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

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

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The Chamber of Commerce of the United States of America (the "Chamber") hereby moves, pursuant to Supreme Court Rule 37.2, for leave to file a brief *amicus curiae* in support of the petition for writ of *certiorari* to the Supreme Court of Appeals of West Virginia. The Chamber is filing this motion because Respondents declined to consent to the Chamber's filing of its brief.[1] A copy of the proposed brief is attached.

As explained more fully on pages 1 and 2 of the attached brief under "Interest of *Amicus Curiae*," the Chamber is the world's largest federation of businesses and associations. The Chamber represents three hundred thousand direct members and indirectly represents an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every economic sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch.

Many of the Chamber's members regularly employ arbitration agreements in their contracts. Arbitration allows them to resolve disputes promptly and efficiently while avoiding the costs associated with traditional litigation. Arbitration is speedy, fair, inexpensive, and less adversarial than litigation in court. Based on the legislative policies reflected in the Federal Arbitration Act ("FAA") and this Court's consistent endorsement of arbitration, the Chamber's members have structured millions of contractual relationships around arbitration agreements.

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1. The Chamber requested consent from Respondents on October 5, 2015. Respondents declined to consent on October 14, 2015.

The Chamber thus has a strong interest in the faithful and consistent application of this Court's FAA jurisprudence, in particular, the mandate requiring arbitration agreements to be "enforced according to their terms." *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989). And because "[s]tate courts rather than federal courts are most frequently called upon to apply the [FAA]," *Nitro-Lift Techs., LLC v. Howard*, 133 S. Ct. 500, 501 (2012) (per curiam), the Chamber has a strong interest in ensuring the state courts' uniform, consistent, and accurate application of the FAA as interpreted by this Court.

Accordingly, the Chamber respectfully requests that the Court grant leave to file the attached brief as *amicus curiae*.

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest federation of businesses and associations. The Chamber represents three hundred thousand direct members and indirectly represents an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every economic sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch.

To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the Nation's business community, including cases involving the enforceability of arbitration agreements. *See, e.g.*, *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013); *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

Many of the Chamber's members regularly employ arbitration agreements in their contracts. Arbitration allows them to resolve disputes promptly and efficiently while avoiding the costs associated with traditional litigation. Arbitration is speedy, fair, inexpensive, and

1. Pursuant to this Court's Rule 37.6, counsel for *amicus curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus curiae*, its members, or its counsel has made a monetary contribution intended to fund the preparation or submission of this brief. Petitioner has consented to the filing of this brief, but Respondents have withheld their consent.

less adversarial than litigation in court. Based on the legislative policies reflected in the Federal Arbitration Act ("FAA") and this Court's consistent endorsement of arbitration, the Chamber's members have structured millions of contractual relationships around arbitration agreements.

The Chamber thus has a strong interest in the faithful and consistent application of this Court's FAA jurisprudence, in particular, the mandate requiring arbitration agreements to be "enforced according to their terms," *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989), including provisions that delegate gateway issues of arbitrability to the arbitrator, *AT&T Techs, Inc. v. Communications Workers of Am.*, 475 U.S. 643, 649 (1986). And because "[s]tate courts rather than federal courts are most frequently called upon to apply the [FAA]," *Nitro-Lift Techs., LLC v. Howard*, 133 S. Ct. 500, 501 (2012) (per curiam), the Chamber has a strong interest in ensuring the state courts' uniform, consistent, and accurate application of the FAA as interpreted by this Court.

SUMMARY OF ARGUMENT

This Court recently admonished the West Virginia Supreme Court of Appeals for "misreading and disregarding the precedents of this Court interpreting the FAA." *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1202 (2012) (per curiam); *see also* Petition Appendix ("Pet. App.") 39a (Loughry, J., dissenting) ("This Court has been notoriously chastised by the United States Supreme Court for its failure to uphold valid arbitration agreements and ensure that such agreements are not

'singled out' for hostile treatment or disfavor."). As Justice Loughry noted in his dissent, the decision below "does little to convey that the United States Supreme Court's message was received; in fact, such tortured 'analysis' certainly suggests that a majority of this Court took little heed of it." *Id*. 39a-40a.

Indeed, the opinion below quite openly exhibits the very "judicial hostility to arbitration" that the FAA was intended to defeat. *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 668 (2012). The lower court brazenly criticized this Court's FAA jurisprudence as "eye-glazing" and "absurd" and characterized the Court's controlling opinion in *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010), as "an ivory-tower interpretation of the FAA that is as dubious in principle as it is senseless in practice." Pet. App. 18a (internal quotation omitted).

