatory is seeking to enforce the delegation clause (e.g., *Zirpoli*, where the arbitrability question was sent to the arbitrator) and cases where the nonsignatory is seeking to stay in court (e.g., *Adler v. Gruma Corp.*, 135 F.4th 55, 79 (3d Cir. 2025), where it concluded that the question whether a nonsignatory could be compelled to arbitrate could not "be delegated to an arbitrator").

The Sixth Circuit has likewise held that "whether a non-signatory may enforce the agreement under state contract law" is a "question of arbitrability" that may be delegated to the arbitrator. *Blanton v. Domino's Pizza Franchising LLC*, 962 F.3d 842, 848 (6th Cir. 2020) (quotation marks and citation omitted). Like the Third Circuit, the Sixth Circuit has

distinguished cases where (as here) the nonsignatory is seeking to *enforce* the arbitration agreement (which it has held raise arbitrability issues delegable to the arbitrator) from cases where the nonsignatory *opposes* enforcement of the arbitration agreement (which it has held raise existence questions the court must decide). *See Blanton*, 962 F.3d at 848 ("This court has treated the non-signatory question differently when the non-signatory *opposes* arbitration …. In that context, our court has said, the question goes to the very 'existence of [a valid arbitration] agreement' and thus the court must itself resolve the question …." (alteration in original; quoting *In re: Auto. Parts Antitrust Litig.*, 951 F.3d 377, 385 (6th Cir. 2020)); *Swiger v. Rosette*, 989 F.3d 501, 507 (6th Cir. 2021) (explaining that "whether [a nonsignatory] can enforce the arbitration agreement against [a signatory] presents a question of arbitrability that [the signatory]'s arbitration agreement delegated to an arbitrator").

The Tenth Circuit has similarly suggested that a nonsignatory question raises "no issue of contract formation, only contract enforcement." *Casa Arena Blanca LLC v. Rainwater by Est. of Green*, 2022 WL 839800, at *5 (10th Cir. Mar. 22, 2022). Such a "gateway issue of arbitrability must be submitted to the arbitrator consistent with the delegation

provisions." *Id.*; *see id.* at *2, 5 (allowing signatory to compel arbitration against nonsignatory).[6]

Finally, the Alabama Supreme Court concurs with characterizing "the question whether an arbitration agreement binds a nonsignatory as a question of arbitrability." *Anderton v. Practice-Monroeville, P.C.*, 164 So.3d 1094, 1101 (Ala. 2014). For that reason, a delegation clause will send nonsignatory issues to the arbitrator: While such "a threshold question of arbitrability [is] usually decided by the court," where "that question has been delegated to the arbitrator," the "arbitrator, not the court, must decide that threshold issue." *Id.* at 1102.

C. The third approach—courts decide nonsignatory issues where the agreement does not clearly and unmistakably apply to nonsignatories

The Ninth Circuit's decision below is joined by the Fourth and Eighth Circuits, as well as the Supreme Court of Texas, in adopting a third approach: These courts have viewed the question of who decides

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[6] Earlier this year the Tenth Circuit issued an unpublished opinion that, without mentioning *Casa Arena Blanca*, reaches the opposite conclusion: In *Munoz v. Conduent State & Local Solutions, Inc.*, 2025 WL 799482, at *7 (10th Cir. Mar. 13, 2025), the Tenth Circuit refused a nonsignatory's attempt to compel arbitration against signatories, holding that the nonsignatory issue was one of contract formation and that "delegation clauses apply only when the court has determined an agreement was formed" between the parties.

nonsignatory issues through the lens of the "clear and unmistakable" standard. In a rather circular fashion, these courts first look to whether the arbitration agreement's delegation clause clearly and unmistakably applies to nonsignatories. If they find that it does not, these courts conclude that there was no delegation of the nonsignatory question—i.e., whether the arbitration agreement applies to nonsignatories—and that the court will therefore decide that question. And having decided the *delegation clause* does not clearly and unmistakably apply to nonsignatories, these courts invariably say the arbitration agreement *as a whole* does not apply either.

The Fourth Circuit, for instance, has held that a delegation clause giving the arbitrator "exclusive authority to resolve any dispute relating to the interpretation, applicability, or enforceability" of the arbitration agreement does *not* authorize the arbitrator to decide nonsignatory issues. *Rogers v. Tug Hill Operating, LLC*, 76 F.4th 279, 283 (4th Cir. 2023). The Fourth Circuit explained that a delegation provision must be "read in the context of the arbitration clause as a whole," and it concluded that the delegation clause *only* delegated "issues—including threshold issues—arising *between*" the signatories to the arbitration agreement. *Id.* at 288. It therefore held that the *court* needed to decide "whether, as a matter of state contract law, [the nonsignatory] was authorized to enforce the arbitration agreement," *id.*, and it ultimately

concluded that the nonsignatory was not so authorized, *id.* at 289–90.

