No.

IN THE
Supreme Court of the United States

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

Petitioners,

v.

SCOTT BURNETT ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The signatories to a contract agreed to arbitrate any claim or dispute arising out of the contract and delegated to the arbitrator the power to determine whether a dispute is subject to arbitration. The plaintiffs, who signed the contract, sued a nonsignatory parent company asserting liability based on the nonsignatory's relationship with its subsidiary, a signatory. The nonsignatory defendant sought to compel arbitration to determine whether the plaintiffs' claims are arbitrable.

The question presented is:

Whether the court must leave the question of arbitrability to the arbitrator, as the First, Second, Third, and Sixth Circuits have held, or whether the court may decide the question of arbitrability for itself, notwithstanding the contract's delegation of that issue to the arbitrator, as the Fourth, Fifth, Eighth, and Ninth Circuits have held.

PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE STATEMENT

1. Petitioners, and defendants-appellants below, are HomeServices of America, Inc.; BHH Affiliates, LLC; and HSF Affiliates, LLC.

2. Respondents include other defendants below—the National Association of Realtors; Keller Williams Realty, Inc.; Realogy Holdings Corp.; and RE/MAX, LLC—as well as plaintiffs-appellees below, including named plaintiffs Scott Burnett, Ryan Hendrickson, Jerod Breit, Scott Trupiano, Jeremy Keel, Frances Harvey, Hollee Ellis, Shelly Dreyer, and Rhonda Burnett, and unnamed class members of three classes:

a. "All persons who, from April 29, 2015 through the present, used a listing broker affiliated with Home Services of America, Inc., Keller Williams Realty, Inc., Realogy Holdings Corp., RE/MAX, LLC, HSF Affiliates, LLC, or BHH Affiliates, LLC, in the sale of a home listed on the Heartland MLS, Columbia Board of Realtors, Mid America Regional Information System, or the Southern Missouri Regional MLS, and who paid a commission to the buyer's broker in connection with the sale of the home";

b. "All persons who, from April 29, 2015 through the present, used a listing broker affiliated with Home Services of America, Inc., Keller Williams Realty, Inc., Realogy Holdings Corp., RE/MAX, LLC, HSF Affiliates, LLC, or BHH Affiliates, LLC, in the sale of a home in Missouri listed on the Heartland MLS, Columbia Board of Realtors, Mid America Regional Information System, or the Southern Missouri Regional MLS, and who paid a commission to the buyer's broker in connection with the sale of the home"; and

c. "All persons who, from April 29, 2014 through the present, used a listing broker affiliated with Home Services of America, Inc., Keller Williams Realty, Inc., Realogy Holdings Corp., RE/MAX, LLC, HSF Affiliates, LLC, or BHH Affiliates, LLC, in the sale of a residential home in Missouri listed on the Heartland MLS, Columbia Board of Realtors, Mid America Regional Information System, or the Southern Missouri Regional MLS, and who paid a commission to the buyer's broker in connection with the sale of the home."

3. BHH Affiliates, LLC, is a subsidiary of HSF Affiliates, LLC, which is a subsidiary of HS Franchise Holding, LLC, which is a subsidiary of HomeServices of America, Inc., which is a subsidiary of Berkshire Hathaway Energy Company, which is a subsidiary of Berkshire Hathaway Inc. Berkshire Hathaway Inc. is a publicly traded company, and the Vanguard Group, Inc., owns 10% or more of Berkshire Hathaway Inc.'s stock.

RELATED PROCEEDINGS

United States District Court (W.D. Mo.):

Sitzer et al. v. *National Association of Realtors et al.*,
No. 4:19-cv-332-SRB (July 19, 2022)
(order denying second motion to compel arbitration)

United States Court of Appeals (8th Cir.):

Burnett et al. v. *National Association of Realtors et al.*,
No. 22-2664 (Aug. 2, 2023)
(judgment affirming denial of second motion to compel arbitration)

Burnett et al. v. *National Association of Realtors et al.*,
No. 22-8009 (June 2, 2022) (judgment denying permission to appeal from class-certification decision)

Sitzer et al. v. *National Association of Realtors et al.*,
No. 20-1779 (Sept. 10, 2021) (judgment affirming denial of first motion to compel arbitration)

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PETITION FOR A WRIT OF CERTIORARI

Petitioners HomeServices of America, Inc.; BHH Affiliates, LLC; and HSF Affiliates, LLC (collectively, "HomeServices") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-16a) is reported at 75 F.4th 975. The order of the district court on petitioners' motion to compel arbitration (App. 17a-36a) is reported at 615 F. Supp. 3d 948.

JURISDICTION

The judgment of the court of appeals was entered on August 2, 2023. A petition for rehearing was denied on September 7, 2023 (App. 37a-38a). On November 28, 2023, Justice Kavanaugh granted petitioners' application to extend the time to file this petition to February 2, 2024. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2 of the Federal Arbitration Act, 9 U.S.C. § 2, provides that:

> A written provision in * * * a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction * * * shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract or as otherwise provided * * * .

STATEMENT

The Federal Arbitration Act ("FAA") requires courts to enforce arbitration agreements "according to their terms," including agreements that require arbitration of "'gateway' questions" concerning whether a particular claim must be arbitrated. *Rent-A-Center, West, Inc.* v. *Jackson*, 561 U.S. 63, 67-69 (2010). "[I]f a valid agreement exists, and if the agreement delegates the arbitrability issue to an arbitrator, a court may not decide the arbitrability issue." *Henry Schein, Inc.* v. *Archer & White Sales, Inc.*, 139 S. Ct. 524, 530 (2019).

In the decision below, the Eighth Circuit violated that principle when it decided for itself whether the plaintiffs' antitrust claims against HomeServices are subject to arbitration. There is no dispute that the plaintiffs agreed to contracts that include mandatory arbitration provisions.[1] Those contracts require the arbitrator, not the court, to resolve disputes about the "interpretation" and "enforcement" of the contracts. App. 3a-5a. But rather than enforce those provisions by ordering arbitration, the Eighth Circuit interpreted the terms of the contracts under state law and concluded that the contracts did not require the plaintiffs to arbitrate claims against HomeServices, the indirect parent of the real-estate brokerages that signed arbitration agreements with the plaintiffs.

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[1] Because arbitrability as to the named plaintiffs was resolved at an earlier stage of the proceeding, the decision below (and this petition) concern solely the arbitrability of the unnamed class members' claims. For convenience, the petition refers to the unnamed class members as "the plaintiffs" unless otherwise noted.

By arrogating to itself the power to decide arbitrability, the Eighth Circuit erred and exacerbated a deep and well-established conflict among the circuits. Indeed, courts have repeatedly recognized that the question of *who decides* whether a nonsignatory can enforce an arbitration agreement is an issue on which "[c]ourts appear split." *RUAG Ammotec GmbH* v. *Archon Firearms, Inc.*, 538 P.3d 428, 433 (Nev. 2023); *Newman* v. *Plains All American Pipeline, L.P.*, 44 F.4th 251, 254 (5th Cir. 2022) (Jones, J., dissenting from denial of rehearing en banc) (panel opinion "puts this court out of step with at least five (if not more) of our sister circuits").

