No. 15-316

IN THE

Supreme Court of the United States

SCHUMACHER HOMES OF CIRCLEVILLE, INC.,

Petitioner,

v.

JOHN SPENCER AND CAROLYN SPENCER,

Respondents.

On Petition for a Writ of Certiorari
to the Supreme Court of Appeals
of West Virginia

BRIEF IN OPPOSITION

Randall L. Trautwein
Counsel of Record
Michael L. Powell
LAMP BARTRAM LEVY
TRAUTWEIN & PERRY, PLLC
720 Fourth Avenue
P.O. Box 2488
Huntington, WV 25725-2448
(304) 523-5400
rtrautwein@lbltplaw.com

QUESTION PRESENTED

Respondents contended in state court that the arbitration agreement here is unconscionable and thus unenforceable. Petitioner responded that a provision in the agreement stating that "[t]he arbitrator(s) shall determine all issues regarding the arbitrability of the dispute" delegates that enforceability issue to an arbitrator. Faced with this response, the West Virginia Supreme Court of Appeals recognized that, under *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010), "where a delegation provision in a written arbitration agreement gives to an arbitrator the authority to determine whether the arbitration agreement is valid, irrevocable, or enforceable under general principles of state contract law, a trial court is precluded from deciding a party's state contract law challenge to an arbitration agreement" absent a challenge "specifically" to "the delegation provision itself." Pet. App. 17a. But the court held that the provision in question does *not* delegate questions of enforceability to an arbitrator. The court reasoned that the provision's text "does not" – as this Court's precedent requires – "'clearly and unmistakably' confer authority to the arbitrator to decide" such questions. *Id.* 24a (quoting *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)).

The question presented here, therefore, has nothing to do with the rule of *Rent-A-Center*. The question is whether the alleged delegation provision here speaks with the "clear and unmistakable" language necessary to delegate questions of enforceability to an arbitrator.

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STATEMENT OF THE CASE

In 2011, respondents John and Carolyn Spencer signed a form contract with petitioner Schumacher Homes of Circleville, Inc. (Schumacher) for the construction of a new home. Pet. App. 6a-7a. In the contract, Schumacher reserved the right to litigate in court any claim for a mechanic's lien, MTD 2, the "most effective action" for a contractor when a homeowner fails to pay, Pet. App. 48a. At the same time, the contract stated that "any claim, dispute or cause of action" that the Spencers might bring shall, to the extent allowed by law, "be subject to final and binding arbitration by an arbitrator appointed by the American Arbitration Association." MTD 2. The arbitration clause further stated that "[t]he arbitrator(s) shall determine all issues regarding the arbitrability of [any such] dispute." *Id.*

After Schumacher failed to correct numerous construction defects – which prevented the Spencers from moving into their house – the Spencers sued Schumacher in West Virginia circuit court. Compl. ¶¶ VI-VII.

Schumacher moved under the Federal Arbitration Act (FAA) to dismiss or compel arbitration. The Spencers opposed the motion, arguing that the arbitration provision was unenforceable. Specifically, they argued that the provision was unconscionable because it compelled arbitration for all of the Spencers' claims while permitting litigation for Schumacher's only realistic action, the mechanic's lien. Pls. Resp. MTD 8-10. Six months then passed between that filing and oral argument on the motion. Pet. App. 7a.

At oral argument, Schumacher contended for the first time that the circuit court could not rule on the Spencers' unconscionability argument because the contractual clause delegating "all issues regarding the arbitrability of the dispute" delegated questions of enforceability to an arbitrator. Pet. App. 24a-25a. The circuit court ignored Schumacher's new argument and found the entire arbitration agreement procedurally and substantively unconscionable. Accordingly, the court denied the motion to compel arbitration. *Id.* 8a.

Schumacher filed an interlocutory appeal in the West Virginia Supreme Court of Appeals, arguing that the circuit court should have sent the question of unconscionability to the arbitrator because of the alleged delegation provision and that the circuit court's unconscionability analysis was flawed. Pet. App. 9a, 27a n.13.

