No. _____

In the
Supreme Court of the United States

THE RAMS FOOTBALL COMPANY, LLC and
E. STANLEY KROENKE,

Petitioners,

v.

ST. LOUIS REGIONAL CONVENTION AND SPORTS
COMPLEX AUTHORITY, et al.,

Respondents.

On Petition for Writ of Certiorari to the Missouri Court of Appeals, Eastern District

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Federal Arbitration Act (FAA) is designed to ensure that arbitration agreements are enforced according to their terms and placed on equal footing with other contracts. This Court has stated that courts should apply ordinary state-law contract principles to determine whether an arbitration agreement exists, and should enforce provisions that authorize arbitrators to decide questions of arbitrability—*e.g.*, whether an arbitration agreement covers a dispute—when the parties' intent to arbitrate arbitrability is "clear and unmistakable."

In this case, the parties expressly incorporated into their arbitration agreement the rules of the American Arbitration Association existing at the time any dispute may arise. At the time of the dispute at issue here, those rules expressly assigned arbitrability questions to the arbitrator. Although a federal court held in the context of this very agreement that such an incorporation clearly and unmistakably evinces the parties' intent to arbitrate arbitrability under state contract law, the Missouri appellate court below held that the same agreement does not satisfy this Court's "clear and unmistakable" test. That decision not only defies the FAA and this Court's precedent; it entrenches a lower-court split regarding the import of the "clear and unmistakable" test and evinces the very hostility to arbitration that the FAA was enacted to counteract.

The question presented is:

Whether the Federal Arbitration Act permits a court to refuse to enforce the terms of an arbitration agreement assigning questions of arbitrability to the

arbitrator if those terms would be enforceable under ordinary state-law contract principles in a non-arbitration context.

PARTIES TO THE PROCEEDING

Petitioners are The Rams Football Company, LLC, and E. Stanley Kroenke, the club's owner. Petitioners were defendants in the trial court and appellants in the appellate court.

Respondents are the St. Louis Regional Convention and Sports Complex Authority, the City of St. Louis, and the County of St. Louis. Respondents were plaintiffs in the trial court and respondents in the appellate court.

The National Football League (NFL), all other NFL clubs, and all other NFL club owners were defendants in the trial court, but were not involved in the proceedings relevant to this petition.

CORPORATE DISCLOSURE STATEMENT

The Rams Football Company, LLC has no parent company, and no publicly held company owns more than 10% of its stock. E. Stanley Kroenke is an individual.

STATEMENT OF RELATED PROCEEDINGS

Circuit Court of Missouri (22nd Judicial Circuit, City of St. Louis):

- *St. Louis Reg'l Convention and Sports Complex Authority v. National Football League*, No. 1722-CC00976 (Dec. 27, 2016) (denying application to compel arbitration)

Missouri Court of Appeals (Eastern District):

- *St. Louis Reg'l Convention and Sports Complex Authority v. National Football League*, No. ED10682 (Apr. 16, 2019), transfer application denied, May 20, 2019, motion for stay of mandate denied, Sept. 12, 2019 (affirming denial of application to compel arbitration upon retransfer from Supreme Court of Missouri)
- *St. Louis Reg'l Convention and Sports Complex Authority v. National Football League*, No. ED10682 (Aug. 21, 2018), transfer application denied, Oct. 2, 2018 (affirming denial of application to compel arbitration)

Supreme Court of Missouri:

- *St. Louis Reg'l Convention and Sports Complex Authority v. National Football League*, No. SC97929 (Sept. 3, 2019) (denying second transfer application)
- *St. Louis Reg'l Convention and Sports Complex Authority v. National Football League*, No. SC97488 (Jan. 29, 2019) (sustaining first transfer application)

Supreme Court of the United States

The Rams Football Company, LLC v. St. Louis Reg'l Convention and Sports Complex Authority, No. 19A335 (Oct. 8, 2019) (denying application for stay of mandate)

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PETITION FOR WRIT OF CERTIORARI

This case presents an important question about how to reconcile two principles this Court has derived from the Federal Arbitration Act (FAA). This Court has long emphasized that the primary purpose of the FAA is to ensure that arbitration agreements are enforced according to their terms and placed on "equal footing" with all other contracts. *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1424 (2017). In *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), and *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010), the Court recognized that when courts have been assigned the responsibility to determine which issues are arbitrable, they should apply a presumption of arbitrability. At the same time, the Court clarified that this presumption is inapplicable to the threshold question of whether courts or arbitrators should decide arbitrability. On that question, silence or ambiguity is not enough to send the threshold issue to the arbitrator; rather, the parties' intent to do so must be "clear and unmistakable." This case lies at the intersection of these equal-footing and clear-and-unmistakable principles. While most courts view the "clear and unmistakable" test as an application of equal-footing principles (and so demand only the clarity required under generally applicable contract law), the state court below and other state courts view the "clear and unmistakable" test as a deviation from equal-footing principles (and so apply the kind of special anti-arbitration rules generally condemned by this Court in the name of applying this Court's precedents).

Applying that arbitration-disfavoring approach, the court below proceeded to hold that a St. Louis jury should resolve a highly charged dispute over whether the Rams should pay the City of St. Louis and other local entities damages for moving the jury's hometown NFL team to California. Thus, at the very moment when the Rams most needed the neutral arbitrator for which they had bargained, the state court deprived them of the contractual promise. It did so, moreover, on the mistaken premise that this Court's cases *compel* courts to apply special anti-arbitration rules in the context of agreements to arbitrate arbitrability. That decision is plainly wrong, and the split that it deepens is untenable.

OPINIONS BELOW

The Missouri Supreme Court's order denying petitioners' second transfer application is unreported but available at App.1-3. The opinion of the Missouri Court of Appeals, which it issued after the Missouri Supreme Court sustained petitioners' first transfer application, is available at 2019 WL 1606160 and reproduced at App.5-25. The Missouri Supreme Court's order sustaining petitioners' first transfer application is unreported but available at App.26-27. The Missouri Court of Appeals' opinion accompanying its order denying petitioners' first transfer application is available at 2018 WL 4701484 and reproduced at App.28-30. The Missouri Court of Appeals' original opinion is unreported but reproduced at App.31-47. The Missouri Circuit Court's opinion is available at 2017 WL 6885090 and reproduced at App.48-53.

