No. 12-855

IN THE
Supreme Court of the United States

LIMITED LIABILITY COMPANY, *ET AL.*,

Petitioners,

v.

JANE DOE,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of the Commonwealth of Puerto Rico

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Respondent Maggie Correa Avilés (Ms. Correa) was both an owner and an employee of petitioner McConnell Valdés LLC (McV), and each of her roles was governed by a separate contract. As an owner, she was party to an Operating Agreement that included an arbitration provision. As an employee, she was covered by an Employee Manual that is part of the employment contract and does not provide for arbitration. After Ms. Correa sued McV for discrimination and retaliation in her capacity as an employee, McV moved to dismiss the case based on the arbitration clause of the Operating Agreement. The trial court denied the motion and held that the arbitration agreement did not apply to claims arising from an employment relationship, and both the intermediate appellate court and the Supreme Court of Puerto Rico denied discretionary review of the trial court's decision. The question presented is

Whether the trial court erred in holding that the arbitration clause in the Operating Agreement does not apply to a controversy arising out of an employment relationship subject to a separate contract—the Employee Manual—that does not provide for arbitration.

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INTRODUCTION

Petitioners seek review of an unpublished, non-precedential, and fact-bound decision of a Puerto Rico court that correctly applied general contract law principles to determine that the parties had not agreed to arbitrate claims arising from an employment relationship. The Court should decline review.

As an initial matter, this Court lacks jurisdiction because the Puerto Rico Supreme Court denied discretionary review, and 28 U.S.C. § 1258 grants this Court jurisdiction only over certain final judgments "rendered by the Supreme Court of the Commonwealth of Puerto Rico." Even if § 1258 allows this Court to review a decision of an inferior commonwealth court when the Puerto Rico Supreme Court denies discretionary review, petitioners have sought a writ of certiorari to the wrong court because the Court of Appeals of the Commonwealth of Puerto Rico also denied discretionary review, although it issued an opinion explaining the basis for that denial. Because the higher courts denied review, the trial court's order is the operative decision.

Further, contrary to petitioners' claim, the court below did not apply any arbitration-specific Puerto Rico law and did not disregard this Court's precedents under the Federal Arbitration Act (FAA). The court below expressed none of the judicial hostility towards arbitration that the Court identified in *Marmet Health Care Center, Inc. v. Brown*, 132 S. Ct. 1201 (2012), and *Nitro-Lift Technologies, LLC v. Howard*, 133 S. Ct. 500 (2012). To the contrary, the Commercial Arbitration Act of Puerto Rico is interpreted consistently with the FAA, and the outcome of this case would be the same under either Act.

Finally, petitioners' assertion of a circuit split on the issue whether the incorporation by reference of American Arbitration Association rules in an arbitration agreement shows that the parties agreed that the arbitrator would determine arbitrability does not support review in this case. The Puerto Rico Supreme Court is in accord with the federal courts on that issue, and the trial court found that petitioners waived the issue by submitting without reservation to the court's jurisdiction and agreeing to have the court determine the scope of the arbitration clause.

OPINIONS AND ORDERS BELOW

As noted in the petition (at 1), the opinions and orders entered in this case by the courts below are unpublished. At the time the petition was filed, those opinions and orders were under seal, and the parties had litigated the case under pseudonyms. On January 4, 2013, the Court of First Instance for the Commonwealth of Puerto Rico lifted the seal, granted public access to the record, and dispensed with the use of pseudonyms. The names of the parties are set forth in the petition (at ii). Accordingly, in this brief, we refer to the parties by their names.

Although petitioner McConnell Valdés LLC (McV) purports to seek a writ of certiorari to the Court of Appeals of the Commonwealth of Puerto Rico, that court denied discretionary review. Therefore, the order of the Court of First Instance for the Commonwealth of Puerto Rico (Pet. App. 56a) is the operative decision. *See* Eugene Gressman et al., *Supreme Court Practice* 177, 179 (9th ed. 2007); *see also* Pet. 13 n.5 (stating that "to the extent that the judgment of the Court of First Instance is deemed the operative judgment, petitioners seek a writ of certiorari to that court").