The court affirmed. The court criticized Schumacher for failing to raise the alleged delegation provision until oral argument, noting that "[i]n somewhat similar cases, parties have been found to have waived, abandoned, or failed to establish a right to enforcement of an arbitration clause." Pet. App. 24a-25a, 25a n.12. But "[e]ven assuming [the alleged delegation provision] was properly raised to the circuit court," the West Virginia Supreme Court of Appeals determined that both this Court's FAA precedent and West Virginia contract law supported the circuit court's holding. *Id.* 27a-28a.

The court explained that parties may use a "delegation provision" to delegate to an arbitrator questions such as whether an arbitration agreement is enforceable or whether a substantive dispute falls

within the scope of an arbitration agreement. Pet. App. 15a, 20a-21a. The court also detailed this Court's holding in *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010). In *Rent-A-Center*, the Court held that if a delegation provision exists, it is severable; that is, "a party must specifically object to the delegation provision" apart from the arbitration agreement. Pet. App. 17a. The West Virginia Supreme Court of Appeals therefore recognized that if an arbitration agreement delegates a certain gateway question to an arbitrator, "the trial court may only consider a challenge that is directed at the validity, revocability or enforceability of the *delegation provision itself*." *Id.* (emphasis added).

However, the West Virginia Supreme Court of Appeals explained that there is a "prerequisite" to applying *Rent-A-Center*, Pet. App. 24a. If parties desire to delegate gateway questions, there must be "'clea[r] and unmistakabl[e]' evidence that they did so." *Id.* 20a (alteration in original) (quoting *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)).

The West Virginia Supreme Court of Appeals held that the provision here assigning "issues regarding the arbitrability of the dispute" to an arbitrator did not clearly and unmistakably delegate questions of enforceability. Pet. App. 23a-24a. That being so, the Spencers had no duty to specifically challenge the alleged delegation provision. The Spencers were entitled to challenge the enforceability of the arbitration agreement as a whole. *Id.*

Turning to that challenge, the West Virginia Supreme Court of Appeals agreed with the circuit court that the arbitration agreement was

unconscionable. Pet. App. 28a. This holding allows the case to proceed on the merits in circuit court.

Two justices dissented. Pet. App. 29a. They asserted, without citing any cases, that Schumacher adequately preserved its ability to rely on the delegation provision. *Id.* 34a. They also claimed that the contract's delegation of disputes concerning "arbitrability" to the arbitrator clearly and unmistakably delegated issues of enforceability and validity. *Id.* 35a. Finally, the dissent maintained in a footnote that it would not have found the arbitration agreement unconscionable. *Id.* 30a n.2.

REASONS FOR DENYING THE WRIT

Petitioner asserts that the West Virginia Supreme Court of Appeals' decision "cries out" for this Court's intervention. Pet. 20. But petitioner cries wolf. First of all, this Court lacks jurisdiction to take up the state court's non-final judgment. Even if jurisdiction existed, there would be no basis for review. The West Virginia court's decision is consistent with this Court's precedent. It does not conflict with the precedent from any other state court of last resort or any federal court of appeals. And the petition does not raise any significant issue beyond this case. Even if it did, this case would be a poor vehicle for revisiting this Court's arbitration jurisprudence.

I. This Court Lacks Jurisdiction To Review The West Virginia Supreme Court Of Appeals' Non-Final Judgment.

Petitioner alleges, without elaboration, that this Court has jurisdiction under 28 U.S.C. § 1257(a). *See* Pet. 1. But that provision provides jurisdiction over

only "[f]inal judgments" rendered by state courts of last resort. The West Virginia Supreme Court of Appeals' decision does not satisfy the plain terms of this statutory requirement because it remands for further proceedings on the merits in the state circuit court. *See* Pet. App. 8a, 28a.

Nor does this case fit within any of the four judicially created exceptions to the finality requirement under Section 1257(a). *See Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 477-83 (1975). The first three could not plausibly apply here. *See id.* at 477-82. Under the fourth *Cox Broadcasting* exception, this Court may review an interlocutory state-court judgment where all three prerequisites are satisfied:

(1) "[T]he federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court";
(2) "[R]eversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come"; and
(3) "[A] refusal immediately to review the state court might seriously erode federal policy."

Id. at 482-83.

This case does not satisfy either the second or the third prerequisite.