JURISDICTION

The Missouri Court of Appeals issued its opinion below on April 16, 2019, and the Missouri Supreme Court denied transfer on September 3, 2019. This Court has jurisdiction under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the U.S. Constitution, *see* U.S. Const. amend VI, cl. 2, and the relevant provision of the FAA, *see* 9 U.S.C. §2, are reproduced at App.54.

STATEMENT OF THE CASE

A. Legal Background

Congress enacted the FAA in 1925 "in response to a perception that courts were unduly hostile to arbitration." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018). Section 2 is the statute's "primary substantive provision," *Rent-A-Ctr.*, 561 U.S. at 67, and it 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 … shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. §2. As this Court has explained, "the central or 'primary' purpose of the FAA is to ensure that 'private agreements to arbitrate are enforced according to their terms.'" *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682 (2010). The FAA thus "places arbitration agreements on equal footing with all other contracts" and reflects a "national policy favoring arbitration." *Buckeye Check*

Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006). Among other reasons, that national policy exists because arbitration allows for "streamlined proceedings and expeditious results," *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985), and helps to "avoid the costs of litigation," *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001).

As this Court recently reiterated, contracting parties may agree to arbitrate not only the merits of a dispute, but also "'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019). After all, an "agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the … court to enforce," so "the FAA operates on this additional arbitration agreement *just as it does on any other*"—*i.e.*, it is enforced "according to [its] terms." *Id.* (emphasis added).

When the parties agree that courts should decide arbitrability questions, courts must apply a "presumption" in favor of arbitration, such that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *First Options*, 514 U.S. at 945; *see also Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002). But when it comes to the threshold question of whether the parties agreed to arbitrate arbitrability, this Court has held that this presumption does not apply. Accordingly, while "silence or ambiguity" on the question of "*whether* a particular merits-related

dispute is arbitrable" should be resolved in favor of arbitration, "silence or ambiguity about the question *who* (primarily) should decide arbitrability" is not subject to that presumption. *First Options*, 514 U.S. at 945 (quotation marks omitted). Instead, this Court has instructed that "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clear and unmistakable' evidence that they did so." *Id.* at 944.

Although the Court has described this "clear and unmistakable" test as imposing a "heightened" standard relative to other arbitrability questions, *Rent-A-Ctr.*, 561 U.S. at 69 n.1, it has repeatedly emphasized that state courts are precluded from applying a contracting "rule [that] singles out arbitration agreements for disfavored treatment," for such a rule "violates the FAA" and its equal-footing principle. *Kindred Nursing*, 137 S. Ct. at 1425; *see also, e.g.*, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011); *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987). Accordingly, "[c]ourts may not … invalidate arbitration agreements under state laws applicable *only* to arbitration provisions." *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

To reconcile any tension between these two lines of precedent, most lower courts have concluded that the "clear and unmistakable" test does not empower courts to displace ordinary state-law contracting principles with a special federal-law rule disfavoring arbitration. Instead, courts have concluded that the "clear and unmistakable" standard simply distinguishes the presumption of arbitrability applicable when the agreement directs courts to

decide arbitrability questions and requires no more clarity than is demanded for other questions under state contracting law. Put differently, a majority of courts treat the "clear and unmistakable" standard as a deviation from the presumption of arbitrability, but *not* as a deviation from the equal-footing principle.

Applying that equal-footing approach, most courts have concluded that parties can satisfy the "clear and unmistakable" test by incorporating by reference the Commercial Arbitration Rules of the American Arbitration Association (AAA), which provide that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement." AAA Commercial R-7(a); *see also Henry Schein*, 139 S. Ct. at 528 ("The rules of the American Arbitration Association provide that arbitrators have the power to resolve arbitrability questions."); *Wells Fargo Advisors, LLC v. Sappington*, 884 F.3d 392, 397 (2d Cir. 2018); *Fallo v. High-Tech Inst.*, 559 F.3d 874, 878 (8th Cir. 2009). A minority of state courts, however, have interpreted the "clear and unmistakable" test as displacing state law and requiring courts to subject arbitrability provisions to a special federal-law standard that makes them uniquely difficult to enforce. *See, e.g.*, *Flandreau Pub. Sch. Dist. No. 50-3 v. G.A. Johnson Constr., Inc.*, 701 N.W.2d 430 (S.D. 2005); *Roubik v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 692 N.E.2d 1167 (Ill. 1998); *Gilbert St. Developers, LLC v. La Quinta Homes, LLC*, 94 Cal. Rptr. 3d 918 (Cal. App. 2009). Those courts view the "clear and unmistakable" standard as an intentional deviation from the equal-footing principle that animates the rest of the FAA.

Applying that uniquely demanding standard, they find delegations by reference inadequate.

B. Factual and Procedural Background

1. This lawsuit arises out of the Rams' 2016 decision to relocate their NFL football team from St. Louis to Los Angeles—a politically charged issue in the state of Missouri, and in St. Louis in particular. App.5. Petitioners are the Rams Football Company and the club's owner, E. Stanley Kroenke. App.5. Respondents are the St. Louis Regional Convention and Sports Complex Authority (RSA), the City of St. Louis, and St. Louis County. App.5.

The Rams were founded in 1936 and, between 1946 and 1994, called the Los Angeles area home. By the end of the 1994 NFL season, however, they were playing in "one of the worst sports facilities in the country." D17 at 8; D19.[1] St. Louis officials therefore approached the Rams about occupying the new Trans World Dome in St. Louis beginning with the 1995 NFL season. *See St. Louis Convention & Visitors Comm'n v. NFL*, 154 F.3d 851, 853 (8th Cir. 1998). The RSA owned the stadium and managed the public funds used to construct it, *see id.*, while the St. Louis Convention & Visitors Commission (CVC)—a government-controlled body whose members are appointed by the St. Louis mayor and county executive—held the rights to lease it, *see* Mo. Rev. Stat. §67.601; D18 at 2. Negotiations culminated in detailed agreements governing the Rams' tenure in St. Louis. Based on the Rams' experience in Anaheim, the

[1] "D" refers to the documents before the Missouri Court of Appeals.

negotiations and the agreements focused heavily on (1) the required upkeep, improvements, and quality of the stadium into the future; (2) the Rams' rights and remedies if the St. Louis entities failed to provide a top-tier stadium at the St. Louis entities' expense; and (3) the processes for resolving any disputes involving those rights and other issues related to the agreements. *See* D15; D16; D21.