The First, Second, Third, and Sixth Circuits all hold that, when a nonsignatory's capacity to compel arbitration is challenged, "if the parties to [an arbitration agreement] clearly and unmistakably intended to delegate the issue of enforceability of the contract (or any other issue) to an arbitrator, the challenge to the enforceability of the arbitration agreement must be decided by the arbitrator, not by a court." *Zirpoli* v. *Midland Funding, LLC*, 48 F.4th 136, 145 (3d Cir. 2022); see also *Apollo Computer, Inc.* v. *Berg*, 886 F.2d 469, 473-74 (1st Cir. 1989) (nonsignatory's capacity to compel arbitration is "issu[e] relating to the continued existence and validity of the agreement" and thus "[t]he arbitrator should decide" the issue); *Contec Corp.* v. *Remote Solution Co.*, 398 F.3d 205, 211 (2d Cir. 2005) (nonsignatory's "purported right to enforce the [arbitration agreement] is a matter of the Agreement's continued existence, validity and scope, and is therefore subject to arbitration"); *Blanton* v. *Domino's Pizza Franchising LLC*, 962 F.3d 842, 852 (6th Cir. 2020) ("the arbitrator should decide for itself whether

[a nonsignatory] can enforce the arbitration agreement").

The decision below, by contrast, joined the Fourth, Fifth, and Ninth Circuits on the other side of the divide. These circuits hold that courts must decide whether a nonsignatory may invoke an arbitration agreement even when the agreement delegates gateway issues to the arbitrator. See, *e.g.*, *Rogers* v. *Tug Hill Operating, LLC*, 76 F.4th 279, 287 (4th Cir. 2023) ("*the district court* must determine" whether a nonsignatory "is entitled to enforce the arbitration agreement under state contract law"); *Newman* v. *Plains All American Pipeline, L.P.*, 23 F.4th 393, 398-99 (5th Cir. 2022) ("It is up to us—not an arbitrator—to decide whether [a nonsignatory] can enforce the * * * arbitration agreement"); *Kramer* v. *Toyota Motor Corp.*, 705 F.3d 1122, 1127 (9th Cir. 2013) (where party seeking arbitration was nonsignatory, "the district court had the authority to decide whether the instant dispute is arbitrable"); see also *RUAG Ammotec*, 538 P.3d at 433 (enforcement by nonsignatory presents issue "of contract formation that must be decided by the courts").

This Court should eliminate this conflict and reject the Eighth Circuit's misguided approach. Wresting interpretive authority from arbitrators in the face of contracts delegating that issue to the arbitrator violates the FAA and this Court's precedents. And the circuit conflict on this vital and recurring issue "greatly frustrate[s] any relative uniformity in the enforcement of arbitration agreements." *Boys Markets, Inc.* v. *Retail Clerks Union, Local 770*, 398 U.S. 235, 246 (1970).

This case presents an ideal vehicle to resolve the conflict. The parties vigorously litigated this issue below, and the Eighth Circuit squarely addressed it with flawed but outcome-determinative reasoning. That erroneous ruling had enormous ramifications: Despite waiving their right to pursue class litigation against HomeServices, the plaintiffs obtained a $1.8 billion verdict, which they are seeking to treble. The petition should be granted, and the Eighth Circuit reversed.

1. In 1925, Congress enacted the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, "in response to a perception that courts were unduly hostile to arbitration" and "routinely refused to enforce agreements to arbitrate disputes." *Epic Systems Corp.* v. *Lewis*, 138 S. Ct. 1612, 1621 (2018). Concluding that "arbitration had more to offer than courts recognized—not least the promise of quicker, more informal, and often cheaper resolutions for everyone involved[,] * * * Congress directed courts to abandon their hostility and instead treat arbitration agreements as 'valid, irrevocable, and enforceable.'" *Ibid.* (quoting 9 U.S.C. § 2).

The FAA permits "[a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration" to petition a district court that would otherwise have jurisdiction over the dispute, "save for such agreement," "for an order directing that such arbitration proceed in the manner provided for in such agreement." 9 U.S.C. § 4. The FAA establishes "a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary," the effect of which "is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Moses H.*

Cone Memorial Hospital v. *Mercury Construction Corp.*, 460 U.S. 1, 24 (1983).

An extensive body of this Court's caselaw delineates the FAA's division of authority between courts and arbitrators. The initial question whether an arbitration agreement was formed is a question for courts to decide. *Henry Schein, Inc.*, 139 S. Ct. at 530 ("[B]efore referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement exists.").

Other issues may be delegated to arbitrators, and "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone*, 460 U.S. at 24-25. Delegable issues include whether a particular dispute must be arbitrated—that is, questions of the arbitrator's own jurisdiction, commonly called questions of arbitrability. *Rent-A-Center, West, Inc.*, 561 U.S. at 68-69. A party asserting such a delegation must offer "'clea[r] and unmistakabl[e]' evidence" that an agreement delegates the issue of arbitrability to the arbitrator. *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 944 (1995) (alterations in original).

Courts applying that principle have typically found clear and unmistakable delegations in two circumstances: when the parties' arbitration agreement expressly delegates arbitrability to the arbitrator by, for example, requiring the arbitrator to "resolve any dispute relating to the * * * enforceability * * * of this Agreement," *e.g.*, *Rent-A-Center, West, Inc.*, 561 U.S. at 68–69, or when the agreement incorporates by reference a set of arbitral rules that provide for arbitra-

tors to decide gateway questions of arbitrability, see, *e.g.*, *Blanton*, 962 F.3d at 846 (collecting cases).

If an arbitration agreement delegates to the arbitrator the authority to decide threshold questions of arbitrability, "a court may not override the contract" and "possesses no power to decide the arbitrability issue." *Henry Schein*, 139 S. Ct. at 529. "That is true even if the court thinks that the argument that the arbitration agreement applies to a particular dispute is wholly groundless" or "frivolous." *Ibid.* Applying that principle, this Court has repeatedly rejected demands that a court decide arbitrability when an arbitration agreement has delegated that question to the arbitrator. See, *e.g.*, *id.* at 530; *Rent-A-Center*, 561 U.S. at 75-76.

This Court has held that the FAA allows a litigant to move to compel arbitration even if the movant did not itself sign the arbitration agreement. *Arthur Andersen LLP* v. *Carlisle*, 556 U.S. 624, 631 (2009). This "gateway dispute about whether the parties are bound by a given arbitration clause raises a 'question of arbitrability.'" *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002). That threshold question of whether an arbitration agreement may be "enforced by or against nonparties to the contract" is decided according to the state law governing the contract. *Arthur Andersen*, 556 U.S. at 631.