1. *Not preclusive of further litigation.* Far from "preclud[ing] further litigation on the relevant cause of action," *Cox Broad.*, 420 U.S. at 482-83, a reversal from this Court would only spawn additional state-court proceedings in this case. This is so for two independent reasons.

First, a reversal from this Court would not send this case to arbitration. Instead, as the West Virginia Supreme Court of Appeals signaled, *see* Pet. App. 24a n.12, the parties would still need to litigate whether petitioner forfeited its right to enforce the alleged delegation provision. (For the reasons explained below, respondents would likely prevail on this point. *See infra* at 21-22.) The prospect of these additional proceedings alone precludes finality here.

Second, even if petitioner ultimately succeeded in having an arbitrator determine whether the arbitration agreement is enforceable, that would still not "be preclusive of any further litigation on the relevant cause of action," *Cox Broad.*, 420 U.S. at 482-83.

An arbitrator would apply the same state law as the circuit court to determine whether the arbitration agreement is unconscionable. Like the circuit court, the arbitrator could (and probably would) hold that the arbitration agreement is substantively and procedurally unconscionable under West Virginia law.[1] The contract requires respondents to arbitrate

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[1] In earlier proceedings, petitioner argued that Ohio law, not West Virginia law, should apply to this issue. But the West Virginia Supreme Court of Appeals found "no error in applying West Virginia's substantive contract law" because Schumacher

all of their claims, while allowing petitioner to litigate a mechanic's lien, the only issue it would "[r]ealistically" raise. Pet. App. 48a. This lack of mutuality makes the agreement substantively unconscionable. *Id.* 48a-49a. In addition, this contract of adhesion is procedurally unconscionable because it was presented to a less sophisticated party, without representation, on a take-it-or-leave-it basis. Pls. Br. to W. Va. S. Ct. App. 10-11.

If the arbitrator held the agreement unconscionable, that would send the case back to the circuit court for further litigation on respondents' cause of action. The prospect of those further proceedings further defeats finality.

2. *No serious erosion of federal policy*. A state-court judgment that, as here, merely applies a settled federal standard to the specific facts of a case does not threaten to "seriously erode federal policy." For example, in *Johnson v. California*, 541 U.S. 428 (2004) (per curiam), the defendant challenged the California Supreme Court's application of *Batson v. Kentucky*, 476 U.S. 79 (1986), to his case. The Court

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"concede[d] in its brief that 'defenses to contracts are similar in Ohio as in West Virginia.'" Pet. App. 27a n.13.

The dissent below maintained that it matters whether Ohio law applies because Ohio has a statute prohibiting arbitration of claims involving the title to or possession of real estate, necessitating the carve-out of the mechanic's lien. Pet. App. 30a-31a n.2; Def. Reply to W. Va. S. Ct. App. 10. But the dissent overlooked that this statute would be preempted by Section 2 of the FAA because it "is applicable *only* to arbitration." *Gustavus, LLC v. Eagle Invs.*, No. 24899, 2012 WL 1079888, at *4 (Ohio Ct. App. Mar. 30, 2012).

held that it lacked jurisdiction to review the claim because there was no "erosion of federal policy that is not common to all decisions rejecting a defendant's *Batson* claim." *Id.* at 430; *see also Florida v. Thomas*, 532 U.S. 774, 780 (2001) (state-court decision applying the Fourth Amendment was not final because "the State can make no claim of serious erosion of federal policy that is not common to all run-of-the-mine decisions suppressing evidence in criminal trials").

Petitioner may reply that in *Southland Corp. v. Keating*, 465 U.S. 1 (1984), the Court treated as "final" an interlocutory decision from the California Supreme Court refusing to compel arbitration. *Id.* at 6. But that state-court decision rested on a state law that "nullif[ied]" any arbitration agreement when a party asserted a claim under the state law, thus potentially precluding the FAA's application to any franchise agreement in California. *Id.* at 5, 7.