2. Of particular importance here, the Rams and respondents are parties to a relocation agreement and a 30-year stadium lease (collectively, the 1995 Contracts), which they signed when the Rams moved to St. Louis in 1995. App.9-10. The 1995 Contracts are governed by Missouri law and contain a broad arbitration clause, which requires "[a]ny controversy, dispute or claim between or among any of the parties … to this Amended Lease, related to this Amended Lease, including, without limitation, any claim arising out of, in connection with, or in relation to the interpretation, performance or breach of this Amended Lease," to be "settled by arbitration." D16 §§20, 25; D15 §§8.10, 8.11; *see* App.9.

The parties agreed in the 1995 Contracts to arbitrate future disputes "in accordance with the most applicable *then existing* rules of the American Arbitration Association." App.9; D16 §25 (emphasis added). The AAA rules themselves reinforced that command, for the 1993 AAA Commercial Arbitration Rules that were in effect at the time stated that "[t]hese rules *and any amendment of them* shall apply in the form obtaining at the time the demand for arbitration or submission agreement is received by the AAA." AAA Commercial R-1 (1993) (emphasis added).

And, as noted, since 1999, the AAA rules have provided that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement."[2]

Respondents promised in the 1995 Contracts to provide the Rams a "first tier" stadium, meaning one ranking in the top 25% of all NFL stadiums on 15 metrics. App.23-24; D21 §§1.1.1, 1.3.1. The Rams had just one remedy if respondents did not meet that standard: the option to convert the lease to an annual tenancy and "to relocate … as of the end of any year." D16 §16(e)(i); D15 §8.5; *see also* App.24. Respondents conceded that they did not meet the first-tier requirement. Negotiations reached an impasse in 2012, and, in accordance with the 1995 Contracts, the parties submitted their dispute for arbitration under the "then existing" AAA Commercial Arbitration Rules—*i.e.*, the then-current 2009 rules. *See* D20; D58 at 13-14. After an arbitral panel unanimously ruled for the Rams, D20 at 7, the RSA told the Rams that it did not intend to satisfy the first-tier requirement, acknowledging that the Rams could in turn "exercise any and all rights … under the Lease." D28 at 2; D29 at 2. In 2016, the Rams exercised their contractual right "to relocate." D16 §16(e)(i); *see also* App.36.

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[2] The decisions below state that this provision first appeared in the AAA rules in 2003. While the provision has been codified in Rule 7(a) since 2003, *see* AAA Commercial R-7(a) (2003), the AAA first amended the rules to include it in 1999, *see, e.g.*, Br. for Am. Arbitration Ass'n 17, *BG Grp. PLC v. Republic of Argentina*, No. 12-138 (U.S. filed Sept. 3, 2013).

3. In April 2017, notwithstanding the arbitration agreement and their willingness to abide by it (and the then-current 2009 AAA Rules) during the 2012 negotiations, respondents sued the Rams in state court in St. Louis, along with the NFL, all other NFL clubs, and all other club owners. App.11; D2. Respondents purported to sue primarily based on the 1984 NFL Relocation Policy—an internal guidance document unilaterally promulgated by the NFL Commissioner that contains a list of "factors that may be considered in evaluating [a] proposed" relocation. App.36; D3 at 3-4. Count I of the complaint alleges that this internal document is a binding contract, that respondents are third-party beneficiaries of it, and that the Rams breached it. App.36. Count II alleges that the Rams were unjustly enriched, including by the Rams' "use of a publicly-funded stadium under team-friendly [lease] terms." D2 ¶¶24, 66; App.36-37. Counts III and IV allege that various public statements about respondents' ongoing stadium negotiations with the Rams were fraudulent. App.37. And Count V alleges that the Rams' owner tortiously interfered with "a probable future business relationship between the Rams and Plaintiffs." D2 ¶99; App.37.

The Rams applied to compel arbitration based on the 1995 Contracts. App.37. Among other things, respondents did not dispute (1) that they were all parties to the 1995 Contracts and their valid arbitration clause; or (2) that the arbitration clause incorporated the AAA rules. In addition, respondents did not dispute that, if the court concluded that the 1995 Contracts did not delegate arbitrability to the arbitrator, then the court would have to consider both

respondents' claims and the Rams' defenses to determine if the dispute "touches matters covered by" the 1995 Contracts and is therefore arbitrable. D41.

The trial court nevertheless denied the Rams' application. App.48-53. Without offering any explanation, the court stated that "there is no clear and unmistakable evidence … that the parties agreed to arbitrate arbitrability." App.53. And though it was undisputed that the Rams had raised defenses arising out of the 1995 Contracts, it further held that all of respondents' claims fell outside the scope of the arbitration agreement simply because respondents purported not to sue based on the 1995 Contracts. App.52-53.

4. The Rams appealed to the Missouri Court of Appeals, which affirmed. App.32. Instead of answering the threshold question—*i.e.*, whether the agreement delegated arbitrability to the arbitrator—the court ruled on the merits of arbitrability itself, concluding that all of respondents' claims should remain in court. App.40-41, 43-44. The Rams applied for transfer to the Missouri Supreme Court of Missouri, but the Court of Appeals denied the application. App.28-30. In doing so, the court issued a further opinion stating that it "considered [the Rams'] 'artfully pleaded' defenses and did not find they required arbitration." App.29.

The Rams then applied for transfer directly with the Missouri Supreme Court, which, in January 2019, sustained the application and ordered the case retransferred "for reconsideration in light of" this Court's decision in *Henry Schein* and a recent decision from the Missouri Supreme Court, both of which made

clear that courts must respect agreements to delegate arbitrability to the arbitrator. App.26-27.

C. The Decision Below

On remand, without additional briefing or argument, the Court of Appeals again affirmed the trial court, this time holding that the 1995 Contracts did not clearly and unmistakably assign arbitrability to the arbitrator. App.5-25. Although the court acknowledged that the parties agreed in the 1995 Contracts to abide by "whatever rules are in use by AAA … at the time of a dispute," and that the AAA rules in force when the parties' dispute arose assigns arbitrability to the arbitrator, it refused to enforce that agreement because the AAA rules in force *in 1995* did not do so. In the court's view, the "clear and unmistakable" test could not be satisfied absent clear and unmistakable evidence that the parties specifically decided to arbitrate arbitrability in 1995. App.18-19. The court relegated *Henry Schein* to a footnote, explaining that it "does not impact our analysis" because the AAA delegation provision "first appear[ed]" after 1995, and thus "could not provide 'clear and unmistakable' evidence of the parties' affirmative contractual intent in 1995." App.7, 16 & n.5.