The Eight Circuit has taken the same approach. *See Burnett v. National Ass'n of Realtors*, 75 F.4th 975, 983 (8th Cir. 2023), *cert. denied sub nom. HomeServices of Am., Inc. v. Burnett*, 144 S. Ct. 1347 (2024). In *Burnett*, the Eighth Circuit recognized—per a prior Eighth Circuit decision—that "[w]hether a particular arbitration provision may be used to compel arbitration between a signatory and a *nonsignatory* is a threshold question of arbitrability." *Id.* at 982 (quoting *Eckert/Wordell Architects, Inc. v. FJM Props. of Willmar, LLC*, 756 F.3d 1098, 1100 (8th Cir. 2014)). Nevertheless, it relied on Missouri law to hold that the delegation clause did "not *clearly and unmistakably* delegate to an arbitrator threshold issues of arbitrability between nonparties." *Id.* at 983 (emphasis added; quotation marks and citations omitted).

In *Kramer v. Toyota Motor Corp.*, 705 F.3d 1122 (9th Cir. 2013), the Ninth Circuit similarly suggested that nonsignatory issues are "scope" questions that can be delegated to an arbitrator. *Id.* at 1128 ("[A] disagreement between Plaintiffs and [the nonsignatory defendant] 'is simply not within the scope of the arbitration agreement.'"). Nonetheless, *Kramer* likewise held that a *court* must decide whether a nonsignatory can enforce the arbitration agreement where the delegation provision lacks "clear and unmistakable evidence that [the signatories]

agreed to arbitrate arbitrability with nonsignatories." *Id*. at 1127. The decision below applied *Kramer* to hold that Petitioner (the nonsignatory defendant) could not compel the signatory plaintiffs to arbitrate their claims, concluding that the arbitration agreement's delegation clause (which applies broadly to "[a]ny claim or controversy arising out of the Interface [or] this Agreement") "does not clearly and unmistakably delegate" the question of nonsignatory enforcement to the arbitrator. Pet. App. 2a–3a.

Finally, the Supreme Court of Texas has likewise held that a delegation clause does *not* "show[] clear intent to arbitrate" questions "related to the existence of an arbitration agreement with a non-signatory." *Jody James Farms, JV v. Altman Group, Inc.*, 547 S.W.3d 624, 632 (Tex. 2018). And this holds "[e]ven when the party resisting arbitration is a signatory to an arbitration agreement." *Id.* It has explained that where the arbitration agreement does not "'expressly provide that certain non-signatories are considered parties' or otherwise expressly extend the contract's benefits to third parties," there can be no "clear and unmistakable evidence that [the signatories] agreed to arbitrate arbitrability in disputes with non-signatories." *Id.* at 633 (brackets, quotation marks, citation, and footnote omitted).

III. This Question Frequently Arises, Imposes Considerable Costs on Courts and Litigants, and Undermines the Purpose of the FAA

Nonsignatory issues and the question of who decides them commonly arise in the federal and state trial courts, and are clearly of great importance to litigants.

In an empirical study conducted by *amicus*, out of 1,132 contested motions to compel arbitration decided by state and federal trial courts across the country, approximately a third involved nonsignatory issues. Half of those nonsignatory cases arose in the consumer arbitration context, a quarter arose in the employment arbitration context, and almost a fifth arose in the commercial arbitration context. Moreover, in approximately a third of the nonsignatory cases there was also a delegation provision, raising the question of who ought to decide the nonsignatory issue.[7]

This extensive pre-arbitration litigation over who decides nonsignatory questions frustrates the primary goal of arbitration agreements—to "secure a fair and expeditious resolution of the underlying controversy." *Howsam*, 537 U.S. at 85. As the Court

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[7] The study that produced this data is discussed in Tamar Meshel & Moin A. Yahya, *The Gatekeepers of the Federal Arbitration Act: An Empirical Analysis of the FAA in the Lower Courts*, 94 Miss. L.J. 485 (2025).

has often noted, parties choose arbitration due to its "streamlined proceedings," "expeditious results," and "a desire to keep the effort and expense required to resolve a dispute within manageable bounds." *Mitsubishi*, 473 U.S. at 633. Parties who agree to arbitrate their disputes "'trade[] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'" *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991) (quoting *Mitsubishi*, 473 U.S. at 628).

Uncertainty over who decides nonsignatory questions undermines these benefits of arbitration. It increases the "front-end" transaction costs of negotiating and drafting enforceable delegation and arbitration agreements. Choi & Triantis, *supra,* 119 Yale L.J. at 883. It also increases parties' "judicial enforcement costs," Karen Eggleston, Eric A. Posner & Richard Zeckhauser, *The Design and Interpretation of Contracts: Why Complexity Matters*, 95 Nw. U. L. Rev. 91, 119–21 (2000), by forcing them to devote time and resources litigating preliminary jurisdictional questions, pushing off consideration of the merits. The "uncertain judicial interpretation" of delegation provisions in turn "creates incentives for wasteful game-playing by each party." Choi & Triantis, *supra*, 119 Yale L.J. at 882. These sorts of problems caused by disagreements over preliminary matters are precisely why the Court has long embraced "the rule that jurisdictional rules should be clear." *Direct Mktg. Ass'n v. Brohl*, 575 U.S. 1, 14 (2015) (brackets,

quotation marks, and citation omitted). The same is true here.