2. Respondents Rhonda Burnett, Scott Burnett, Ryan Hendrickson, Jerod Breit, Scott Trupiano, and Jeremy Keel (a group of home sellers) filed a putative class action against brokerages including petitioners HomeServices of America, Inc.; BHH Affiliates, LLC; and HSF Affiliates, LLC (collectively, "HomeServ-

ices"). App. 2a. The named plaintiffs alleged that petitioners enforced rules established by the National Association of Realtors that required home sellers to compensate the home buyer's broker through anticompetitive practices. App. 2a-3a.

HomeServices is a national, full-service real-estate brokerage holding company that has brokerage subsidiaries in various regions included within regional real-estate Multiple Listing Services, databases that real-estate brokers use to share information about properties listed for sale. App. 2a. One of HomeServices' wholly owned regional subsidiaries, HomeServices of MOKAN, LLC, in turn wholly owns nonparties Reece & Nichols Realtors, Inc. ("ReeceNichols"), and BHH KC Real Estate, LLC ("BHH KC"). App. 3a.

Certain putative class members entered into agreements with ReeceNichols and BHH KC to list their homes for sale. App. 3a. Each of these agreements contained an arbitration provision referring all disputes arising under the agreements to binding arbitration and waiving the right to litigate such disputes in court. App. 3a-7a.

The wording of the arbitration agreements changed slightly over the years. The 2014-2017 agreements provide:

> Any controversy or claim between the parties to this Contract, its interpretation, enforcement or breach (which includes tort claims arising from fraud and fraud in the inducement), will be settled by binding arbitration pursuant to[,] administered by[,] and under the rules of the American Arbitration Associ-

> ation (AAA), or such other neutral arbitrator agreed to by the parties.

App. 3a (alterations in original; emphases omitted).

The 2018 agreements provide:

> Any dispute or claim between the parties to this Agreement, its interpretation, enforcement or breach (which includes tort claims arising from fraud and fraud in the inducement), will be settled by binding arbitration pursuant to the rules of the American Arbitration Association (AAA) and by a neutral arbitrator agreed to by the parties.

App. 4a (emphases omitted).

And the 2019-2022 agreements provide:

> Any dispute or claim between the parties to this Agreement, its interpretation, enforcement or breach (which includes tort claims arising from fraud and fraud in the inducement), will be settled by binding arbitration.

App. 5a (emphasis omitted).

Each of the agreements also included a class-action waiver: "Neither party may, in any court proceeding or dispute resolution process, bring any dispute as a representative or member of a class, or to act in the interest of the general public or in any private attorney general capacity." App. 5a-6a (emphasis omitted) (2018-2022 agreements); App. 4a ("Neither party will be entitled to join or consolidate disputes by or against others in any arbitration, or to include in any arbitration any dispute as a representative or member of a class, or to act in any arbitration in the interest of the

general public or in any private attorney general capacity." (emphasis omitted) (2014-2017 agreements)).

After litigating through the pleading stage, HomeServices moved to compel arbitration of the named plaintiffs' claims. App. 7a. The district court denied the motion on the ground that HomeServices could not invoke the arbitration agreements because it was not a signatory to the agreements—only its wholly-owned subsidiaries ReeceNichols and BHH KC were. App. 7a-8a. The Eighth Circuit affirmed on the ground that HomeServices had waived its right to arbitrate the named plaintiffs' claims by litigating against them for nearly a year. *Ibid.*

The district court then granted the plaintiffs' motion for class certification, and HomeServices filed a second motion to compel arbitration limited to the unnamed class members. App. 8a. The district court denied this motion as well, concluding that HomeServices had waived its right to arbitration and could not enforce the agreements as a nonsignatory to them. App. 8a-10a.

The Eighth Circuit affirmed on the ground that HomeServices could not enforce the arbitration agreements because it was not a signatory. App. 10a. (The Eighth Circuit did not consider the district court's waiver conclusion. *Ibid.*)

The Eighth Circuit acknowledged that arbitration agreements may delegate threshold issues of arbitrability to an arbitrator and 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." App. 13a. Rather than honor the delegation clause and send that ques-

tion to the arbitrator, however, the Eighth Circuit independently decided the question for itself. App. 13a-15a.

The court of appeals suggested that HomeServices was required to establish that a contract existed between the plaintiffs *and HomeServices* for HomeServices to compel arbitration. App. 13a. It then looked immediately to Missouri law to answer that question, determining that HomeServices would not be treated as a party entitled to enforce the agreements under state law because the agreements "do not name HomeServices as a party or third-party beneficiary." App. 13a-14a (emphasis omitted). Based on this state-law interpretation of the contract, the Eighth Circuit held that the arbitration agreements do not "clearly and unmistakably delegate to an arbitrator threshold issues of arbitrability between nonparties." App. 14a-15a. The Eighth Circuit then denied HomeServices' petition for rehearing en banc. App. 37a-38a.

After the Eighth Circuit issued its mandate in September 2023, the case rapidly proceeded to trial the next month. The jury returned a nearly $1.8 billion verdict against HomeServices and other defendants—an amount the plaintiffs are seeking to treble. Dist. Ct. Dkts. 1134, 1294. Post-trial proceedings remain pending in the district court.

REASONS FOR GRANTING THE PETITION

I. The Decision Below Exacerbates A Deep, Acknowledged Conflict About Who Decides Whether Nonsignatories May Enforce Arbitration Agreements

This Court's review is needed to resolve an acknowledged and entrenched circuit conflict about a

recurring and important question in arbitration jurisprudence: who decides whether a nonsignatory may enforce an arbitration agreement when the agreement delegates questions of arbitrability and enforcement to the arbitrator.

That split has attracted both judicial and academic attention. Those circuits that, like the Eighth Circuit below, usurp the arbitrator's authority, are "out of step" and in "conflict" with those circuits that let the arbitrator decide. *Newman* v. *Plains All American Pipeline, L.P.*, 44 F.4th 251, 254 (5th Cir. 2022) (Jones, J., dissenting from denial of rehearing en banc on vote of 8-8). The conflicting results in the courts of appeals undermine the uniformity the FAA strives to achieve and leave it "[p]articularly unclear" whether enforcement by nonsignatories "relate[s] to the *scope* of the arbitration agreement or to its *existence*." Tamar Meshel, *"A Doughnut Hole in the Doughnut's Hole": The* Henry Schein *Saga and Who Decides Arbitrability*, 73 Rutgers L. Rev. 83, 114 n.181 (2020).

A. The First, Second, Third, and Sixth Circuits correctly hold that the arbitrator must decide

In circumstances very similar to those here, the Sixth Circuit has held that the *arbitrator* decides whether a nonsignatory can enforce an arbitration agreement. In *Blanton* v. *Domino's Pizza Franchising LLC*, the court confronted whether, in a federal antitrust class action, a nonsignatory defendant (Domino's) could enforce an arbitration agreement that the plaintiff had signed with a Domino's franchisee. 962 F.3d 842, 843-44 (6th Cir. 2020).