In reaching that conclusion, the court did not cite any generally applicable rule of Missouri law that bars parties from incorporating a set of rules that may change over time; nor did it mention that the AAA rules in existence in 1995 expressly incorporated any later amendment to them. Moreover, although the court recognized that a federal court in Missouri had considered the same arbitration agreement and

concluded that it clearly and unmistakably manifested the parties' intent to arbitrate arbitrability, it refused to follow that decision, summarily declaring it "distinguishable and unpersuasive." App.17 (discussing *McAllister v. St. Louis Rams, LLC*, No. 16-cv-172 (E.D. Mo. Nov. 17, 2017)).

Turning to the merits of arbitrability, the court again declined to discuss the Rams' defenses. Instead, focusing solely on respondents' claims, it held that the parties' dispute is not arbitrable because all of "[t]h[e] counts are based on the [Rams'] alleged failure to comply with their obligations under the NFL Policy, not the 1995 Lease or 1995 Relocation Agreement," and respondents' "claims do not require reference to or construction of those contracts." App.22-23.

The Rams again sought transfer to the Missouri Supreme Court, but the Court of Appeals again denied the application. *See* App.3. The Rams then sought transfer directly with the Missouri Supreme Court, but this time the court denied review. App.1-2. Following those denials, the Rams moved to stay the Court of Appeals' mandate, but both the Court of Appeals and this Court denied relief. *See* No. 19A335.

REASONS FOR GRANTING THE PETITION

The question whether courts or arbitrators will decide whether a dispute is arbitrable is "fundamental" to arbitration law. *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1416-17 (2019). Yet lower courts are plainly divided over how to determine whether parties agreed to assign that question to an arbitrator. Some simply demand the same clarity that state law demands for comparable questions, while

others demand an extraordinarily clear delegation as a matter of federal law. Put differently, some courts view the "clear and unmistakable" standard as an application of the FAA's bedrock equal-footing standard, while others view it as a deviation from that doctrine. The courts are hopelessly divided, as well-illustrated by the division between federal and state courts over the import of the very arbitration agreement at issue here.

The decision below widens the divide, joining a number of state courts in concluding that contract terms that qualify as clear and unmistakable for other purposes nevertheless flunk this Court's test. That holding not only conflicts with the decisions of every federal court to address the issue, but runs counter to the first principles of the FAA, which is designed to eliminate novel rules that discriminate against arbitration. If an agreement to incorporate an evolving building code would be sufficiently clear and unmistakable to be enforced under Missouri law (and it undoubtedly would be), then so too is an agreement to incorporate an evolving set of rules governing arbitration—including who will resolve threshold questions of arbitrability. By concluding otherwise, the decision below reached a profoundly wrong conclusion on a profoundly important question, and widened a division among the lower courts to boot. The need for certiorari is clear.

Now is the right time, and this is the right case, for this Court to provide much-needed guidance regarding the "clear and unmistakable" test. Arbitrability disputes arise with great frequency and demand certainty, but there is nothing certain about

the current state of the law, with courts unable to agree on something as basic as whether the "clear and unmistakable" test is an embodiment of the FAA's equal-footing doctrine or a deviation from it. This case is an exemplar of that basic dispute, as a state court that was looking for extraordinary clarity decided arbitrability for itself, while a federal court that was looking at the same agreement and applying equal-footing principles sent the arbitrability question to the arbitrators. This Court has often granted review in FAA cases when federal and state courts in the same jurisdiction have reached conflicting conclusions. This case involves not only such an intrastate conflict, but a national one as well. And the minority approach not only deviates from the FAA's bedrock equal-footing doctrine, but attributes the need to do so to this Court and its cases. Thus, only this Court can intervene and make clear once and for all that the FAA does not permit special arbitration-only rules disfavoring arbitration, and that this principle applies to the agreement to arbitrate arbitrability "just as it does on any other" issue. *Henry Schein*, 139 S. Ct. at 529.

I. The Lower Courts Are Divided Over The Import Of This Court's "Clear And Unmistakable" Test For Assigning Gateway Questions Of Arbitrability To Arbitrators.

The decision below exacerbates an acknowledged division among the lower courts regarding the import of this Court's "clear and unmistakable" test. Courts and commentators alike have identified confusion regarding that test for years. *See, e.g.*, David Horton, *Arbitration About Arbitration*, 70 Stan. L. Rev. 363, 414, 418 (2018) (lamenting that "[t]here has never

been a shared understanding of what it means to have a 'clear and unmistakable' delegation clause" and that "*Rent-A-Center* has exacerbated this problem"); *see also, e.g.*, *Ed's Pallet Servs., Inc. v. Applied Underwriters, Inc.*, No. 15-CV-1163-SMY-SCW, 2017 WL 9287091, at *3 (S.D. Ill. Apr. 7, 2017); *Holzer v. Mondadori*, No. 12 CIV. 5234 NRB, 2013 WL 1104269, at *7 (S.D.N.Y. Mar. 14, 2013); Stuart M. Widman, *What's Certain Is the Lack of Certainty About Who Decides the Existence of the Arbitration Agreement*, 59-Jul. Disp. Resol. J. 54, 55 (May-July 2004). As things now stand, two competing viewpoints exist.

1. On one side of the spectrum, numerous courts (including every federal court to address the issue) have held that terms in an arbitration agreement that seek to arbitrate questions of arbitrability must be enforced so long as they are clear and unmistakable under ordinary contract principles. In other words, those courts have viewed the "clear and unmistakable" test as an application of the FAA's basic postulate that the terms of arbitration agreements should be interpreted on an "equal footing" with other agreements and not subject to special rules disfavoring arbitration. Those courts thus apply neither a presumption in favor of arbitrability nor any special rule demanding extraordinary clarity, but instead look for the degree of clarity required generally by ordinary contracting principles.