JURISDICTION

McV's supplemental brief concedes that no case law addresses whether 28 U.S.C. § 1258 authorizes this Court to review a decision of an inferior commonwealth court when the Puerto Rico Supreme Court denies discretionary review. Drawing a parallel to 28 U.S.C. § 1257, however, McV asserts in the petition (at 2) that this Court has jurisdiction under § 1258. But unlike § 1257, which gives the Court jurisdiction over certain final judgments "rendered by the highest court of a State in which a decision could be had," § 1258 gives this Court jurisdiction only over certain final judgments "rendered by the Supreme Court of the Commonwealth of Puerto Rico." McV does not seek a writ of certiorari to the Supreme Court of Puerto Rico, but to an inferior commonwealth court, and thus this case does not fall within the scope of § 1258.

McV nonetheless claims that § 1258 applies, citing *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986). As McV acknowledges, however, in *Posadas*, the Court held that the judgment in question—a dismissal by the Puerto Rico Supreme Court of an appeal for want of a "substantial constitutional question," where the appellant had the right to appeal a superior court decision to the Puerto Rico Supreme Court on the ground that it "'involv[ed] or decid[ed] a substantial constitutional question,'" *id.* at 338 (quoting P.R. Laws Ann., Tit. 4, § 37(a) (1978))—"was a merits decision of the Puerto Rico Supreme Court." Pet. Supp. Br. at 2. Accordingly, "the *Posadas* Court did not need to decide the threshold jurisdictional question presented here." *Id.*

McV argues that the rule under § 1257 allowing a petitioner to seek certiorari to a lower court that issues a

judgment if the state supreme court denies discretionary review should apply equally to § 1258. But when a state supreme court denies review, the lower court becomes, in the words of § 1257, "the highest state court in which a decision could be had." *See Virginian Ry. Co. v. Mullens*, 271 U.S. 220, 222 (1926) (explaining that the higher court declined to review the judgment "making the trial court the highest court of the state in which a decision could be had"); *Am. Ry. Express Co. v. Levee*, 263 U.S. 19, 20-21 (1923) ("[W]hen the [state supreme court] jurisdiction was declined the Court of Appeal was shown to be the highest Court of the State in which a decision could be had."). In contrast, when the Puerto Rico Supreme Court denies review, the lower court does not become, in the words of § 1258, "the Supreme Court of the Commonwealth of Puerto Rico." Thus, the plain language of § 1258 provides no support for the assertion of jurisdiction over this case.

STATEMENT OF THE CASE

Respondent Maggie Correa Avilés is an attorney who worked at McV, a law firm in Puerto Rico. Pet. App. 66a. Ms. Correa was both an owner and an employee of the firm. Her role as a capital member of McV was controlled by the firm's Operating Agreement (OA). The OA governs the "operational and administrative aspects" of the firm, *id.* 67a, and sets forth a confidential dispute resolution process that culminates in arbitration administered by the American Arbitration Association under its rules of commercial arbitration, *id.* 490a-492a. As the trial court found below, "[t]he arbitration clause applies to any claim filed by a capital member in regard to operational or administrative affairs of the [firm]." *Id.* 68a. "The OA has no provisions related to any claims arising

from an employment relationship such as discrimination, harassment or retaliation." *Id.* 67a.

Ms. Correa's employment with McV was subject to the firm's Employee Manual (EM), which is applicable to all employees of the firm, including capital members. The EM sets forth an equal employment opportunity policy that expressly requires that employees and members respect the rights of fellow employees and members to be free from discrimination and harassment. The EM does not have an arbitration clause. *Id.*

In December 2011, the firm reduced Ms. Correa's compensation. Ms. Correa appealed the decision to the firm's policy committee, of which she was also a member, arguing that the reduction in compensation both violated the OA and constituted unlawful employment discrimination on the basis of sex and age. The committee rejected Ms. Correa's claim, and the parties attempted to mediate the dispute without success. On March 22, 2012, the firm filed a demand for arbitration. Implicitly recognizing that the OA and its arbitration provision do not apply to disputes arising from an employment relationship, in its demand for arbitration the firm contended that Ms. Correa "had no claim arising from her employment relationship inasmuch as she was an 'employer' and not an 'employee.'" *Id.* 65a n.8; *see also id.* 68a. On March 30, 2012, the firm expelled Ms. Correa from the policy committee.