The Sixth Circuit properly framed the issue as "whether there's 'clear and unmistakable' evidence that the parties agreed to arbitrate 'arbitrability.'" 962 F.3d at 846. The court noted the confusion in other decisions that "conflate the questions of contract formation and interpretation (which generally involve state law) with the question whether a particular agreement satisfies the 'clear and unmistakable' standard (which seems to be one of federal law)." *Ibid.* As to this latter federal-law question, the Sixth Circuit concluded that "the incorporation of the AAA Rules provides 'clear and unmistakable' evidence that the parties agreed to arbitrate 'arbitrability.'" *Ibid.* Thus, the Sixth Circuit affirmed the order compelling arbitration of the gateway "question of arbitrability." *Id.* at 848. The court easily dismissed the suggestion that the movant could not compel arbitration without having signed the agreement—this argument didn't "challenge the existence of the arbitration agreement" but only its scope. *Id.* at 849. And the signatory nonmovant could scarcely challenge the agreement's existence "because he signed it." *Ibid.*; *see also Becker* v. *Delek US Energy, Inc.,* 39 F.4th 351, 356 (6th Cir. 2022) (reaffirming that "[w]hether a non-signatory can enforce a delegation clause is * * * a question of enforceability, not existence," of the contract).

A recent Third Circuit decision similarly adopts the proper approach. *Zirpoli* v. *Midland Funding, LLC*, 48 F.4th 136 (3d Cir. 2022). *Zirpoli* considered whether a nonsignatory assignee could enforce a contract's arbitration clause. *Id.* at 138, 142-43. The clause nominally limited its coverage. *Id.* at 139 (allowing "You or We" to "demand arbitration"). Yet the agreement also provided that the arbitrator would

settle issues about the "enforceability," "arbitrability," and "scope of this Agreement." *Ibid.*

While the nonmovant contested the validity of the assignment, "determining whether Midland is a valid assignee goes directly to whether it can *enforce* arbitration as the agreement provides, not whether the agreement *exists*." 48 F.4th at 144. And because the contract delegated "the arbitrability of any [c]laim" to the arbitrator, the court correctly held that "an arbitrator shall resolve the arbitrability" of the dispute. *Id.* at 145 (emphasis omitted).

The Third Circuit majority condemned any alternative approach as irreconcilable with the delegation clause. *Zirpoli*, 48 F.4th at 142. Because there was no question that a contract existed between the original parties, the dispute over who could enforce that agreement was a "merits" question. *Id.* at 142-43. And the delegation clause plainly committed that "merits" question to the arbitrator. *Ibid.* For the court to effectively ignore the delegation and decide for itself whether a nonsignatory could compel enforcement would render the "who decides" question "pointless" and the delegation clause "meaningless." *Id.* at 143.

Earlier decisions from the First and Second Circuits reinforce the view that delegation clauses make the question whether nonsignatories may enforce an arbitration agreement one for the arbitrator to decide. In *Contec Corp.* v. *Remote Solution Co.*, the Second Circuit considered whether an agreement that nominally extended only to the contract's "parties," but that also delegated interpretive issues to the arbitrator, could be enforced by a nonsignatory. 398 F.3d

205, 208 (2d Cir. 2005). The nonmovant signatory opposing arbitration argued that permitting enforcement by the nonsignatory was improper because "the contractual language [wa]s effective only between the contracting parties." *Id.* at 209.

But the Second Circuit disagreed. The court began by observing that the parties to the litigation had "a sufficient relationship to each other and to the rights created under the agreement" because "the issues the non-signatory is seeking to resolve in arbitration are intertwined with the agreement that the [signatory nonmovant] has signed." 398 F.3d at 209.[2] Then, because the nonmovant had signed a contract giving the arbitrator the power to "determine her own jurisdiction," the court concluded that the nonmovant could not "disown its agreed-to obligation to arbitrate * * * the question of arbitrability." *Id.* at 211. Whether "the parties" should be construed to encompass nonsignatories, thus, was an interpretive issue for the arbitrator to decide. *Ibid.*

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[2] *Contec*'s preliminary "relational sufficiency" inquiry stands in some tension with this Court's later pronouncement that "a court may not decide an arbitrability question that the parties have delegated to an arbitrator" even when the demand for arbitration is allegedly "frivolous" or "wholly groundless." *Henry Schein, Inc.* v. *Archer & White Sales, Inc.*, 139 S. Ct. 524, 530 (2019). In any event, that relational-sufficiency inquiry places the Eighth Circuit in conflict with the Second because here, just as in *Contec*, "there is * * * an undisputed relationship between [the] corporate form[s]" of HomeServices and its signatory subsidiary, there is no dispute that the plaintiffs "signed the [arbitration] Agreement[s]," and the antitrust claims arise from the very same transaction that was the basis for the arbitration agreement. 398 F.3d at 209.

Similarly, the First Circuit, in *Apollo Computer, Inc.* v. *Berg*, held that a delegation clause required the arbitrator to resolve nonsignatory enforcement. 886 F.2d 469, 473 (1st Cir. 1989). There, the purported assignee of an arbitration agreement sought to compel arbitration. *Id.* at 470. As in *Zirpoli* and *Contec*, the party opposing arbitration—which concededly was a party to the original agreement—contended that the assignment to the nonsignatory was invalid, and thus that the nonsignatory could not compel arbitration. *Id.* at 472.

The First Circuit declined to resolve the validity of the assignment because the "parties contracted to submit issues of arbitrability to the arbitrator." 886 F.2d at 472. The contract signed by the nonmovant was undisputedly a "prima facie agreement to arbitrate." *Id.* at 473. Whether the agreement was "validly assigned" and "whether it can be enforced" by the assignee were "issues relating to the continued existence and validity of the agreement." *Ibid.* Given the contract's incorporation of the ICC rules, which give the arbitrator power "to determine her own jurisdiction," the First Circuit held that "[t]he arbitrator should decide whether a valid arbitration agreement exists between Apollo and the defendants under the terms of the contract." *Id.* at 473-74.

The Tenth Circuit has also suggested its agreement in a related context addressing whether a signatory could compel a third-party beneficiary to arbitrate a claim. It held that when "there is an arbitration agreement between" the movant and a nonparty that "contains a delegation [clause]," the district court must "sen[d] the case to arbitration," even when the nonsignatory resisting arbitration disputes whether *it*

agreed to arbitrate. *Casa Arena Blanca LLC* v. *Rainwater ex rel. Estate of Green*, 2022 WL 839800, at *5 (10th Cir. Mar. 22, 2022). "[T]he question of whether the Agreement should be enforced against [a nonsignatory] as a third-party beneficiary of that contract is one that should be decided by an arbitrator, not the court," because "there is no issue of contract formation, only contract enforcement." *Ibid.*

B. By contrast, the Fourth, Fifth, and Ninth Circuits incorrectly usurp issues delegated to the arbitrator

The Ninth Circuit laid out its competing view in *Kramer* v. *Toyota Motor Corp.*, 705 F.3d 1122 (9th Cir. 2013). The contract at issue there—between various Toyota dealerships and car buyers—delegated disputes "about the interpretation and scope" of its arbitration clause to the arbitrator. *Id.* at 1125. Yet it also was nominally an agreement between just those parties; "either you or we" could compel arbitration under the contract's terms. *Id.* at 1124.