Unlike the California Supreme Court in *Southland*, the West Virginia Supreme Court of Appeals did not announce a blanket rule barring arbitration for an entire category of claims. The court here simply determined that particular language in a single private contract did not satisfy the Court's "clear and unmistakable" standard set forth in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995). In the future, parties contracting in West Virginia can easily replace the language in this contract with more specific language to clearly and unmistakably delegate issues of

enforcement. *See infra* at 17-18. Even if such a fact-bound holding were incorrect, it could not be said to "seriously" erode federal policy.[2]

II. The Decision Of The West Virginia Supreme Court Of Appeals Faithfully Applies This Court's Precedent.

1. Petitioner claims that the West Virginia Supreme Court of Appeals' decision "squarely conflicts" with this Court's holding in *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010), that the party challenging the validity of a delegation provision must specifically challenge that provision apart from the arbitration agreement as a whole. Pet. 2.

But the decision is consistent with *Rent-A-Center*. There, the parties stipulated that a clause expressly delegating questions of "interpretation, applicability, *enforceability* or formation" to the arbitrator, 561 U.S. at 66 (emphasis added), covered the enforceability question at issue, *id.* at 69 n.1.

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[2] Earlier this term, this Court reviewed another interlocutory decision from a state court refusing to compel arbitration. *See DIRECTV v. Imburgia*, 136 S. Ct. ___, 2015 WL 8546242 (Dec. 14, 2015). But there, the parties did not brief, and this Court did not mention, any jurisdictional issue, so the case has "no precedential effect" on that score. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998). At any rate, the contract in that case, like *Southland*, triggered a state-law rule banning arbitration in a certain category of cases (would-be class actions) that "st[ood] as an obstacle to the accomplishment and execution" of the FAA. *DIRECTV*, 2015 WL 8546242, at *3 (quotation marks and citation omitted). No categorical state law or rule is at issue here.

Thus, this Court's holding was premised on the existence of a clearly and unmistakably applicable delegation clause. *See id.* at 69 n.1, 71-72. The issue in this case, by contrast, is *whether* the arbitration agreement includes a clear and unmistakable delegation of the issue of enforceability. That question turns on applying the rule of *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), not on *Rent-A-Center*.

2. In *First Options*, this Court held that a contractual provision does not delegate a gateway issue to an arbitrator unless it contains "clea[r] and unmistakabl[e]" language to that effect. 514 U.S. at 944 (alterations in original); *see also Rent-A-Center*, 561 U.S. at 69 n.1 (recognizing this rule). Petitioner does not dispute that the clear and unmistakable standard applies in this case. Rather, petitioner argues that the West Virginia Supreme Court of Appeals erred in holding that the provision at issue does not "clearly and unmistakably delegate[] to the arbitrator the authority to decide challenges to the validity or enforceability of the parties' arbitration agreement as a whole." Pet. 21.

Petitioner is incorrect. The contractual reference here to "the arbitrability of [a] dispute" does not clearly and unmistakably encompass disagreements concerning the enforceability of the arbitration agreement.

a. The term "arbitrability" does not clearly and unmistakably refer to whether an arbitration agreement is enforceable. Arbitrability generally means "whether the parties have agreed to arbitrate the merits of a dispute," Pet App. 20a – in other

words, whether a substantive dispute falls within the *scope* of the arbitration agreement.

For example, *AT & T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643 (1986), defined the question of arbitrability as one of scope – namely, "whether a collective-bargaining agreement creates a duty for the parties to arbitrate a *particular* grievance," *id.* at 649 (emphasis added); *see also First Options*, 514 U.S. at 944-46. Likewise in *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002), the Court noted that a "question of arbitrability" is "a disagreement about whether an arbitration clause in a concededly binding contract applies to a particular type of controversy." *Id.* at 84.

In addition, petitioner has used the term "arbitrability" in this very action to refer to scope. In its motion to compel arbitration, petitioner discussed "arbitrability" under the heading "[t]he Arbitration Agreement purports to cover the dispute." MTD 5-6. In that section, petitioner argued that the arbitration clause was "broad," with a citation to *Oldroyd v. Elmira Savings Bank, FSB*, 134 F.3d 72, 76 (2d Cir. 1998), *abrogated on other grounds by Katz v. Cellco P'ship*, 794 F.3d 341 (2d Cir. 2015). MTD 5-6. *Oldroyd* held that the plaintiff's claim of retaliatory discharge must be sent to an arbitrator – a question of scope. 134 F.3d at 76-77. Petitioner then concluded by stating that "[t]he allegations in the Complaint fall within the scope of the arbitration agreement." MTD 6.