Indeed, the need for clarity is especially acute in the arbitration context, because uncertainty over who decides nonsignatory questions undermines the *raison d'être* of the FAA—the enforcement of valid arbitration agreements.

As the Court has repeatedly held, "[t]he preeminent concern of Congress in passing the [FAA] was to enforce private agreements into which parties had entered." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985); *see also*, *e.g., Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 270 (1995) ("[T]he basic purpose of the Federal Arbitration Act is to overcome courts' refusals to enforce agreements to arbitrate."); *Badgerow v. Walters*, 596 U.S. 1, 18 (2022) ("[T]he 'preeminent' purpose of the FAA was to overcome some judges' reluctance to enforce arbitration agreements when a party tried to sue in court instead.").

Accordingly, the FAA requires courts to "rigorously enforce agreements to arbitrate." *Dean Witter*, 470 U.S. at 221. And this requirement extends to agreements to arbitrate arbitrability. *See Suski*, 602 U.S. at 148 ("An agreement to allow an arbitrator to decide whether a dispute is subject to arbitration—*i.e.*, its arbitrability—is simply an additional, antecedent agreement, and the FAA operates on this additional arbitration agreement just as it does on

any other." (ellipsis, quotation marks, and citation omitted).

Yet the confusion over who decides nonsignatory questions—and the inevitable pre-arbitration litigation that this confusion produces—renders the enforcement of arbitration agreements and delegation provisions uncertain and unpredictable. This is a far cry from "Congress's clear intent, in the Arbitration Act, to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22, (1983).

IV. Uncertainty Over This Question Destabilizes the International Arbitration System

Finally, the uncertainty over who decides nonsignatory questions affects international arbitrations, such as the one at issue in this case. Indeed, courts have applied the same divergent approaches to the "who decides" question in international arbitration cases. *See, e.g., Apollo*, 886 F.2d at 470, 473; *Contec*, 398 F.3d at 207, 209–11; *Brittania-U*, 866 F.3d at 711–15; *Nipro Corp. v. Verner*, 2021 WL 8894430, 1–2, *11–14 (S.D. Fla. June 24, 2021); *Republic of Kazakhstan v. Chapman*, 585 F.Supp.3d 597, 599–601, 608–09 (S.D.N.Y. 2022); *Mars, Inc. v. Szarzynski*, 2021 WL 2809539 (D.D.C. July 6, 2021).

There is no global uniform answer to the question of who decides nonsignatory issues. In most major international arbitration jurisdictions, however, clear principles have been developed either by legislation or by the courts. For instance, Canadian courts refer a nonsignatory question to the arbitrator unless it "involves pure questions of law, or questions of mixed fact and law requiring only superficial consideration of the evidentiary record." *Peace River Hydro Partners v. Petrowest Corp.*, 2022 SCC 41, ¶ 42. French courts refer a nonsignatory question to the arbitrator unless the arbitration agreement is "manifestly inapplicable." Laurence Kiffer, *National Report for France (2020 through 2021)*, *in* ICCA International Handbook on Commercial Arbitration, Supplement No. 114, at 34 (Lise Bosman, ed., 2023). German courts conduct "a full review" of nonsignatory questions and do not refer them to arbitration. Stefan M. Kröll, *National Report for Germany (2007 through 2023)*, *in* ICCA International Handbook on Commercial Arbitration, Supplement No. 125, at 20 (Lise Bosman, ed., 2023).

As things currently stand in the United States, in contrast, the answer to this "who decides" question is "very complex" and "produces more challenging and uncertain results, than does the same subject in most other jurisdictions." Gary B. Born, *International Commercial Arbitration*, § 7.03(E) (3rd ed. 2020). The "uncertain results" that parties to international arbitration agreements face in American courts are destabilizing to the international arbitration system.

The Court should resolve this uncertainty and thereby facilitate the effective functioning of the international arbitration system.

The Court has held that "the emphatic federal policy in favor of arbitral dispute resolution … applies with special force in the field of international commerce." *Mitsubishi*, 473 U.S. at 631. That is because "agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting." *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 13–14 (1972); *see also Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516–17 (1974) (quoting *Bremen*). Courts must therefore be sensitive to "the need of the international commercial system for predictability in the resolution of disputes." *Mitsubishi*, 473 U.S. at 629.

Yet, unlike other jurisdictions, American courts are unable to provide predictability to parties to international arbitration agreements. Who decides nonsignatory questions in American courts depends on the particular federal or state court in which a party happens to commence litigation. As the Court cautioned 50 years ago, this state of affairs "invite[s] unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantage," which in turn "damage[s] the fabric of international commerce and trade, and imperil[s] the willingness and ability of businessmen to enter into international commercial agreements." *Scherk*, 417 U.S. at 516–17.

CONCLUSION

The question of who decides nonsignatory issues is a matter of great practical importance in the enforcement of domestic and international arbitration agreements. This question arises frequently in pre-arbitration litigation, is not resolved by the Court's precedents, and has produced juridical chaos in the lower courts. The resulting uncertainty undermines the FAA's purpose and destabilizes the international arbitration system. For these reasons, the Court should grant the petition for a writ of certiorari.

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