When the buyers sued Toyota for alleged defects in the vehicles' braking systems, Toyota sought to compel arbitration. 705 F.3d at 1124-25. Though Toyota was a nonsignatory to the agreements, Toyota argued the agreements' delegation of issues about the agreements' interpretation and scope meant "the arbitrator should decide the issue of whether a nonsignatory may compel Plaintiffs to arbitrate." *Id.* at 1127.

The Ninth Circuit disagreed, treating the issue as one of formation for the court. Noting that "the terms of the arbitration clauses [we]re expressly limited" to the plaintiffs and dealerships, it effectively decided

that though the agreement delegated interpretive issues to the arbitrator, it did not clearly provide that the plaintiffs agreed to arbitrate with nonsignatories. 705 F.3d at 1127. So the Ninth Circuit decided for itself the interpretive question whether the contract's references to "you" and "we" should extend to nonsignatories—concluding that it could not, and refusing arbitration on that basis. *Ibid.*

More recently, the Fifth Circuit endorsed an analysis substantively identical to the Ninth's. There, an employee (Newman) signed an employment agreement containing an arbitration provision with his employer (Cypress), and subsequently sued another company (Plains), for whom Newman performed work. *Newman* v. *Plains All American Pipeline, L.P.*, 23 F.4th 393, 397 (5th Cir. 2022). Plains, a nonsignatory to the Newman-Cypress agreement, moved to compel arbitration and argued that the agreement's incorporation of the AAA rules required the arbitrator to resolve whether the agreement encompassed nonsignatories. *Ibid.*

The Fifth Circuit, like the Ninth, rejected that argument. It broadly held that when a nonsignatory seeks to enforce an arbitration agreement, there is no difference between the agreement's "enforceability" on the one hand and its "existence" on the other. *Newman*, 23 F.4th at 398. The court then believed that it was bound to decide "the first-step, formation question"—whether the nonsignatory and the original signatory opposing arbitration *themselves* had a contract. *Id.* at 399. And, finding no contract between Newman and Plains, the Fifth Circuit refused arbitration. *Ibid*.

Illustrating lower courts' confusion on the issue, the Fifth Circuit purported to apply the Second Circuit's analysis in *Contec*. *Newman*, 23 F.4th at 400. The Fifth Circuit thought that *Contec* had "plainly reasoned that enforceability goes to the first-step, formation question that is determined by the courts." *Ibid.* (citing 398 F.3d at 209). Yet *Contec* held directly the opposite. It never analyzed whether the nonsignatory seeking arbitration and the signatory opposing it had formed a contract, nor did it even mention the word "formation." Instead, it required that the nonsignatory show as a threshold matter that it had a "sufficient relationship" with the original signatory whose right to arbitration it was attempting to enforce. *Contec*, 398 F.3d at 209; see *supra* n.2. But the Second Circuit held that it was ultimately a question for the arbitrator whether the nonsignatory in fact could "claim rights under the" agreement—thus taking no position on whether any legal relationship *actually* existed between the nonsignatory and the signatory opposing arbitration. *Contec*, 398 F.3d at 209. The Second Circuit explained that a delegation clause nominally extending only to the "parties" nonetheless mandated arbitration of whether a nonsignatory could compel enforcement. *Id.* at 211.

Newman demonstrates the deep division among jurists on this issue. The panel decision escaped en banc review by an equally divided vote, with eight judges voting for rehearing and eight judges voting against it. 44 F.4th 251. Dissenting from the denial, Judge Jones pointed out that *Newman* placed the Fifth Circuit "out-of-step" and in "conflict" with multi-

ple other circuits—and in tension even with the Fifth Circuit's own precedent. *Id.* at 251, 254.[3]

Mere months ago, the Fourth Circuit joined the Fifth and Ninth Circuits in holding that courts decide whether a nonsignatory may enforce an arbitration agreement that commits determination of that issue to the arbitrator. There, a plaintiff who worked for Tug Hill sued under the Fair Labor Standards Act, claiming that the company had unlawfully denied him overtime pay. *Rogers* v. *Tug Hill Operating, LLC*, 76 F.4th 279, 282 (4th Cir. 2023). Tug Hill moved to compel arbitration based on an agreement the plaintiff had with a third party, RigUp, that had helped the plaintiff find his position with Tug Hill. The agreement required the plaintiff to arbitrate "every dispute arising in connection with" the agreement and provided that "[t]he arbitrator has exclusive authority to resolve any dispute relating to the interpretation, applicability, or enforceability of this binding arbitration agreement." *Id.* at 283-84 (emphasis omitted; alteration in original).

The district court granted the motion to compel arbitration, but the Fourth Circuit reversed. 76 F.4th

[3] *Newman* and the decision of the Eighth Circuit below also created intra-circuit conflicts in those courts. See *Eckert/Wordell Architects, Inc.* v. *FJM Properties of Willmar, LLC*, 756 F.3d 1098, 1100 (8th Cir. 2014) (holding 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" that is "for the arbitrator to decide"); *Brittania-U Nigeria, Ltd.* v. *Chevron USA, Inc.*, 866 F.3d 709, 715 (5th Cir. 2017) (holding that, "as in *Contec*, the language of the agreement clearly and unmistakably delegates arbitrability, even with regard to [the plaintiff's] dispute with [nonsignatories]").

at 282. That court held that when "the party seeking to enforce an arbitration agreement is not itself a party to that agreement, *the district court* must determine * * * whether that party is entitled to enforce the arbitration agreement under state contract law." *Id.* at 287. The Fourth Circuit rejected Tug Hill's argument that the plaintiff had agreed to delegate that issue to the arbitrator based on the court's independent interpretation of the arbitration agreement: "When the delegation provision is read in the context of the arbitration clause as a whole, it is plain that [plaintiff] agreed to arbitrate issues—including threshold issues—arising *between him and RigUp*," not "whether a third party like Tug Hill has rights under the arbitration agreement." *Id.* at 288. The Fourth Circuit thus widened the circuit split, joining the Fifth, Eighth, and Ninth Circuits, and breaking with the First, Second, Third, and Sixth Circuits.[4]

C. State courts are also divided

Just as the federal courts of appeals are in disarray on this question, state supreme courts are similarly divided.

The Alabama Supreme Court takes the view of the First, Second, Third, and Sixth Circuits, holding that, while "the question whether an arbitration provision may be used to compel arbitration between a signatory and a nonsignatory is a threshold question of arbitrability usually decided by the court," when "that question has been delegated to the arbitrator," "[t]he arbitrator, not the court, must decide that threshold

[4] Tug Hill's petition asking this Court to resolve the split is pending as of the filing of this petition. See *Tug Hill Operating, LLC* v. *Rogers*, No. 23-661 (U.S. filed Dec. 15, 2023).

issue." *Anderton* v. *Practice-Monroeville, P.C.*, 164 So. 3d 1094, 1102 (Ala. 2014); *Carroll* v. *Castellanos*, 281 So. 3d 365, 371 (Ala. 2019) (same). But see *Jim Burke Automotive, Inc.* v. *McGrue*, 826 So. 2d 122, 131-32 (Ala. 2002) (earlier case appearing to share the Eighth Circuit's view).