For instance, in *Wells Fargo Advisors, LLC v. Sappington*, the Second Circuit considered whether arbitration clauses governed by Missouri law, which were signed between 2011 and 2014, validly delegated arbitrability questions to the arbitrator by

incorporating the AAA's 1993 Securities Arbitration Rules. 884 F.3d at 394. The court acknowledged "the presumption that questions of arbitrability … are for a court to decide," but it noted that the presumption is overcome "when there exists clear and unmistakable evidence from the arbitration agreement, *as construed by the relevant state law*, that the parties intended that the question of arbitrability shall be decided by an arbitrator." *Id.* at 395 (emphasis added). Applying Missouri contract law, the Second Circuit found the requisite clear and unmistakable evidence. *See id.* at 396. As the court stated, the 1993 rules incorporated "any amendment" to those rules; in 1999, the AAA replaced those rules with the Commercial Arbitration Rules; and when the dispute between the parties arose, the Commercial Arbitration Rules expressly stated that arbitrators should resolve arbitrability questions. *See id.* at 396-97. Responding to the appellant's "criticism" that this "string of inferences" should not satisfy the "clear and unmistakable" test, the court "reject[ed]" it, for under Missouri law, "[i]ncorporating the 1993 Rules … 'made them as much a part of the contracts as any other provision.'" *Id.* at 397 (quoting *City of Chesterfield v. Frederich Constr. Inc.*, 475 S.W.3d 708, 711 (Mo. Ct. App. 2015)).

Other federal courts have followed that same approach. In fact, a federal court has examined the *very same arbitration agreement* at issue here and concluded that the parties' intent to arbitrate arbitrability is clear and unmistakable under ordinary contract principles—and thus under this Court's "clear and unmistakable" test too. In *McAllister v. St. Louis Rams, LLC*, No. 16-cv-172 (E.D. Mo. Nov. 17, 2017), the Eastern District of Missouri addressed

claims involving the Rams' relocation to Los Angeles in a case involving the Rams and the CVC, the entity that held the rights to lease the St. Louis stadium to the Rams. ECF No. 276 at 1-2; *see* p.7, *supra*. Invoking the 1995 Contracts, the Rams moved to compel arbitration, including as to questions of arbitrability, and the district court granted that motion after enforcing the plain language of the agreement, just as it would in any other contract case.

As the court explained, the parties agreed to follow the "then existing" AAA Commercial Arbitration Rules, and "then existing" referenced "the time the arbitration demand is made."[3] *Id.* at 3-4. Because the AAA Commercial Arbitration Rules existing at the time of the Rams' arbitration demand "provide[d] … that disputes regarding jurisdiction … should be resolved in arbitration," the court held that it must "grant[] the Rams' motion to compel arbitration, including as to the threshold question of arbitrability." *Id.* at 4[4]; *see also, e.g.*, *Hodge v. Top*

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[3] For good measure, the court added that "the 1993 [AAA] Rules (that were in effect when the [arbitration agreement] was signed in 1995) state that 'these rules and any amendment[s] of them shall apply in the form obtaining at the time the demand for arbitration … is received by the AAA.'" *McAllister*, ECF No. 276 at 4. Accordingly, the court concluded, "even the 1993 Rules require the use of the Rules currently in existence." *Id.*

[4] Because decisions compelling arbitration (including as to questions of arbitrability) are not immediately appealable, *see* 9 U.S.C. §16(b), there was no appeal to the Eighth Circuit in *McAllister*, and the district court decision likely reflects the final word of federal courts in the Eighth Circuit on the meaning of this particular arbitration agreement.

Rock Holdings, Inc., No. 4:10CV1432 FRB, 2011 WL 1527010, at *4-*5 (E.D. Mo. Apr. 20, 2011) (similar).

This approach is not unique to courts applying Missouri law. For example, in *Dish Network LLC v. Ray*, 900 F.3d 1240 (10th Cir. 2018), a case involving Colorado law, the Tenth Circuit explicitly "adopt[ed] the approach of the Second Circuit in *Sappington*," which explains that a court "must consider whether there is clear and unmistakable evidence that the parties intended [to delegate arbitrability] based on the language of the clause at issue" and that "[s]tate law defines how explicit the clause's language must be to satisfy that standard." *Id.* at 1247 (emphasis omitted). The arbitration agreement before the Tenth Circuit had incorporated the AAA Commercial Arbitration Rules by reference, and the court found that such an incorporation provision readily passed this Court's "clear and unmistakable" test. *Id.* at 1246. That was so, the court explained, because "Colorado requires no language more specific." *Id.*

The Eleventh Circuit followed suit in *Spirit Airlines, Inc. v. Maizes*, 899 F.3d 1230 (11th Cir. 2018). There, the court considered whether an arbitration agreement governed by Florida law delegated certain arbitrability questions to the arbitrator by incorporating AAA rules. Applying "normal interpretive methods" of Florida contract law, *id.* at 1235, the court answered in the affirmative, as the relevant AAA rules included supplementary rules providing that arbitrators should resolve the arbitrability question at issue, *id.* at 1233.

Other federal-court examples abound. *See, e.g.*, *Halliburton Energy Servs., Inc. v. Ironshore Specialty*

Ins. Co., 921 F.3d 522, 536-39 (5th Cir. 2019); *PaineWebber Inc. v. Elahi*, 87 F.3d 589, 600-01 (1st Cir. 1996); *Grynberg v. BP P.L.C.*, 585 F. Supp. 2d 50, 55 (D.D.C. 2008); *Pikes Peak Nephrology Assocs. v. Total Renal Care, Inc.*, No. 09-cv-00928-CMA-MEH, 2010 WL 1348326, at *6-7 (D. Colo. Mar. 30, 2010); *Cong. Constr. Co. v. Geer Woods, Inc.*, No. 3:05-CV1665 (MRK), 2005 WL 3657933, at *3 (D. Conn. Dec. 29, 2005); *Brandon, Jones, Sandall, Zeide, Kohn, Chalal & Musso, P.A. v. MedPartners, Inc.*, 203 F.R.D. 677, 684-85 (S.D. Fla. 2001).