On April 2, 2012, Ms. Correa filed a complaint in the Court of First Instance for the Commonwealth of Puerto Rico. Ms. Correa sought to enjoin the arbitration of her discrimination claims arising from her status as an employee and to pursue those claims in court. Ms. Correa filed her complaint using pseudonyms to preserve confidentiality in case the court ruled that her employment

discrimination claims were subject to the arbitration provision of the OA, which requires confidentiality.

In response to Ms. Correa's lawsuit, McV terminated Ms. Correa's employment and expelled her from the firm. *Id.* 69a. Ms. Correa amended her complaint to add claims for retaliation and to seek reinstatement.

The trial court held a hearing on April 11, 2012. At the hearing, McV "agreed to request a stay in the arbitration proceedings before the American Arbitration Association (AAA), *while the Court adjudicated the dispute regarding the arbitrability of [Ms. Correa's] claims.*" *Id.* 61a-62a (emphasis in original). After the hearing, McV filed a motion to dismiss the lawsuit and compel arbitration of the dispute, and the trial court scheduled an evidentiary hearing to resolve the issue of arbitrability. *Id.* 62a. Although McV argued in its motion that it was not submitting to the trial court's jurisdiction, the court found that McV "had already done so through [its] initial appearance and through [its] active participation without reservation, in the April 11, 2012 hearing." *Id.* n.5.

After the issue was fully briefed, the trial court reviewed "the voluminous file constituting the case record" and, on June 4, 2012, issued its decision.[1] *Id.* 66a. The court found, as a matter of fact, that capital members could be both owners and employees of the firm because the two roles are not mutually exclusive. The court further found that Ms. Correa's discrimination and retaliation claims arise from the employment relationship and are covered by the EM, which has no arbitration provi-

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[1] Although the issue of arbitrability was initially raised in a motion to dismiss, the trial court relied on extensive material outside the pleadings and made factual findings to determine the issue.

sion. Thus, if Ms. Correa is found to be an employee, she will be entitled to pursue her discrimination and retaliation claims in court because such claims are outside the scope of the arbitration clause of the OA, and Ms. Correa "did not agree to arbitrate any claims arising from her employment relationship" with the firm. *Id.* 68a.

The trial court noted that agreements to arbitrate are contractual and that the Federal Arbitration Act (FAA) reflects a public policy favoring arbitration where the parties have contracted to do so. *Id.* 69a-72a. The court concluded, however, that Ms. Correa's discrimination and retaliation claims "are outside the scope ('subject matter') of the OA and its arbitration clause" because they arise from an employment relationship with McV. *Id.* 74a. The court observed that the firm's argument that Ms. Correa's claims were covered by the arbitration clause of the OA rested on the firm's contention that Ms. Correa was not an employee and enjoyed no protection from employment discrimination. The trial court rejected McV's position as a matter of fact. *Id.* 74a-76a.

On June 12, 2012, McV filed a petition for writ of certiorari with the Puerto Rico Court of Appeals seeking discretionary review of the trial court's decision. McV argued that the trial court erred by 1) assuming jurisdiction to determine the arbitrability of Ms. Correa's claims; 2) concluding that her employment-based claims are outside the scope of the OA's arbitration clause; and 3) not finding Puerto Rico employment-discrimination law preempted by the FAA. *Id.* 23a-24a. McV did not seek review of the trial court's determination that McV had submitted to the court's jurisdiction and agreed to have the court determine arbitrability or the trial court's fac-

tual finding that Ms. Correa could be both an owner subject to the OA and an employee covered by the EM.[2]

On June 15, 2012, the court of appeals denied McV's petition for review. In explaining its denial, the court observed that Puerto Rico's Commercial Arbitration Act, 32 L.P.R.A. § 3201 *et seq.*, closely follows the provisions of the FAA and the FAA's interpretive case law. Pet. App. 26a. After a general discussion of parallel decisions on arbitration in the courts of Puerto Rico and the federal courts, the court of appeals stated that the trial court had not erred in finding that the employment dispute is outside the scope of the OA's arbitration provision and denied certiorari. *Id.* 31a.