The supreme courts of Nevada, Arkansas, and Tennessee, on the other hand, adopt the position below. The Nevada Supreme Court has held that "an arbitration agreement's enforceability as to a nonsignatory" is an issue of "contract formation that must be decided by the courts in the first instance." *RUAG Ammotec GmbH* v. *Archon Firearms, Inc.*, 538 P.3d 428, 433 (Nev. 2023). The Supreme Court of Arkansas similarly held that a nonsignatory to an arbitration agreement could not compel a signatory to arbitrate, reasoning that "clear and unmistakable evidence in the arbitration provisions that the *parties* * * * agreed to arbitrate arbitrability" does not evidence an agreement to arbitrate with nonsignatories. *Bigge Crane & Rigging Co.* v. *Entergy Arkansas, Inc.*, 457 S.W.3d 265, 270-71 (Ark. 2015). And the Tennessee Supreme Court has described the question of "the extent to which [a] nonsignatory third-party beneficiary may be bound to [an] arbitration provision" as a "separate and distinct" inquiry from deciding "which claims are 'arbitrable.'" *Harvey ex rel. Gladden* v. *Cumberland Trust & Investment Co.*, 532 S.W.3d 243, 273 n.41 (Tenn. 2017).

Other courts have taken more complicated approaches, declining to adopt either side taken in the federal courts. The Texas Supreme Court, for example, has explained that "whether nonsignatories are bound by an arbitration agreement is a distinct issue

that may involve either or both" the questions of (1) "whether a litigant agreed to arbitrate" and (2) "the scope of the arbitration clause," suggesting that the court may treat the question as one of contract formation, arbitrability, or both, depending on the circumstances. *In re Labatt Food Service, L.P.*, 279 S.W.3d 640, 643 (Tex. 2009). And the New Jersey Supreme Court has held that parties may delegate to an arbitrator the determination of "whether an entity other than a signatory party can be subject to * * * binding arbitration provisions," only if there is "an express contract provision conferring authority on the arbitrator" to make that determination. *Laborers' Local Union Nos. 472 & 172* v. *Interstate Curb & Sidewalk*, 448 A.2d 980, 984 (N.J. 1982).

D. The conflict among the circuits is outcome determinative

Had HomeServices moved to compel arbitration in the First, Second, Third, or Sixth Circuits (and likely the Tenth), it would have prevailed and therefore avoided a classwide antitrust trial. Those courts would have recognized that the plaintiffs and the real-estate brokerage companies (ReeceNichols and BHH KC) had an undisputed contract to arbitrate disputes. They then would have asked the federal-law question whether those agreements clearly and unmistakably delegate threshold questions of arbitrability. Given the agreements' adoption of the AAA rules and express provision that the arbitrator must decide disputes about the agreements' enforcement and interpretation, these courts would have concluded they do delegate those disputes. See, *e.g.*, *Zirpoli*, 48 F.4th at 143. And the courts likewise would not have afforded apparently dispositive weight to the agreements' ref-

erence to "the parties." See, *e.g.*, *id.* at 139; *Contec*, 398 F.3d at 209-11. After all, whether "the parties" should be construed to encompass nonsignatories is precisely the sort of interpretive question the agreements leave for the arbitrator. Applying state law, the arbitrator ultimately might have ruled against HomeServices on that question. But that is not the point; what matters is who decides it. And those courts' answer is unambiguous: the arbitrator.

The Eighth Circuit got the question of whether a nonsignatory may enforce an arbitration agreement and the question of *who decides* that question backwards. Rather than treat nonsignatory enforcement as an issue of contractual interpretation, it asked whether the plaintiffs *and HomeServices* formed a contract to arbitrate under state law. It independently concluded that Missouri courts would not understand the plaintiffs and HomeServices to have signed "a valid and enforceable agreement." App. 11a. And it further asserted that the contract's reference to "the parties" precluded holding that the agreement clearly and unmistakably delegated the question of nonsignatory enforcement to the arbitrator—the very question the majority approach treats as one for the arbitrator to decide. App. 14a.

That arrogation of interpretive authority puts the Eighth Circuit "out-of-step" and in "conflict" with the majority approach. *Newman*, 44 F.4th at 251, 254 (Jones, J., dissenting from denial of rehearing en banc).

II. The Decision Below Violates The Federal Arbitration Act And This Court's Precedents

The Eighth Circuit paid lip service to the notion 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." App. 13a. But even though these contracts delegate questions of interpretation and enforcement to the arbitrator, the Eighth Circuit then answered the arbitrability question for itself. App. 15a-16a.

The Eighth Circuit erred. It elided the distinction between formation of the contract, which is for the court, and interpretation of the contract, which must be decided by the arbitrator when, as here, the agreement so delegates. The consequences of that error are severe. HomeServices was subjected to a class action jury trial and $1.8 billion verdict in a case that should have been resolved through arbitration, not litigation—much less through a class action, which the plaintiffs waived in the agreements.

For decades, this Court has repeatedly intervened to correct lower courts' refusal to enforce arbitration agreements "according to their terms." *Rent-A-Center, West, Inc.* v. *Jackson*, 561 U.S. 63, 67 (2010). It has likewise explained that courts may not "short-circuit the [arbitration] process" simply because they consider arguments for arbitration weak or even "wholly groundless." *Henry Schein, Inc.*, 139 S. Ct. at 527-28. The very point of delegating threshold arbitrability issues to an arbitrator is to let the arbitrator decide them—not for a court to sidestep the arbitrator's prerogative and construe an agreement's scope

for itself based on its own suppositions about the agreement's text and state contract law.

Those principles decide this case. Arbitrators—not courts—must settle whether nonsignatories may enforce an arbitration agreement when the agreement delegates interpretive issues to the arbitrator. That is because this "gateway dispute about whether the parties are bound by a given arbitration clause raises a 'question of arbitrability.'" *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002). And "if the agreement delegates the arbitrability issue to an arbitrator, a court may not decide [it]." *Henry Schein*, 139 S. Ct. at 530.

Under the FAA, "arbitration is a matter of contract, and courts must enforce arbitration contracts according to their terms." *Henry Schein*, 139 S. Ct. at 529. A natural consequence of that principle is that "parties may agree to have an arbitrator decide not only the merits of a particular dispute but also "'gateway" questions of "arbitrability,"'" including whether the agreement "covers a particular controversy." *Ibid.* Despite purporting to apply these principles, the Eighth Circuit's analysis turns them on their head.

1. The Eighth Circuit's initial error was to conflate the *merits* of whether a dispute is arbitrable with the anterior question of *who decides* those merits. The Eighth Circuit reasoned that because the relevant agreements refer to arbitration between "the parties," the agreements must make nonsignatory enforcement impermissible. App. 14a & 15a n.5. Whether this dispute is ultimately subject to arbitration, however, is not the point. The critical issue instead is *who decides*

whether the underlying dispute is subject to arbitration.