State-court examples exist too. For instance, in *Ex parte Johnson*, 993 So. 2d 875 (Ala. 2008), the Alabama Supreme Court considered whether arbitration agreements governed by Alabama law that incorporated the AAA Commercial Arbitration Rules constituted a valid agreement to delegate a particular question of arbitrability to the arbitrator. *Id.* at 882-88. Although the parties incorporated those rules before the AAA amended them to address the particular question at issue, the court nevertheless held that ordinary contracting principles compelled the conclusion that arbitrability questions belonged before the arbitrator, as the AAA rules in effect at the time of contracting stated that the parties would have to abide by later amendments to those rules. *Id.* at 883-84. The court thus rejected the invitation to arrogate the arbitrability question unto itself, explaining that "indifference to the unambiguous terms of a written agreement is contradictory to settled principles of Alabama contract law" and that it could not "create unique rules of contract law applicable only to arbitration agreements." *Id.* at 885 (citing *Casarotto*, 517 U.S. at 687).

2. The Missouri Court of Appeals' decision below lies at the opposite end of the spectrum. Although ordinary principles of Missouri contract law permit parties to incorporate rules or codes that may evolve over time, and while Missouri courts deem such terms clear and unmistakable in non-arbitration settings, *see* pp.27-30, *infra*, the court below held that such incorporation provisions *cannot* suffice in the delegation-of-arbitrability context, *see, e.g.*, App.19. In effect, the court below held that this Court's "clear and unmistakable" test is a deviation from the equal-footing doctrine and creates a special federal rule that disfavors arbitration by requiring parties to exhibit an extraordinary degree of clarity, above and beyond what would be required for other matters, before they can agree to arbitrate the question of arbitrability.

Unfortunately, the decision below does not stand alone in that regard. Other state courts likewise have agreed that the "clear and unmistakable" test is best interpreted as a deviation from equal-footing principles that imposes extraordinary requirements on contracting parties in the arbitration-of-arbitrability context. For instance, in *Flandreau Public School District No. 50-3 v. G.A. Johnson Construction, Inc.*, the South Dakota Supreme Court considered an arbitration agreement that incorporated the AAA Construction Industry Arbitration Rules, which also include an arbitration-of-arbitrability provision. 701 N.W.2d at 432. Although ordinary principles of South Dakota contract law provide that parties "may incorporate by reference another document," *Dakota Foundry, Inc. v. Tromley Indus. Holdings, Inc.*, 737 F.3d 492, 497 (8th Cir. 2013) (quoting *James River Equip. Co. v. Beadle Cty.*

Equip., Inc., 646 N.W.2d 265, 269 (S.D. 2002)), the court refused to honor that rule, reasoning that, for purposes of the "clear and unmistakable" test, the arbitration agreement was "silent" on arbitrability because the text of the agreement did not *itself* expressly address the issue, *see Flandreau*, 701 N.W.2d at 436-37. In effect, then, the court treated the "clear and unmistakable" rule as a standalone, federal clear-statement rule.

The Illinois Supreme Court likewise departed from ordinary contracting principles in *Roubik v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* 692 N.E.2d 1167. In *Roubik*, the parties had signed an arbitration agreement that was governed by New York law, *id.* at 1168, and ordinary principles of New York contract law provided that the relevant language in the agreement clearly and unmistakably assigned arbitrability questions to the arbitrator, *id.* at 1176 (Heiple, J., dissenting); *see Smith Barney Shearson Inc. v. Sacharow*, 689 N.E.2d 884, 887-88 (N.Y. 1997). Nonetheless, the Illinois Supreme Court held that the language could not overcome this Court's "clear and unmistakable" test, with the majority accusing the dissenting justice (who had interpreted this Court's cases as requiring adherence to equal-footing principles) of "wholly ignor[ing] [this Court's] directi[ons]," *Roubik*, 692 N.E.2d at 1173; *cf. id.* at 1176 (Heiple, J., dissenting) ("under the relevant state law, the language of the arbitration agreement and the provision of the NASD manifest the parties' intent to submit the arbitrability issue to arbitration").

And the conflict runs deeper still, as California courts have indicated on multiple occasions that the

"clear and unmistakable" test authorizes wholesale departures from the equal-footing doctrine and ordinary contracting principles. *See, e.g.*, *Gilbert St. Developers*, 94 Cal. Rptr. 3d at 922 ("*First Options* specifically *contrasted* (a) 'ordinary state-law principles that govern the formation of contracts' with (b) the clear and unmistakable rule, which the *First Options* court described as an 'important qualification' in deciding the question of whether arbitrators have power to decide their own power. That is, it is not enough that ordinary rules of contract interpretation simply yield the result that arbitrators have power to decide their own jurisdiction."); *see also Ajamian v. CantorCO2e, L.P.*, 137 Cal. Rptr. 3d 773, 789 (Cal. Ct. App. 2012) (same); *Eakins v. Corinthian Colleges, Inc.*, No. E058330, 2015 WL 758286, at *4-*6 (Cal. Ct. App. Feb. 23, 2015) (concluding that arbitration agreement incorporating AAA Consumer Arbitration Rules, which contained a delegation provision at time of contracting, could not satisfy the "clear and unmistakable" test).

As these decisions illustrate, the lower courts are deeply divided over what the "clear and unmistakable" test demands. Many courts (and all federal courts) view the test as compatible with the equal-footing doctrine and simply require clear and unmistakable evidence applying ordinary contract law, which generally allows for the incorporation of third-party rules, including rules that expressly provide that they may change over time. Arbitration is hardly the only context where incorporating an external set of rules subject to subsequent improvements makes sense, and state contracting law is generally no obstacle to that sensible arrangement. *See, e.g.*, *Energy Reserves Grp.,*

Inc. v. Kansas Power & Light Co., 459 U.S. 400, 416 (1983) (discussing energy contracts that "expressly recognize the existence of extensive regulation by providing that any contractual terms are subject to relevant present and future state and federal law"); 11 Richard A. Lord, *Williston on Contracts* §30:23 (4th ed. 1990) (parties may incorporate future changes to rules if contract language "clearly indicates such to have been intention of parties"). But some state courts, including the court below, interpret the "clear and unmistakable" test as a deviation from equal-footing principles—in other words, as reflecting the kind of express rule disfavoring arbitration that this Court has warned against in every other context. The former group is plainly right, but in all events, the need for this Court's review is palpable, as a "national" arbitration policy obviously requires uniformity across the Nation. *Buckeye Check Cashing*, 546 U.S. at 443.