On June 19, 2012, McV again sought discretionary review, this time by filing a petition for a writ of certiorari with the Supreme Court of Puerto Rico. *Id.* 430a. That court denied review without explanation on September 7, 2012. *Id.* 81a. McV twice moved for reconsideration; both motions were denied. *Id.* 86a, 95a.

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[2] In footnote 3 on page 11 of its petition to this Court, McV states that it continues to dispute whether Ms. Correa "was an employee entitled to bring discrimination and retaliation claims." That issue is the subject of an ongoing evidentiary hearing in the trial court, but the court has already noted that the documentary evidence suggests that Ms. Correa "lacked the control typical of owners and employers." Pet. App. 75a.

REASONS FOR DENYING THE WRIT

I. The Question Whether the Operating Agreement Is a Contract in Interstate Commerce for Purposes of the FAA Does Not Warrant Review Because It Does Not Affect the Outcome of this Case.

McV latches on to dicta in the order denying intermediate appellate review, in which the appellate court indicated that McV failed to establish that the OA is a contract in interstate commerce subject to the FAA. Pet. 15-18. But that discussion made no difference to the denial of McV's motion to dismiss, and it provides no basis for this Court's review. *See* Eugene Gressman et al., *Supreme Court Practice* 248 (9th ed. 2007) (stating that Court will deny review if asserted error is irrelevant to ultimate outcome of the case).

First, the trial court's order is the operative decision because the higher-level Puerto Rico courts declined discretionary review.[3] And the trial court neither rejected application of the FAA nor discussed whether the OA is a contract in interstate commerce. Rather, the trial court's decision was based on its findings that 1) Ms. Correa could be both an owner and employee of McV; 2) her discrimination and retaliation claims arose from her alleged status as an employee covered by the EM, which is a part

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[3] As explained above, assuming this Court has jurisdiction under 28 U.S.C. § 1258 in the same way it would under 28 U.S.C. § 1257 if this case had arisen in a state court, the petition for a writ of certiorari should have been directed to the judgment of the trial court, *see, e.g.,Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 678 n.1 (1968), even though the court of appeals indicated that it denied discretionary review because it believed the trial court's decision was correct. *See Mich.-Wash. Pipeline Co. v. Calvert*, 347 U.S. 157, 160 (1954); *Am. Ry. Express*, 263 U.S. at 20-21.

of the employment contract and has no arbitration provision; 3) claims arising from an employment relationship are outside the scope of the arbitration clause of the OA; and 4) Ms. Correa never agreed to arbitrate claims arising from an employment relationship with the firm. Pet. App. 66a-68a. The trial court assumed without discussion that the FAA applied, and it recognized that the FAA's "main purpose is for the Courts to enforce all valid arbitration contracts." *Id.* 71a (citing 9 U.S.C. § 1). The court concluded, however, that there was no arbitration agreement to enforce regarding discrimination and retaliation claims arising from an employment relationship and the EM's equal employment opportunity policy, and that such claims are beyond the scope of the arbitration clause in the OA.

Second, the appellate court's discussion of the FAA's interstate commerce requirement had no effect on that court's decision to deny discretionary review. The appellate court recognized that the FAA "applies to the states when the contracts involve interstate commercial transactions," *id.* 26a (citing 9 U.S.C. § 2), but stated in the next paragraph, without explanation, that "given the inapplicability" of the FAA, it would apply Puerto Rico law on arbitration. *Id.* Contrary to McV's assertion, however, the court of appeals did not then go on to apply some special rule of Puerto Rico law that is less friendly to arbitration than the FAA. Rather, the appellate court's statement concerning application of Puerto Rico law versus the FAA made no difference to its view of the case, because, as the court emphasized, "Puerto Rico's doctrine in the subject matter of arbitration has closely followed [the FAA's] provisions, as well as its interpretive case law." *Id.* 27a.

Finally, even if the appellate court erred in stating that the OA was not a contract in interstate commerce and even if the appellate court's order denying review were reviewable here, the error would be, at worst, an "erroneous factual finding[] or the misapplication of a properly stated rule of law." S. Ct. R. 10. "A petition for a writ of certiorari is rarely granted when the error" asserted is of that type. *Id.*

For each of these reasons, the statement in the appellate court order denying discretionary review does not warrant this Court's review.