There can be no question that *Rent-A-Center* provides the rule of decision here. In that case, the Court held that, unless a party seeking to avoid arbitration "challenge[s] the delegation provision specifically, we must treat it as valid under § 2," and refer "any challenge to the validity of the [arbitration agreement] as a whole [to] the arbitrator." *Rent-A-Center*, 561 U.S. at 69. Because the only argument Respondents advanced was a challenge to the "entire arbitration agreement," Pet. App. 7a, this case presents a straightforward application of *Rent-A-Center* requiring enforcement of the parties' delegation provision.

Putting its hostility to arbitration into action, the lower court made an end run around this Court's governing precedent by manufacturing ambiguity out of the plain terms of a routine delegation provision.

Petitioner's Brief ("Pet.") 12-13. Identifying the question before the Court as whether "the parties agreed to arbitrate arbitrability," Pet. App. 20a (quotation omitted), the lower court nevertheless concluded that a delegation provision referring to the arbitrator "all issues regarding the arbitrability of the dispute," *id.* 7a, was too "nebulous" to be enforceable, *id.* 24a.

This is not an instance in which a lower court simply misapplied federal law. Here, the court below openly disparaged the Court's FAA rulings and refused to apply controlling law. Such "outright defiance of" this Court and its FAA jurisprudence, Pet. 20, should not be allowed to stand. *See, e.g.*, *Marmet Health*, 132 S. Ct. at 1202 ("When this Court has fulfilled its duty to interpret federal law, a state court may not contradict or fail to implement the rule so established."). This Court's supervision of the West Virginia courts is once again badly needed. The decision below should be summarily reversed.

ARGUMENT

I. The Decision Below Blatantly Disregards A Bedrock Rule Of FAA Jurisprudence.

In 1925, Congress responded to "centuries of judicial hostility to arbitration agreements," *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510-11 (1974), by enacting the FAA, thereby codifying a "national policy favoring arbitration" and "plac[ing] arbitration agreements on equal footing with all other contracts," *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006); *see also American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2308-09 (2013) ("Congress enacted the

FAA in response to widespread judicial hostility to arbitration.") (citing *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011)); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) ("[The FAA's] purpose was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts.").

The heart of the FAA is section 2, *see Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983), which makes written arbitration agreements "valid, irrevocable, and enforceable" as a matter of federal law, "save upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2; *see also Perry v. Thomas*, 482 U.S. 483, 489 (1987). Section 2 "create[s] a body of federal substantive law of arbitrability," *Moses H. Cone*, 460 U.S. at 24, the central mandate of which requires arbitration agreements to be "enforced according to their terms," *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989).

Arbitration under the FAA, then, "is a matter of contract," *Rent-A-Center*, 561 U.S. at 69, and "parties are 'generally free to structure their arbitration agreements as they see fit,'" *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 683 (2010) (quoting *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995)); *see also Volt*, 489 U.S. at 479.

To be sure, certain "gateway issues of arbitrability" are presumptively for the court to decide. *Howsam v.*

Dean Witter Reynolds, Inc., 537 U.S. 79, 84-85 (2002). As this Court has explained repeatedly, these issues of "arbitrability" include both "'whether the parties are bound by a given arbitration clause'" and "'whether an arbitration clause in a concededly binding contract applies to a particular type of controversy.'" *BG Group PLC v. Republic of Argentina*, 134 S. Ct. 1198, 1206 (2014) (quoting *Howsam*, 537 U.S. at 84); *see also Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2068 n.2 (2013).

Like any other question, however, the resolution of "arbitrability" questions may be delegated to the arbitrator. *AT&T Techs, Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986); *Rent-A-Center*, 561 U.S. at 68-69. The only condition is that the parties must "clearly and unmistakably provide" for that delegation. *AT&T Techs.*, 475 U.S. at 649. Accordingly, "when the parties submit th[ose] matter[s] to arbitration" via an express delegation clause, "the court must defer to an arbitrator's arbitrability decision." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995).

One of the fundamental rules of the "federal substantive law of arbitrability" is that "an arbitration provision is severable from the remainder of the contract." *Buckeye Check Cashing*, 546 U.S. at 445. When a party seeks to challenge the enforcement of an arbitration agreement, as Respondents do here, the "severability" rule guides the determination of which challenges are to be heard by the court as opposed to the arbitrator. Under this rule, a court is empowered to adjudicate *only* those challenges that are "directed specifically to the agreement to arbitrate." *Rent-A-Center*, 561 U.S. at 71. Thus, "[i]f a party challenges the validity under § 2 of the precise

agreement to arbitrate at issue, the federal court must consider the challenge." *Id.* But "a party's challenge to another provision of the contract, or to the contract as a whole, does not prevent a court from enforcing a specific agreement to arbitrate." *Id.* at 70.