On that threshold point, the agreements clearly and unmistakably provide that the arbitrator must resolve "any dispute," "controversy," or "claim" about the agreements' "interpretation" and "enforcement." App. 3a-5a. This Court has already held that agreements requiring arbitration of "[a]ny * * * dispute" about the "enforceability, or scope" of an arbitration agreement delegate arbitrability questions to the arbitrator. *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440, 442-43 (2006). Therefore, these agreements, like the one in *Buckeye*, require the *arbitrator*, not the *court*, to resolve disputes over arbitrability. And the delegation here is of the belt-and-suspenders variety, as these contracts also adopt the rules of the AAA, which independently delegate arbitrability questions to arbitrators. *Eckert*, 756 F.3d at 1100.[5]

By deciding that the agreements here preclude nonsignatory enforcement, the Eighth Circuit necessarily "reach[ed] the merits" of HomeServices' claim to arbitration. *Zirpoli*, 48 F.4th at 143. If the Eighth Circuit had concluded that the contract *did* permit nonsignatory enforcement, it then would have sent "the arbitrability question of whether [nonsignatories may enforce the agreement] to an arbitrator to decide—even though [it] *already* decided" that very issue. *Ibid.* That "performative" dance would be "anti-

[5] The decision below recognized that adoption of these rules effected a delegation at least in some agreements, but nevertheless applied the same improper gloss, cabining the delegation with the court's own interpretation of the contracts' reference to "the parties." App. 12a, 14a.

thetical to the FAA's purpose of unwanted judicial interference" with the enforcement of arbitration contracts. *Ibid.*

2. The Eighth Circuit attempted to justify its arrogation of the "who decides" question by treating the issue as one of contract *formation*—"whether the parties formed a valid contract that binds them to arbitrate their dispute." App. 11a. In other words, it thought HomeServices needed to show that the plaintiffs *and HomeServices* had an arbitration contract for HomeServices to compel arbitration—a conclusion that it believed was compelled by Missouri law. That is wrong for several reasons.

As an initial matter, state law never should have entered into the Eighth Circuit's calculus. State law no doubt is relevant to whether an arbitration contract exists. But it was *undisputed* that the plaintiffs and the real-estate brokerage companies (ReeceNichols and BHH KC) had formed valid contracts to arbitrate. Where an arbitration contract undisputedly exists, the relevant threshold question of delegation—who decides whether a dispute is arbitrable—is not a matter of state contract law, but of "federal [arbitration] law": whether that contract "clearly and unmistakably" delegated arbitrability. See, *e.g.*, *Blanton*, 962 F.3d at 846. Any state law that purported to control that distinct inquiry would be "preempted" by the FAA and this Court's decisions. *Lamps Plus, Inc.* v. *Varela*, 139 S. Ct. 1407, 1431 n.4 (2019) (Kagan, J., dissenting.).

Accordingly, whatever Missouri law happens to say about nonsignatory enforcement—a question about the merits of the arbitrability dispute—does not

determine the threshold question of *who applies* that state law to decide the arbitrability dispute. As to that distinct federal-law question—who decides—there is no requirement that HomeServices show *it* had a contract with the plaintiffs. To the contrary, this Court has repeatedly held that there is no "categorica[l] ba[r]" on nonsignatory enforcement under the FAA. *Arthur Andersen LLP* v. *Carlisle*, 556 U.S. 624, 631 (2009); accord *GE Energy Power Conversion France SAS, Corp.* v. *Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637, 1643-44 (2020).

3. Nor can the Eighth Circuit's reasoning be justified by the principle that "one can[not] be forced into arbitration by a contract to which one is a stranger." App. 12a. True, it may go "without saying that a contract cannot bind a nonparty." *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279, 294 (2002); see also *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 943 (1995) (suggesting arbitration is proper to resolve "only those disputes" "that the parties have agreed to submit to arbitration"). But the plaintiffs are not strangers to the arbitration agreements. It is undisputed that they signed the agreements and agreed to arbitration. And in holding that the FAA permits enforcement of arbitration agreements by nonsignatories, this Court already rejected this very same argument, describing those passages as "dicta" that "pertained to *issues* parties agreed to arbitrate" and to "an entity * * * which obviously had no third-party obligations under the contract in question." *Arthur Andersen*, 556 U.S. at 631-32. "Neither these nor any of our other cases have presented for decision the question whether arbitration agreements that are otherwise enforceable by (or against) third parties trigger protection under the

FAA." *Ibid*. And, in *Arthur Andersen*, this Court answered that question in the affirmative, expressly resolving that third parties *may* invoke the FAA to force arbitration even when they are nonsignatories. *Ibid*.

This Court has also noted (in a parenthetical citing *First Options*) that courts generally "should decide whether the arbitration contract [binds] parties who did not sign the agreement." *Howsam*, 537 U.S. at 84. But that simply restated the general presumption that courts are to decide "questions of arbitrability" in the absence of a delegation. *Ibid*. Here, questions of arbitrability are delegated to the arbitrator, and "[w]hen the parties' contract assigns a matter to arbitration, a court may not resolve the merits of the dispute." *Henry Schein*, 139 S. Ct. at 530.

III. This Case Is An Appropriate Vehicle To Resolve This Important And Recurring Question

This case is an ideal vehicle for this Court to decide an important and recurring question of federal arbitration law that frequently recurs. The conflict between the courts of appeals undermines the uniformity in the law of arbitration the FAA seeks to impose.

A. This petition raises an important and recurring issue

The question raised in this petition has far-reaching implications for the uniform "body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1, 24 (1983). This is "a subject as to which Congress has declared the need for national uni-

formity." *Evanston Insurance Co.* v. *Cogswell Properties, LLC*, 683 F.3d 684, 693 (6th Cir. 2012).

As the recent conflicting decisions indicate, see *supra* at 11-23, the question presented regularly recurs. See, *e.g.*, *Zirpoli*, 48 F.4th at 140 ("We are once again confronted with the 'mind-bending issue' of arbitration about arbitration."). Indeed, this petition is one of two pending before this Court on this issue. See *Tug Hill Operating, LLC*, No. 23-661.[6] One scholar has noted that the arbitrability of gateway questions of arbitrability "has become one of the most important and unsettled areas on the docket," with "more than two hundred decisions dealing with delegation clauses" in 2016 *alone*. David Horton, *Arbitration About Arbitration*, 70 Stan. L. Rev. 363, 370 (2018). Lower-court decisions on this issue "are a tangled mess," and "[t]he mist descends at the first step in the analysis, where courts disagree about how to tell whether a contract assigns gateway matters about the arbitration to the arbitrator." *Ibid.*

Indeed, this issue is already recurring for HomeServices and the real-estate brokerage industry. The $1.8 billion verdict in this case has "prompt[ed] a wave of follow-on suits against the industry" in courts

[6] This petition independently warrants this Court's review and is an appropriate vehicle for resolving this split because the plaintiffs do not dispute that they signed the agreements, because the issue was squarely addressed below, because the issue was outcome determinative, and because the court of appeals' error resulted in a $1.8 billion class verdict in a dispute that never should have gone to litigation. If the Court grants the petition in *Tug Hill*, petitioners request that the Court grant this case as well or, in the alternative, hold this petition pending the outcome in *Tug Hill*.

around the country. Katie Arcieri, *Real Estate Verdict Spurs 'Race to Courthouse' Over Collusion*, Bloomberg Law (Nov. 8, 2023), http://tinyurl.com/4ey2fa3m. And this identical issue is currently before the district court in *Moehrl* v. *National Association of Realtors*, No. 19-cv-1610 (N.D. Ill.), a challenge involving twenty multiple listing services in several states around the country, where HomeServices' motion to compel arbitration has been pending for over nine months.