II. The Decision Below Defies The Federal Arbitration Act And This Court's Precedent.

This Court's intervention is warranted not only because of the conflict in the lower courts, but also because the decision below is profoundly wrong. Under the FAA and this Court's precedent, state courts may not refuse to enforce arbitration agreements solely on the basis of novel rules unique to arbitration. Yet there is no other way to describe what the court below did here.

1. As this Court has repeatedly emphasized, "the FAA's primary purpose" is to "ensur[e] that private agreements to arbitrate are enforced according to their terms." *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479

(1989). In other words, "the FAA requires courts to honor parties' expectations." *Concepcion*, 563 U.S. at 351. Consistent with the principle that arbitration is just "a matter of contract," *id.*, courts must "place[] arbitration agreements on equal footing with all other contracts," *Buckeye Check Cashing*, 546 U.S. at 443. And as this Court reiterated just last Term, these principles apply with equal force when parties "agree to have an arbitrator decide … gateway questions of arbitrability." *Henry Schein*, 139 S. Ct. at 529. After all, an "agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the … court to enforce," meaning the "FAA operates on this additional arbitration agreement *just as it does on any other*." *Id.* (emphasis added).

Just as in any other contract case, then, "courts generally … should apply ordinary state-law principles that govern the formation of contracts" to determine "whether the parties agreed to arbitrate a certain matter"—and that "includ[es] arbitrability." *First Options*, 514 U.S. at 944. To be sure, the Court has stated that agreements to arbitrate arbitrability must be "clear and unmistakable," and it has noted that this language means that a "heightened" standard governs. *See id.* at 944-45; *Rent-A-Ctr.*, 561 U.S. at 69 n.1. But that language is designed to indicate that the presumption in favor of arbitrability that applies when a court is adjudicating the scope of an arbitration agreement is not applied to the threshold question of whether courts or arbitrators are to determine the scope of the agreement. Nothing in this Court's decisions has indicated any intent to deviate from the bedrock principles that arbitration

agreements are interpreted based on generally applicable contracting law and not subject to extraordinary rules that disfavor arbitration. Nor has this Court indicated the existence or content of a unique body of federal contracting rules that applies when determining whether an antecedent agreement to arbitrate arbitrability is enforceable. This Court has instead adopted the opposite view, underscoring that the equal-footing doctrine and ordinary contracting principles "operate[] on this additional arbitration agreement just as it does on any other," *Henry Schein*, 139 S. Ct. at 529, and require all arbitration agreements to be placed "on an *equal* plane with other contracts," *Kindred Nursing*, 137 S. Ct. at 1427 (emphasis added).

Properly understood, then, the "clear and unmistakable" test is an application of the equal-footing doctrine, not a deviation from it. It simply means that parties must manifest their intent to arbitrate arbitrability in a manner that is clear and unmistakable *under ordinary state-law contract principles*. That means that arbitration agreements that are silent or ambiguous regarding who should resolve arbitrability (including after accounting for principles like incorporation by reference) do not constitute an agreement to arbitrate arbitrability and do not benefit from presumption of arbitrability that governs when courts are assigned the authority to determine whether specific issues are arbitrable. *First Options*, 514 U.S. at 944-45; *cf. Lamps Plus*, 139 S. Ct. at 1414-17. But the inapplicability of that presumption does not mean that there is some federal rule requiring an extraordinary degree of clarity beyond that needed under ordinary state contracting

law. Such a rule would be fundamentally incompatible with the equal-footing doctrine and the entire thrust of the FAA itself.

If the courts below had honored the equal-footing doctrine, this would have been an easy case. Under ordinary principles of Missouri contract law, there is no doubt that parties may incorporate matters into their contract by reference. *See, e.g.*, *Dunn Indus. Grp., Inc. v. City of Sugar Creek*, 112 S.W.3d 421, 435 n.5 (Mo. 2003) (en banc) (per curiam) ("In Missouri, matters incorporated into a contract by reference are as much a part of the contract as if they had been set out in the contract in haec verba."). There is likewise no doubt under ordinary principles of Missouri contract law that parties may incorporate rules or codes that may change over time, which is why parties routinely agree to terms to that effect. *See, e.g.*, *City of St. Joseph v. Lake Contrary Sewer Dist.*, 251 S.W.3d 362, 367-69 (Mo. Ct. App. 2008); *Griffin v. First Cmty. Bank of Malden*, 802 S.W.2d 168, 170 (Mo. Ct. App. 1990); *St. Louis Realty Fund v. Mark Twain S. Cty. Bank 21*, 651 S.W.2d 568, 573 (Mo. Ct. App. 1983).

In the 1995 Contracts at issue here, the parties adhered to these ordinary state-law contracting principles. They incorporated terms by reference, stating that all of their disputes would be conducted "in accordance with the most applicable then existing rules of the American Arbitration Association." App.9. The "then" in "then existing" is plainly a reference to the time the dispute is submitted to arbitration—*i.e.*, the parties fully anticipated that the AAA rules would change and affirmatively opted to apply the then-

current version in favor of an outdated one.[5] *See McAllister*, ECF No. 276 at 3-4. And since the turn of this century, the AAA rules have made unmistakably clear that arbitrators—not the courts—"shall have the power to rule on … the arbitrability of any claim." AAA Commercial R-7; *accord Henry Schein*, 139 S. Ct. at 528. Given that petitioners filed their arbitration demand only after respondents filed suit in 2017—*i.e.*, long after the AAA's arbitrability provision took effect—it cannot be seriously contested that the Missouri Court of Appeals had only one option here. It should have "respect[ed] the parties' decision as embodied in the contract" by recognizing that it has "no power to decide the arbitrability issue." *Henry Schein*, 139 S. Ct. at 528-29. Indeed, as this Court explained in *Henry Schein*, that conclusion holds even if the court believed that "the argument that the arbitration agreement applies to the particular dispute is 'wholly groundless.'" *Id.* at 528.