The leading arbitration association also uses the term "arbitrability" to delegate only questions of scope. The American Arbitration Association's *Consumer Arbitration Rules*, which are often

incorporated into contracts, designate that the arbitrator "shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim." Am. Arbitration Ass'n, *Consumer Arbitration Rules* 17 (2014). Whether a claim or counterclaim is "arbitrabl[e]" can only refer to whether the claim or counterclaim falls within the substantive scope of the agreement.

Questions of *scope* are different from questions of *enforceability*. And the term "arbitrability" is sometimes used to refer to questions of enforceability – for example, whether the agreement is unconscionable. But contrary to petitioner's argument, the word "arbitrability" alone in these situations does not unambiguously signal that the delegation provision covers issues of enforceability. For instance, in *Rent-A-Center*, this Court characterized a provision as delegating "'gateway' questions of 'arbitrability,'" 561 U.S. at 68-69, but the provision made clear that it covered "any dispute relating to the interpretation, applicability, *enforceability* or formation of this Agreement," *id.* at 66 (emphasis added). Similarly, JAMS, another major arbitration association, uses the term "arbitrability" to cover questions of enforceability. JAMS, *Comprehensive Arbitration Rules & Procedures* 14 (2014). But JAMS's Rule clarifies that "arbitrability" includes questions about "the

formation, existence, *validity*, interpretation or scope of the agreement." *Id.* (emphasis added).[3]

The provision here, by contrast, contains no reference to enforceability. Accordingly, as numerous courts have recognized in the face of similar language, the meaning of the word "arbitrability" is at best ambiguous. *See, e.g.*, *GGIS Ins. Servs., Inc. v. Lincoln Gen. Ins. Co.*, 773 F. Supp. 2d 490, 504 (M.D. Pa. 2011); *Anderton v. Practice-Monroeville, P.C.*, 164 So. 3d 1094, 1104 n.4 (Ala. 2014) (Murdock, J., dissenting); *Bruni v. Didion*, 73 Cal. Rptr. 3d 395, 407 (Ct. App. 2008); George A. Bermann, *The "Gateway" Problem in International Commercial Arbitration*, 37 Yale J. Int'l L. 1, 10-13 (2012); Stephen H. Reisberg, *The Rules Governing Who Decides Jurisdictional Issues:* First Options v. Kaplan *Revisited*, 20 Am. Rev. Int'l Arb. 159, 159-60 (2009). The word may well cover questions of scope, but it is unclear whether it also covers questions of enforceability.

b. What is more, the word "arbitrability" does not stand alone in the provision at issue here. Instead, the term modifies the word "dispute." This usage further indicates that, in this particular contract,

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[3] The *Howsam* Court provided another example of "questions of arbitrability": "[W]hether the parties are bound by a given arbitration clause." 537 U.S. at 84. While petitioner suggests that this example refers to enforceability, *see* Pet. 18 & n.6, this language actually refers to whether a non-signatory is bound by an arbitration agreement. *Howsam*, 537 U.S. at 84 (citing *First Options*, 514 U.S. at 943-46).

"arbitrability" refers only to scope, not to enforceability.

"Dispute" ordinarily refers to the underlying "conflict or controversy" that "has given rise" to a lawsuit. *Dispute*, Black's Law Dictionary (10th ed. 2014). And Schumacher used the word "dispute" elsewhere in the arbitration clause to mean exactly that. The clause states that "any claim, *dispute* or cause of action" will be sent to the arbitrator. MTD 2 (emphasis added). "Claim" and "cause of action" both involve a request for substantive relief. *See Cause of action*, Black's Law Dictionary (10th ed. 2014); *Claim*, Black's Law Dictionary (10th ed. 2014). Under the "associated-words canon," the word "dispute" must mean something similar to "claim" and "cause of action." *See Murray v. State Farm Fire & Cas. Ins. Co.*, 509 S.E.2d 1, 9 (W. Va. 1998); Antonin Scalia & Bryan A. Garner, *Reading Law* 195-98 (2012). That is, "dispute" should be read in both places in this contract to refer to a substantive controversy, such as whether petitioner breached its warranties. As such, the language "the arbitrability of the dispute" appears to contemplate issues of scope, but not enforceability.