II. The Trial Court Rejected McV's Argument Concerning the Scope of the Arbitration Clause Based on Generally Applicable Contract Principles.

McV uses the appellate court's discussion of the FAA's interstate commerce requirement to claim that application of the FAA would have changed the outcome of this case. McV errs, however, both because the only decision on the merits in this case was issued by the trial court, not the court of appeals, and because the rejection of McV's argument concerning the scope of the arbitration clause in the OA did not depend on the application of Puerto Rico law in conflict with the FAA.

The FAA preempts state laws that treat arbitration contracts differently from other contracts, but it preserves general principles of state contract law to determine whether the parties have entered into an agreement to arbitrate. *See AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1746 (2011) (stating that the FAA's "saving clause preserves generally applicable contract defenses"); *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987) ("Thus state law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning

the validity, revocability, and enforceability of contracts generally."). Here, the trial court relied on generally applicable contract law principles to hold that the parties did not agree to arbitrate Ms. Correa's discrimination and retaliation claims.

The trial court found that Ms. Correa and McV had entered into two separate contracts: the OA that applied to Ms. Correa's role as an owner, and the EM that applied to Ms. Correa's role as an employee. Because claims based on an employment relationship arise under the EM and not the OA, the court found that the OA's arbitration clause did not apply. And because the EM did not contain an arbitration agreement, the court found that Ms. Correa "did not agree to arbitrate any claims arising from her employment relationship" with the firm. Pet. App. 68a. The court explained that whether McV and Ms. Correa had agreed to arbitrate this dispute was a matter of contract interpretation:

> If the contract between the parties establishes certain types of specific disputes that will be heard through arbitration, or if the contract excludes certain particular controversies, the courts must act in accordance with what is stipulated in the contract.

Id. 70a (citing *Medina Betancourt v. La Cruz Azul de Puerto Rico*, 155 D.P.R. 735 (2001)). The contract principle relied on by the trial court is consistent with the FAA and this Court's precedents. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 437 U.S. 613, 626 (1985) ("Accordingly, the first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute."). The correctness of a trial court's attempt to determine the intent of the parties to a pair of contracts as applied to a highly

specific set of claims presents no issue worthy of review by this Court.

Attempting to tease out such an issue, McV focuses on the appellate court and asserts that it "succeeded in applying arbitration-specific commonwealth rules that the FAA would clearly preempt." Pet. 21. But—even if the order denying discretionary review were reviewable here—neither of McV's examples supports that statement.

First, McV wrongly claims that Article 1 of Puerto Rico's Commercial Arbitration Act (CAA), 32 L.P.R.A. § 3201, is narrower than the FAA. The CAA provides that parties to an agreement may agree to arbitrate "any dispute which may in the future arise between [the parties] from such [agreement] or in connection therewith." *Id.* The FAA likewise provides for arbitration of controversies "arising out of" the parties' contract. 9 U.S.C. § 2. The CAA and FAA are thus equally broad.

Second, McV argues that the appellate court "buttressed its ruling by invoking Puerto Rico policy favoring judicial resolution of discrimination and retaliation claims under the Puerto Rico constitution." Pet. 20. The court did no such thing. When the appellate court, in issuing a non-precedential decision denying appellate review, described Ms. Correa's claims as arising from "a severance resulting from discrimination and retaliation . . . that violates her fundamental constitutional rights which our current legal system protects," Pet. App. 32a, the court was not opining that such claims as a general matter must be resolved in court, rather than through arbitration. Rather, the court was describing the nature of the claims because, under the contract at issue in the case, claims arising from an employment relationship are outside the scope of the OA's arbitration clause. If the

EM had an arbitration clause, there is no doubt that the court would have found that arbitration was the correct forum to resolve disputes arising from Ms. Correa's employment relationship with McV—even disputes involving discrimination and retaliation. But the EM does not have an arbitration clause.