In *Rent-A-Center*, the Court instructed that the severability rule applies just the same with respect to a delegation provision. Reasoning that "[a]n agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce," the Court explained that "the FAA operates on this additional arbitration agreement just as it does on any other." *Id.* at 70. It "makes no difference" that "the underlying contract is itself an arbitration agreement," because "[a]pplication of the severability rule does not depend on the substance of the remainder of the contract." *Id.* at 72. Accordingly, unless the party seeking to avoid arbitration "challenge[s] the delegation provision specifically, we must treat it as valid under § 2, … leaving any challenge to the validity of the [arbitration agreement] as a whole for the arbitrator." *Id.*

Notably, the party opposing arbitration in *Rent-A-Center* advanced no challenge directed at the delegation clause itself. Rather, he claimed that "the entire arbitration agreement, including the delegation clause, was unconscionable." *Id.* at 73. The Court emphasized that it "need not consider that claim because none of [his] unconscionability challenges was specific to the delegation provision," *id.*, and held that the delegation clause must be enforced pursuant to the FAA.

Rent-A-Center controls this case. Respondents made no challenge specifically addressed to the delegation provision at issue here. Indeed, Respondents never so much as mentioned the delegation provision anywhere in their briefing to the West Virginia courts. Pet. App. 7a, 26a, 34a. Instead, they claimed that "the entire arbitration clause was unconscionable and [thus] unenforceable under state contract law." *Id.* 7a. Under *Rent-A-Center*, then, the delegation provision must be enforced. That should have been the end of the matter.

But the court below refused to enforce the delegation provision. Such a stark refusal to apply controlling precedent is noteworthy by itself. But the manner in which the West Virginia court reached its decision is particularly remarkable, and underscores the need for prompt action by this Court.

The court below showed utter disdain for this Court's governing FAA jurisprudence. The court's opinion began by openly attacking this Court's key FAA precedents as a set of "confounding" decisions that "create an eye-glazing conceptual framework for interpreting contracts with arbitration clauses that is politely described as a tad oversubtle for sensible application." Pet. App. 5a (internal quotation omitted). Further exhibiting its hostility to both arbitration and governing precedent, the court then proceeded to disparage the Court's holding in *Rent-A-Center* as "absurd …. It is an ivory-tower interpretation of the FAA that is as dubious in principle as it is senseless in practice." *Id.* 18a (citation omitted).

The lower court well understood that the severability rule—and *Rent-A-Center* in particular—would require

any challenge to the arbitration agreement as a whole to be referred to arbitration. *Id.* 17a. But the court was apparently determined to act on its open hostility to arbitration. Latching onto the rule that parties may delegate questions of arbitrability to the arbitrator only where the parties "clearly and unmistakably provide" for it, the court concluded without any substantive analysis that the term "arbitrability" in the delegation provision was too "nebulous" for the delegation provision to be enforceable. *Id.* 24a.

There is, however, no ambiguity in the term "arbitrability." "Arbitrability" has a well-defined meaning given to it by this Court. As explained above, *see supra* at 6, the Court repeatedly has defined the term to include both "whether the parties are bound by a given arbitration clause" and "whether an arbitration clause in a concededly binding contract applies to a particular type of controversy." And as Petitioner emphasizes, the federal courts routinely have applied this accepted definition in the course of enforcing delegation provisions that use the same or "similar delegation provisions." Pet. 21-23. Indeed, this understanding of the term "arbitrability" is so well accepted that it is used regularly by one of the largest private alternative dispute resolution providers in the world. *See, e.g.*, JAMS Comprehensive Arbitration Rules & Procedures, Rule 11(b) ("Jurisdictional and *arbitrability* disputes, including disputes over the formation, existence, validity, interpretation or scope of the agreement under which Arbitration is sought, and who are proper Parties to the Arbitration, shall be submitted to and ruled on by the Arbitrator.") (emphasis added), *available at* http://www.jamsadr.com/rules-comprehensive-arbitration/#Rule 11. This is undoubtedly why Justice Loughry remarked in

his dissent that it is "difficult to discern a single term, phrase, or description of the issues encompassed in the term 'arbitrability' that better or more clearly describes those issues that the word 'arbitrability' itself." Pet. App. 36a. In short, the lower court's "[f]eign[ed] confusion" over the meaning of "arbitrability," *id.*, is a naked attempt to end run this Court's governing FAA jurisprudence.[2]

II. Summary Reversal Is Warranted.

As Petitioner explains, "[t]he West Virginia Supreme Court of Appeals has with disturbing frequency ignored, sidestepped, or outright rejected this Court's holdings