III. Petitioner's Split Is Illusory.

Petitioner contends that "[n]umerous" decisions of lower courts conflict with the decision of the West Virginia Supreme Court of Appeals. Pet. 21. But most of the cases cited are federal district court cases,

which cannot establish a split.[4] Petitioner also cites cases from the Fourth and Fifth Circuits. But those cases contain, at most, dicta; none concerns a contract that uses the term "arbitrability." *See Hous. Ref., L.P. v. United Steel, Paper & Forestry, Rubber, Mfg.*, 765 F.3d 396 (5th Cir. 2014); *Peabody Holding Co. v. United Mine Workers of Am.*, 665 F.3d 96 (4th Cir. 2012); *Carson v. Giant Food, Inc.*, 175 F.3d 325 (4th Cir. 1999). Moreover, these courts suggest only that the term "arbitrability" would clearly and unmistakably delegate questions of *scope*, not enforceability. *See Hous. Ref.*, 765 F.3d at 412; *Peabody Holding*, 665 F.3d at 102; *Carson*, 175 F.3d at 330-31.

This leaves petitioner with its reliance on *Sadler v. Green Tree Servicing, Inc.*, 466 F.3d 623 (8th Cir. 2006). There, the Eighth Circuit held that a provision stating that "[a]ny controversy concerning whether an issue is arbitrable shall be determined by the arbitrator(s)" constituted a delegation of enforceability. *Id.* at 624-25. But for two

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[4] In any event, five of these cases hold that the use of the word "arbitrability" merely clearly and unmistakably delegates questions of scope; the cases do not address enforceability. *See Considine v. Brookdale Senior Living, Inc.*, ___ F. Supp. 3d ___, No. 3:14-cv-1601(VAB), 2015 WL 4999897, at *5 (D. Conn. Aug. 21, 2015); *Int'l Union v. Dall. Airmotive, Inc.*, No. 3:14-CV-5035-MDH, 2015 WL 196300, at *5 (W.D. Mo. Jan. 15, 2015); *Swinerton Builders v. Am. Home Assurance Co.*, No. C-12-6047 EMC, 2013 WL 2237885, at *6 (N.D. Cal. May 21, 2013); *Nat'l Union Fire Ins. Co. of Pittsburgh v. Las Vegas Prof'l Ltd. P'ship*, No. 09 Civ. 7490(PKC), 2009 WL 4059174, at *4-5 (S.D.N.Y. Nov. 17, 2009).

independent reasons, *Sadler* does not establish a split either.

First, the term modified by "arbitrable" in *Sadler* is "issue," which is broader than the term "dispute" in the contract here. The legal term "issue" typically refers to any contested point, *see Issue*, Black's Law Dictionary (10th ed. 2014), which can include defenses concerning validity or enforceability in addition to substantive claims for relief. By contrast, the term "dispute" as used in the contract here refers only to substantive claims for relief. *See supra* at 13-14. Therefore, *Sadler* does not establish that the Eighth Circuit would have come to a different conclusion from the West Virginia Supreme Court of Appeals regarding this contract.

Second, this Court has held that the "interpretation of private contracts" – including arbitration clauses – "is ordinarily a matter of state law." *Volt Info. Scis. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 474 (1989). Whenever multiple jurisdictions interpret an imprecise, legalistic term, applying different bodies of state law, they may interpret it in inconsistent ways. For example, in *New Castle County v. Hartford Accident & Indemnity Co.*, 933 F.2d 1162 (3d Cir. 1991), the Third Circuit collected almost fifty cases from myriad jurisdictions construing the phrase "sudden and accidental" in an insurance contract. *Id.* at 1195-96, 1195 nn.60-61. The court then guessed how the Delaware Supreme Court would define the phrase. *Id.* at 1196-99. Four months later, then-Judge Alito, writing for a different panel of the Third Circuit, adopted a contrary interpretation of that same phrase when predicting how the Pennsylvania

Supreme Court would construe it. *See N. Ins. Co. of N.Y. v. Aardvark Assocs., Inc.*, 942 F.2d 189, 191-94 (3d Cir. 1991).

These kinds of anomalies are expected consequences of state-law contract interpretation in our federal system. They do not create circuit splits.