2. The court below reached the contrary conclusion only by exhibiting the kind of judicial hostility to arbitration that the FAA was designed to counteract. In its view, because this Court has said there must be "clear and unmistakable" evidence of an intent to arbitrate arbitrability, courts may demand that parties manifest their intent to have arbitrators decide arbitrability in an even clearer and more

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[5] That said, as the *McAllister* court correctly recognized, *see* ECF No. 276 at 4, even if "then existing" somehow referred to the AAA rules then-extant in 1995, it would make no difference, as the 1993 AAA rules in effect in 1995 stated that they would apply as amended at the time of the demand for arbitration. *See* AAA Commercial R-1 (1993).

unmistakable manner than they must manifest their intent to agree to any other contract term. As a result, while the court acknowledged that the parties had clearly agreed to follow "whatever rules are in use by AAA … at the time of a dispute," and although it recognized that the AAA had long ago amended its rules to assign questions of arbitrability to the arbitrator, App.18, it nonetheless concluded that those terms could not get the job done, *see* App.19 ("Because AAA Rule 7(a) did not exist at the time, we conclude the Plaintiffs, the Rams, and Kroenke did not 'clearly and unmistakably' enter into an antecedent agreement in 1995 to delegate to arbitrators the power to decide whether Plaintiffs' claims must be arbitrated.").

The court did not purport to ground that conclusion in any "generally applicable rule of law" providing that contracting parties who are governed by Missouri law are incapable of clearly and unmistakably binding themselves to an external set of rules that may change over time. *Kindred Nursing*, 137 S. Ct. at 1428 n.2. Nor could it have done so, for no such rule exists. *See, e.g.*, *City of St. Joseph*, 251 S.W.3d at 367-69 (contract stating that parties "shall conform to and be governed by … ordinances now in effect or hereafter enacted and any amendments thereto" was "not … ambiguous" and "clearly … permitted [the city] to pass new, binding ordinances pertaining to the subscribers' sewer systems" (emphasis omitted)).

The best evidence to confirm that conclusion is that numerous federal courts applying Missouri law to interpret arbitration agreements similar—or, in

McCallister, identical—to the agreement here have failed to uncover any generally applicable rule of law that would justify the decision below. *See Sappington*, 884 F.3d at 396-97; *Hodge*, 2011 WL 1527010, at *4-*5; *McAllister*, ECF No. 276 at 4-5. There is a simple explanation for that discrepancy: No such principle exists under Missouri law. If contracting parties in Missouri explicitly stated that they would abide by a third-party safety code that would evolve over time to reflect the latest state of the art, then of course a court would enforce that agreement, and there would be no debate about the "clarity" or "specificity" of the parties' intent to be bound by each particular evolution that may come about.

That the court below arrived at a different conclusion solely because this case dealt with arbitration makes its error obvious: It plainly "single[d] out [an] arbitration agreement[] for disfavored treatment." *Kindred Nursing*, 137 S. Ct. at 1425. Whatever the "clear and unmistakable" test may require, it cannot possibly allow—let alone compel—courts to refuse to enforce agreements to arbitrate arbitrability when they are established through terms that would be enforceable as clearly and unmistakably evincing the parties' intent were any other kind of contractual agreement at issue. This Court has repeatedly reversed decisions that single out arbitration agreements for that kind of special hostility. *See id.*; *Concepcion*, 563 U.S. at 339; *Casarotto*, 517 U.S. at 687. Nothing less is warranted here. Indeed, the fact that the court below read this Court's decisions as *compelling* it to apply a special anti-arbitration-of-arbitrability rule makes the need for this Court's review imperative.

III. The Question Presented Is Exceptionally Important And Warrants Review Now.

The stakes here are considerable. Agreements to arbitrate arbitrability have become commonplace, and contracting parties often invoke a standard set of arbitration rules (such as the rules of the AAA or another arbitral institution) to accomplish them. *See, e.g.*, AAA Commercial R-7(a); JAMS R-11(b); ICC Art. 6(3). Either a minority of courts are requiring parties to litigate when they rightfully belong before an arbitrator, or a majority of courts are requiring parties to arbitrate when they rightfully belong before a judge. Only this Court can decide which one it is. Absent an answer to that question, parties will be left uncertain whether disputes involving enormous financial sums will be resolved in streamlined arbitration proceedings or in time-consuming and procedurally burdensome judicial proceedings.

The need for clarity regarding the "clear and unmistakable" test is evident in the numerous recent petitions for certiorari asking this Court to provide guidance, including in circumstances where parties had incorporated standard arbitration rules. *See, e.g.*, *Spirit Airlines, Inc. v. Maizes*, No. 18-617 (U.S. filed Nov. 13, 2018); *Simply Wireless, Inc. v. T-Mobile US, Inc.*, No. 17-1423 (U.S. filed Apr. 9, 2018); *Scout Petroleum, LLC v. Chesapeake Appalachia, LLC*, No. 15-1242 (U.S. filed Apr. 1, 2016); *Crockett v. Reed Elsevier*, *Inc.*, No. 13-928 (U.S. filed Jan. 31, 2014). This issue is plainly of recurring importance, and there is nothing to be gained by allowing the confusion to continue to fester. Indeed, the division among the lower courts is particularly problematic because it

cleaves along state-federal lines, with every federal court resisting special rules disfavoring arbitration and only state courts on the anti-arbitration side of the dispute. In practical terms, that means that parties like the Rams who are subject to the minority rule are consigned to litigate in the very state courts that are (demonstrably) the most hostile to arbitration. Thus, the split is not just real, but consequential, as it is depriving parties required to litigate in state court of the essential protections of their arbitration agreements and the FAA.

This case proves the point. This case would have proceeded to arbitration if it had started in federal court, which is presumably precisely why it was filed in state court. That intolerable result makes this case similar to other FAA cases in which the Court has granted certiorari. *See, e.g.*, Pet. for Cert. at 17, *Kindred Nursing*, No. 16-32 (U.S. filed July 1, 2016) ("There is a square conflict between the [state court's] ruling below and decisions on the very same legal issue by the federal district courts in Kentucky[.]"); *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 467-68 (2015) (granting certiorari given that "the Ninth Circuit had reached the opposite conclusion on precisely the same interpretive question decided by the California Court of Appeal"). And that result is particularly intolerable here, for the Rams have been deprived of their contractual right to arbitrate precisely when they needed it most—*i.e.*, in a dispute where local passions run high, and the state courts have proven demonstrably hostile to their claims of arbitrability at every turn. This case thus provides an opportune vehicle to resolve a dispute that not only has divided courts throughout the country, but has left

parties forced to litigate in some state courts subject to exactly the kind of hostility to arbitration that the FAA is supposed to preclude.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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