McV incorrectly claims that *Marmet Health Care Center* is "materially indistinguishable from the decisions below." Pet. 22. In *Marmet*, this Court vacated a decision of the West Virginia Supreme Court that refused to enforce arbitration agreements applicable to a particular type of claim. This Court found that the FAA "'requires courts to enforce the bargain of the parties to arbitrate," *Marmet*, 132 S. Ct. at 1203 (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217 (1985)), and preempts "a categorical rule prohibiting arbitration of a particular type of claim." *Id.* at 1204. Thus, the Court vacated the state court's decision to apply such a categorical rule, but remanded the case for the state court to consider whether the arbitration clauses at issue "are unenforceable under state common law principles that are not specific to arbitration and pre-empted by the FAA." *Id.* In contrast, here, the commonwealth court did not hold that discrimination and retaliation claims cannot be resolved in arbitration; rather, the court found, based on generally-applicable contract law principles, that the parties never agreed to arbitrate claims arising from Ms. Correa's status as an employee of the firm.

McV also cites *Nitro-Lift Technologies*, but that decision is similarly inapposite. In *Nitro-Lift*, the Court vacated a decision of the Oklahoma Supreme Court holding, in flat contradiction of the rule announced by this Court in *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006), and *Prima Paint Corp. v. Flood &*

Conklin Mfg. Co., 388 U.S. 395 (1967), that "the existence of an arbitration agreement in an employment contract does not prohibit judicial review of the underlying agreement." 133 S. Ct. at 502 (internal quotation marks and citation omitted). Here, the court did not deny arbitration on the ground that the agreement containing the arbitration clause (the OA) was invalid as a whole (the type of decision that *Nitro-Lift*, *Buckeye*, and *Prima Paint* forbid); rather, it determined that employment disputes are governed by the EM, which has no arbitration provision. The decision poses no conflict with *Nitro-Lift*.

III. McV Waived Any Objection to the Court's Authority to Resolve the Issue of Arbitrability.

McV suggests that this Court should grant review to resolve a circuit split on the issue whether the incorporation by reference of AAA rules in an arbitration agreement shows that the parties agreed that the arbitrator would determine the scope of an arbitration provision. Pet. 27-30. Even if that issue were worthy of this Court's review, this case would not be a proper vehicle to address it.

First, the Puerto Rico Supreme Court has not disagreed with the numerous federal courts that have held that the incorporation of particular arbitration rules shows that the parties agreed to arbitrate arbitrability. To the contrary, in *Municipio de Mayagüez v. Lebrón*, 167 D.P.R. 713 (2006), the Puerto Rico Supreme Court held that incorporation of industry-wide arbitration rules constitutes a binding agreement to solve disputes pursuant to those rules, although in that case the court found that the rules at issue had not been incorporated within the four corners of the contract.

Second, the trial court found that McV appeared at a hearing on April 11, 2012, and "agreed to request a stay in the arbitration proceedings . . . *while the Court adjudicated the dispute regarding the arbitrability of [Ms. Correa's] claims.*" Pet. App. 61a-62a (emphasis in original). After the hearing, McV filed a motion to dismiss and to compel arbitration. In its motion, McV asserted that it was not submitting to the court's jurisdiction and that the arbitrator should decide arbitrability. The trial court, however, found that McV had already submitted to the court's jurisdiction "through [its] initial appearance and through [its] active participation without reservation, in the April 11, 2012 hearing." *Id.* n.5.

The court further explained that "[t]he Puerto Rico Supreme Court in several occasions has ruled that a party that appears voluntarily and materially partakes of an action establishing itself as a party in the suit is submitting to the jurisdiction of the court." *Id.* (citations omitted). Thus, McV waived any objection to having the trial court determine the scope of the arbitration provision in the OA. McV makes no pretense of arguing that the fact-bound question of the correctness of the waiver decision, which served as the basis for the trial court's ruling that it and not the arbitrator would determine the scope of the arbitration agreement, presents an issue on which the lower courts are in conflict or is otherwise appropriate for review by this Court. Rather, McV focuses entirely on the question whether an agreement that incorporates AAA rules constitutes a "delegation" clause within the meaning of *Rent-A-Center West, Inc. v. Jackson*, 130 S. Ct. 2772 (2010), an issue not addressed by the courts below. The Court should wait for a case that presents that question before considering whether it merits a grant of review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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