IV. The Petition Does Not Raise An Important Question.

Even if there were tension between the West Virginia Supreme Court of Appeals' decision and the Eighth Circuit's decision in *Sadler*, that tension would not warrant this Court's attention.

1. The West Virginia Supreme Court of Appeals' holding that the specific contract language here does not satisfy the "clear and unmistakable" test will have little effect on other parties.

Petitioner cites no other cases indicating that other contracting parties use the phrase "arbitrability of the dispute" to attempt to delegate questions to arbitrators. Instead, recent cases indicate that when parties wish to delegate questions of enforceability to an arbitrator, they expressly do so – delegating, for example, "any issue concerning the validity, enforceability, or scope of this loan or the Arbitration agreement." *Parnell v. CashCall, Inc.*, 804 F.3d 1142, 1147-48 (11th Cir. 2015); *see also, e.g.*, *Milan Exp. Co. v. Applied Underwriters Captive Risk Assurance Co.*, 590 Fed. Appx. 482, 484-86 (6th Cir. 2014) (sending questions on "the execution and delivery, construction or enforceability of this Agreement" to an arbitrator).

The use of these phrases is unsurprising because contracting parties have examples of language that

clearly and unmistakably delegate questions of enforceability. In *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010), the contract delegated issues "relating to the interpretation, applicability, enforceability or formation" of the agreement to an arbitrator. *Id.* at 66. Similarly, in *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006), the clause delegated "[a]ny claim, dispute, or controversy . . . arising from or relating to [the] Agreement . . . or the validity, enforceability, or scope" of the arbitration agreement. *Id.* at 442 (ellipses in original).

JAMS also provides model language for contracting parties to use to create a delegation clause that covers enforceability. The suggested clause reads: "Any dispute, claim or controversy arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity therefor, including the determination of the scope or applicability of this agreement to arbitrate, shall be determined by arbitration." JAMS, *JAMS Clause Workbook* 2 (2015).

If a company wants to be sure to delegate questions of enforceability in the future, all it has to do is use language along these lines.

2. Petitioner does not address, much less dispute, any of this. Instead, it suggests this case is more important than the ordinary decision applying a settled rule to specific facts because the West Virginia Supreme Court of Appeals voiced "disdain for this Court's interpretations of the FAA." Pet. 19.

But "this Court reviews judgments, not opinions." *Chevron, U.S.A. Inc. v. Nat. Res. Def.*

Council, Inc., 467 U.S. 837, 842 (1984). All that matters is whether the lower court correctly applied established legal principles to the facts. As explained above, *supra* at 9-14, the West Virginia Supreme Court of Appeals did so.

In any event, petitioner's insinuation that the West Virginia Supreme Court of Appeals is hostile to arbitration is misguided and inaccurate. That court does indeed enforce arbitration agreements. Just last month, it held several challenged arbitration agreements to be valid. *Chesapeake Appalachia, L.L.C. v. Hickman*, ___ S.E.2d ___, 2015 W. Va. LEXIS 1119, at *45, *60-63, *65-66 (W. Va. Nov. 18, 2015). Furthermore, in *State ex rel. Ocwen Loan Servicing v. Webster*, 752 S.E.2d 372 (W. Va. 2013) (per curiam), the court granted the "extraordinary remedy of a writ of prohibition" in order to compel arbitration. *Id.* at 378-79. And, in *State ex rel Johnson Controls, Inc. v. Tucker*, 729 S.E.2d 808 (W. Va. 2012), the court reversed the circuit court's holding that the arbitration clauses at issue were unconscionable. *Id.* at 820-822; *see also New v. Gamestop, Inc.*, 753 S.E.2d 62 (W. Va. 2013) (upholding arbitration agreement against employee's claims of invalidity and unconscionability).

The West Virginia Supreme Court of Appeals, in short, is hardly engaged in any concerted effort "to circumvent this Court's [FAA] precedents," Pet. 13.

V. This Case Would Be A Poor Vehicle To Consider How The "Clear And Unmistakable" Standard Applies To Particular Contract Language Using The Term "Arbitrability."

Even if this Court thought it would be worthwhile to apply the "clear and unmistakable" standard to an alleged delegation provision in a single contract between two private parties, this case would be a poor vehicle for doing so.