The disuniformity among the courts of appeals on the question presented is especially problematic because it makes the "right to enforce an arbitration contract" conferred by the FAA "dependent for its enforcement on the particular forum in which it is asserted." *Southland Corp.* v. *Keating*, 465 U.S. 1, 15 (1984). Such a state of affairs undermines the "national uniformity in the treatment of arbitration agreements" that the FAA "was designed to create," Katherine H. Flynn, *Not Open for Business: A Review of South Carolina's Arbitration Venue Statute, and a Proposal for Reform*, 66 S.C. L. Rev. 727, 730 (2015), and it "frustrat[es] the FAA's goal of promoting a uniform, pro-arbitration federal policy," Tamar Meshel, *Closing the Enforcement Gap: Third-Party Discovery Under the FAA and the Federal Rules of Civil Procedure*, 70 U. Kan. L. Rev. 1, 6 (2021).

If left unresolved, the division between the courts of appeals will also "encourage and reward forum shopping." *Southland*, 465 U.S. at 15. Parties seeking an order to compel arbitration are overwhelmingly likely to be defendants haled into court against their will and therefore subject to the plaintiff's strategic choice of venue. This is particularly true when, as here, a de-

fendant or its affiliates have entered into similar contracts with potential plaintiffs across the country.

Accordingly, if this Court does not grant certiorari to resolve the disagreement between the courts of appeals, the plaintiffs will be able to destroy a contractual agreement to have an arbitrator decide gateway issues of arbitrability simply by filing their complaints in a district within the Fourth, Fifth, Eighth, or Ninth Circuits, so long as venue is proper and personal jurisdiction exists in one of those circuits, see 28 U.S.C. § 1391; Fed. R. Civ. P. 4(k). That venue requirement will be easy to meet in nationwide class actions, because "absent class members" are not "considered when a court decides whether it is the proper venue," *Mussat* v. *IQVIA, Inc.*, 953 F.3d 441, 447 (7th Cir. 2020). And personal jurisdiction will exist whenever the named plaintiffs can show "a defendant is 'essentially at home' in the State" or that the claims "arise out of or relate to the defendant's contacts with the forum." *Ford Motor Co.* v. *Montana Eighth Judicial District Court*, 141 S. Ct. 1017, 1024, 1026 (2021) (emphasis omitted). Thus, class counsel need only recruit named plaintiffs from favored fora to evade arbitration agreements and class waivers. Such gamesmanship is intolerable in a commercial field where the need for a consistent and uniform federal rule of decision is paramount.

B. This case is an appropriate vehicle for review of this important issue

The question presented is outcome determinative and squarely developed below. There is no barrier to this Court's review.[7]

To be sure, this appeal arises in an interlocutory posture. But that is typical in appeals of the denial of a motion to compel arbitration because Congress, in Section 16(a) of the FAA, "create[d] a rare statutory exception to the usual rule that parties may not appeal before final judgment." *Coinbase, Inc.* v. *Bielski*, 599 U.S. 736, 740 (2023); 9 U.S.C. § 16(a). That is why this Court has regularly reviewed arbitration cases in an interlocutory posture on appeal from orders resolving a motion to compel arbitration. See, *e.g.*, *Coinbase, Inc.* v. *Suski*, No. 23-3 (U.S. granted Nov. 3, 2023); *Southwest Airlines Co.* v. *Saxon*, 596 U.S. 450, 455 (2022) (reviewing circuit court judgment denying arbitration and remanding); *Henry Schein*, 139 S. Ct. at 528 (ap-

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[7] The district court's conclusion that HomeServices waived its right to arbitrate the unnamed class members' claims poses no bar to this Court's review. App. 28a. The Eighth Circuit did not endorse the district court's waiver rationale when it affirmed, and for good reason. A party does not waive its right to arbitrate claims of unnamed class members by moving to compel arbitration shortly after class certification because it is "impossible in practice to compel arbitration against speculative plaintiffs and jurisdictionally impossible for [a] District Court to rule on those motions before the class [is] certified." *Gutierrez* v. *Wells Fargo Bank, NA*, 889 F.3d 1230, 1238 (11th Cir. 2018). Indeed, shortly after the Eighth Circuit issued its decision below, it held that "a motion to bind parties who [are] not yet part of the case" is premature, so a party does not waive its right to arbitrate the claims of unnamed class members when it moves to compel arbitration "quickly after the class [is] certified." *H&T Fair Hills, Ltd.* v. *Alliance Pipeline L.P.*, 76 F.4th 1093, 1099-1100 (8th Cir. 2023).

peal from denial of motion to compel); *New Prime Inc.* v. *Oliveira*, 139 S. Ct. 532, 537 (2019) (same); *Arthur Andersen*, 556 U.S. at 627 (same).

Granting review now, in addition to being authorized by Congress and consonant with this Court's practice, is particularly appropriate because resolving the preliminary issue of arbitrability will avoid a further waste of judicial and party resources on post-trial proceedings and an appeal from the post-trial judgment. Rejecting this appeal simply because the case proceeded to trial, arguably in violation of this Court's decision in *Coinbase*, would simply compound "the worst possible outcome for parties and the courts: [further] litigating a dispute in the district [and circuit] court only for" a higher court "to reverse and order the dispute arbitrated." 599 U.S. at 743 (quotation marks omitted).

Denying this petition to await an appeal from the final judgment would serve no purpose because further proceedings in the district court and court of appeals will not change anything about the question presented. To the contrary, as *Coinbase* makes clear, if this dispute must "ultimately head to arbitration in any event," that outcome will vacate the trial judgment and verdict, rendering those further proceedings a "waste [of] scarce judicial resources." 599 U.S. at 743; see also *Britton* v. *Co-op Banking Group*, 916 F.2d 1405, 1410 n.6 (9th Cir. 1990) ("If [the appellant] were to prevail in his claim to a right to arbitration, the district court judgment would be vacated and the parties could proceed to arbitration.").

The question presented by this petition is therefore appropriate for review. The stakes of resolving the

question presented could hardly be more stark. The Eighth Circuit's erroneous decision to usurp the arbitrator's authority subjected HomeServices to an unwarranted class trial and a resulting jury verdict of $1.8 billion. That trial should never have occurred because the plaintiffs are required to arbitrate their claims—and their arguments opposing arbitration must be resolved by the arbitrator, not a court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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