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2. The lower court sought cover in two trial court decisions—*Bruni v. Didion*, 160 Cal. App. 4th 1272 (2008), and *GGIS Ins. Servs. v. Lincoln Gen. Ins. Co.*, 773 F. Supp. 2d 490 (M.D. Pa. 2011)—neither of which stands for the proposition that a delegation provision employing the term "arbitrability" is too nebulous to be enforceable. Consistent with *Rent-A-Center*, the *Bruni* court noted as a general matter that if a party advances a challenge to the "enforcement of the arbitration clause [as a whole]—e.g., illegality or fraud in the inducement—then the court must enforce the 'arbitrability' portion of the arbitration clause by compelling the parties to submit that defense to arbitration." *Bruni*, 160 Cal. App. 4th at 1287. The court decided not to apply this rule because it understood the question at issue in that case was whether the parties ever agreed to arbitrate at all. *See id.* at 1291 ("They cannot be required to arbitrate *anything*—not even arbitrability—until a court has made a threshold determination that they did, in fact, agree to arbitrate *something.*"); *compare Rent-A-Center*, 561 U.S. at 70 n.2. *GGIS* is even less helpful as the court there enforced a delegation provision that used the term "arbitrability," concluding that it "must be read as reserving to the arbitral board the power to decide whether a particular dispute is arbitrable." 773 F. Supp. 2d at 506.

on questions of federal law." Pet. 25. When state courts refuse to apply this Courts' precedents, this Court has not hesitated to intervene. *See, e.g.*, *Marmet Health*, 132 S. Ct. at 1202 ("When this Court has fulfilled its duty to interpret federal law, a state court may not contradict or fail to implement the rule so established." (citing U.S. Const., Art. VI, cl. 2.)).

Because state supreme court decisions often represent the final say in the enforcement of arbitration agreements, such intervention is of utmost importance in the context of this Court's FAA jurisprudence. *See Nitro-Lift*, 133 S. Ct. at 501 ("State courts rather than federal courts are most frequently called upon to apply the [FAA]. . . . It is a matter of great importance, therefore, that state supreme courts adhere to a correct interpretation of the legislation."). Accordingly, the Court has ordered summary reversal of several recent state court decisions that failed to heed its FAA precedents. *See, e.g.*, *id.* at 501, 503 (reversing Oklahoma Supreme Court's decision that "disregard[ed] this Court's precedents on the FAA" and severability); *KPMG LLP v. Cocchi*, 132 S. Ct. 23, 26 (2011) (per curiam) (reversing Florida appellate court ruling that "failed to give effect to the plain meaning of the [FAA] and to [this Court's] holding in" *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985)); *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56-58 (2003) (per curiam) (reversing Alabama Supreme Court's "misguided" approach to FAA's "involving commerce" requirement in light of this Court's decision in *Allied-Bruce*); *see also DirecTV, Inc. v. Imburgia*, No. 14-462, Tr. of Oral Arg. at 50:8-17 (Oct. 6, 2015) (Breyer, J.) (discussing risk of state court noncompliance with this Court's decisions).

This is not the first time the West Virginia Supreme Court of Appeals has demonstrated hostility to arbitration agreements by failing to heed "basic principle[s]" of federal arbitration law. *Marmet Health*, 132 S. Ct. at 1202. Only three years ago, the Court was obliged to summarily reverse a West Virginia decision that personal injury and wrongful death claims were not subject to arbitration, finding "[t]he … court's interpretation of the FAA … both incorrect and inconsistent with the clear instruction in the precedents of this Court." *Id.* at 1203.

In the court below, Justice Loughry underscored the summary reversal in *Marmet Health*. Noting that the West Virginia high court "ha[d] been notoriously chastised" by this Court in that case, he criticized his brethren for not "receiv[ing]" the "message." Pet. App. 39a. In truth, Justice Loughry put it too lightly. The court below referenced *Marmet Health* several times in its opinion and largely demonstrated an understanding of the federal substantive law of arbitrability. Yet instead of applying federal law, the court attacked this Court's FAA jurisprudence and blatantly disregarded its controlling opinion in *Rent-A-Center*. Such open defiance calls for swift correction.

If left unchecked, the decision below may serve as an invitation for state courts to circumvent the FAA. It threatens to thwart the uniform "national policy favoring arbitration," *Nitro-Lift*, 133 S. Ct. at 503 (quotation omitted), and create "an uneven patchwork of 'one-off' unprincipled carve-outs from the FAA that differ from state to state," Pet. 27. Moreover, it will embolden parties that wish to evade contractual obligations to arbitrate disputes in the hopes that unchecked judicial hostility

to arbitration will relieve them of those obligations. The decision below thus hinders the FAA's important goals of "achiev[ing] streamlined proceedings and expeditious results." *Preston v. Ferrer*, 552 U.S. 346, 357 (2008) (internal quotation omitted).

Prompt intervention is badly needed. The Court should summarily reverse the decision below.

CONCLUSION

Amicus curiae respectfully requests that the Court grant the petition for certiorari and summarily reverse the judgment of the Supreme Court of Appeals of West Virginia.

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