1. As a prerequisite to reaching any of petitioner's arguments, the Court would have to reaffirm, over respondents' objection, this Court's holding in *Southland Corp. v. Keating*, 465 U.S. 1 (1984), that the FAA applies in state courts.

While the FAA was initially applied only in federal court, *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 286 (1995) (Thomas, J., dissenting), this Court held in *Southland* that the Act can also be invoked in state court to compel arbitration. *Southland*, 465 U.S. at 16. However, several Justices have objected to *Southland* and the application of the FAA to cases such as this one. *See id.* at 21-36 (O'Connor, J., joined by Rehnquist, J., dissenting); *Allied-Bruce*, 513 U.S. at 284-85 (Scalia, J., dissenting); *id.* at 285-97 (Thomas, J., dissenting). Justice Thomas has continually refused to apply the FAA in this context. *See DIRECTV v. Imburgia*, ___ S. Ct. ___, 2015 WL 8546242, at *9 (Dec. 14, 2015); *Preston v. Ferrer*, 552 U.S. 346, 363 (2008) (Thomas, J., dissenting); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449 (2006) (Thomas, J., dissenting); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 460 (2003) (Thomas, J., dissenting); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 689 (1996)

(Thomas, J., dissenting). Respondents maintain that Justice Thomas's view is correct and applies here.

2. If this Court reverses the West Virginia Supreme Court of Appeals' application of the *First Options* standard, this case would still not go to arbitration. As strongly suggested by the state-court decision, petitioner waived its right to enforce the alleged delegation provision by failing to raise the issue until oral argument on its motion to compel arbitration. Pet. App. 24a-25a, 25a n.12.

Because a delegation provision is effectively a separate contract from the arbitration agreement, *see Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 70 (2010), it follows that it is not enough simply to raise the arbitration agreement. A party seeking to enforce an alleged delegation provision must raise that specific provision in a timely manner. For example, in *Entrekin v. Internal Medicine Associates of Dothan P.A.*, 689 F.3d 1248 (11th Cir. 2012), the defendant invoked the delegation provision for the first time on appeal. *Id.* at 1252. The Eleventh Circuit held that this was "too late" because the defendant "never asked the district court to rule that an arbitrator should decide arbitrability." *Id.* Similarly, in *Mercadante v. Xe Services, LLC*, 864F. Supp. 2d 54 (D.D.C. 2012), the defendant did "not even mention the delegation agreement, let alone seek its enforcement" in its opening motion to compel arbitration, waiting instead until its reply brief to do so. *Id.* at 56-57. The court denied the motion because the undue delay "deprived [p]laintiffs of an opportunity to render a meaningful response." *Id.* at 57.

Under West Virginia waiver law, a party waives a claim by failing to raise it "at the appropriate time" in the circuit court. *State ex rel. Cooper v. Caperton*, 470 S.E.2d 162, 170 (W. Va. 1996). West Virginia applies this general rule in the context of arbitration contracts. *See Chesapeake Appalachia, L.L.C. v. Hickman*, ___ S.E.2d ___, 2015 W. Va. LEXIS 1119, at *40 (W. Va. Nov. 18, 2015). But in its motion to compel arbitration, petitioner failed to raise the alleged delegation provision and instead asked the *trial court* to "review and resolve questions of arbitrability." Mem. Law MTD 8. Like the plaintiffs in *Mercadante*, respondents "were never put on notice that[] in their opposition to the motion to compel" – or in their preparation for oral argument – "they might need to address the enforceability of the delegation provision." Pet. App. 25a.

Petitioner asserts that "there was simply no reason" to raise the delegation provision "before respondents challenged the enforceability of the arbitration agreement." Pet. 9 n.4 (quoting Pet. App. 34a (Loughry, J., dissenting)). But the reason is obvious: failure to do so waives the right. Thus, petitioner has forfeited the right to invoke the provision. And upon a finding of waiver, the West Virginia Supreme Court of Appeals would remand to the circuit court to decide the merits – exactly where the case is now.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Randall L. Trautwein
Counsel of Record
Michael L. Powell
LAMP BARTRAM LEVY
TRAUTWEIN & PERRY, PLLC
720 Fourth Avenue
P.O. Box 2488
Huntington, WV 25725-2448
(304) 523-5400
rtrautwein@lbltplaw.com

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