No. 19-963

IN THE

Supreme Court of the United States

HENRY SCHEIN, INC.,

Petitioner,

v.

ARCHER AND WHITE SALES, INC.,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

BRIEF OF AMICUS CURIAE PROFESSOR GEORGE A. BERMANN IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae George A. Bermann is the Jean Monnet Professor of EU Law, Walter Gellhorn Professor of Law, and director of the Center for International Commercial and Investment Arbitration at Columbia Law School. A faculty member since 1975, Professor Bermann teaches and writes extensively on transnational dispute resolution, European Union law, administrative law, and comparative law. He is a *professeur affilié* of the School of Law of Sciences Po (Paris) and lecturer in the MIDS Masters Program in International Dispute Settlement (Geneva).

Professor Bermann is also an active international arbitrator in commercial and investment disputes; chief reporter of the ALI's Restatement of the U.S. Law of International Commercial and Investor-State Arbitration; co-author of the UNCITRAL Guide to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards; chair of the Global Advisory Board of the New York International Arbitration Center; co-editor-in-chief of the *American Review of International Arbitration*; and founding member of the ICC International Court of Arbitration's Governing Body.

Professor Bermann is interested in this case because it presents an opportunity for the Court to address a central but unsettled issue of domestic and international arbitration law: whether incorporation of institutional rules of arbitral procedure in arbitra-

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[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus* or its counsel, make a monetary contribution intended to fund the preparation or submission of this brief. Each party has filed a letter granting blanket consent to amicus briefs at the merits stage.

tion clauses constitutes "clear and unmistakable" evidence that the parties intended "to arbitrate arbitrability," within the meaning of *First Options of Chi., Inc.* v. *Kaplan*, 514 U.S. 938 (1995). This Court has recognized that the issue of who has primary responsibility to decide arbitrability – court or arbitrator – "can make a critical difference to a party resisting arbitration" because it can remove a party's right to have a court determine the arbitrability of a dispute. *Id.* at 942.

An assumption that the incorporation of such arbitration rules constitutes "clear and unmistakable" evidence under *First Options* is the necessary predicate of Petitioner's position in this case. If that predicate is unsound, the question raised in the petition for certiorari becomes moot. However, the impact of that assumption extends far beyond this case. Domestic and international arbitration clauses typically incorporate arbitral rules similar to the rules in this case. If the mere incorporation of such arbitration rules constitutes "clear and unmistakable" evidence under *First Options,* the presumption that issues of arbitrability are "for judicial determination" will be largely eviscerated. *Howsam* v. *Dean Witter Reynolds, Inc.* 537 U.S. 79, 591 (2002).

This is an opportunity for the Court to address the meaning of the "heightened standard" that it established in *First Options* and that is central to the relationship between courts and arbitral tribunals under the Federal Arbitration Act ("FAA"). *Rent-A-Center, West, Inc.* v. *Jackson*, 561 U.S. 63, 69 n.1 (2010). Only this Court can resolve the divergent views of federal and state courts on whether mere incorporation by reference of standardized arbitration rules meets that heightened standard.

SUMMARY OF ARGUMENT

This case raises an increasingly important aspect of the classic question of who has primary responsibility for determining arbitrability – courts or arbitrators. Since *First Options*, the law has been settled that "[t]he question whether the parties have submitted a particular dispute to arbitration, *i.e.,* the '*question of arbitrability*' is an 'issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise.'" *Howsam*, 537 U.S. at 83 (internal citations omitted).

It is important, in appreciating what is at stake in this case, to recall the meaning of the term "arbitrability" as used by this Court. It entails the following questions: Did the parties reach an agreement to arbitrate? Is that agreement valid? May a nonsignatory invoke the agreement or be bound by it? Is the dispute covered by the agreement? All of these "gateway" issues directly implicate the consent of the parties to submit a dispute to an arbitral rather than a judicial forum.

This Court has consistently maintained that party consent is the very cornerstone of arbitration and source of its legitimacy. It has repeatedly held that "arbitration is a matter of contract"; "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Howsam*, 537 U.S. at 83 (quoting *Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960)); *accord Lamps Plus, Inc.* v. *Varela*, 139 S. Ct. 1407, 1415, 1419 (2019); *Granite Rock Co.* v. *Int'l Bhd. of Teamsters*, 561 U.S. 287, 299 (2010); S*tolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.,* 559 U.S. 662, 684 (2010); *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995); *Volt Info. Scis., Inc.* v. *Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479

(1989); *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985).

It is accordingly well settled that a party is entitled, upon request, to a judicial determination of arbitrability. The reason this Court insisted in *First Options* on "clear and unmistakable" evidence of an intent to delegate arbitrability is simple: a party must not lightly be deprived of access to a court on issues that so fundamentally implicate party consent. Logically, under a delegation, the arbitrability of a dispute ends up being determined, not by a court, but exclusively by a body whose authority stems from the very arbitration agreement whose existence, validity or applicability are in question.

Despite the issue's fundamental importance, it remains unsettled whether incorporation by reference into an arbitration clause of a set of institutional arbitration rules containing a "competence-competence" provision – *i.e.,* one empowering a tribunal to determine its own jurisdiction – satisfies the "clear and unmistakable" evidence test.

As demonstrated below, the mere presence of a competence-competence clause in the rules that the parties referenced in their arbitration clause falls far short of constituting "clear and unmistakable" evidence that the parties intended to withdraw from courts the authority to determine issues of arbitrability.

When the present dispute first came before this Court, the question was whether a proper delegation could be avoided when the challenge to arbitrability is "wholly groundless." This Court ruled that no such exception exists. *Henry Schein, Inc.* v. *Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019). The Court was not asked to address the premise on which the "wholly

groundless" question rested, namely, that incorporation of institutional rules containing a competence-competence clause constitutes "clear and unmistakable" evidence of a delegation in the first place.

Nevertheless, in its directions on remand, this Court specifically invited the Fifth Circuit to address the question whether *First Options*' "clear and unmistakable" delegation had been met:

> We express no view about whether the contract at issue in this case in fact delegated the arbitrability question to an arbitrator. The Court of Appeals did not decide that issue. Under our cases, courts "should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so." On remand, the Court of Appeals may address that issue in the first instance. . . .

Schein, 139 S. Ct. at 531.

In fact, during oral argument, several members of this Court demonstrated considerable interest in the matter. At the very outset, Justice Ginsburg asked counsel to explain why the arbitration agreement in the case divested courts of authority to determine arbitrability:

> But clear – clear and unmistakable delegation, why can't it be both; that is, that the arbitrator has this authority to decide questions of arbitrability, but it is not exclusive of the court? We have one brief saying that that is indeed the position that the Restatement has taken.
>
> . . .
>
> When . . . the model case is this Court's [*Rent-A-Center*] decision, and there the clause said the arbitrator, not the court, has exclusive authority.

> And here we – we're missing both the arbitrator, to the exclusion of the court, and the arbitrator has exclusive authority.

Tr. of Oral Argument ("O.A. Tr.") at 7, 18, *Schein*, 139 S. Ct. 524 (No. 17-1272). Similarly, Justice Kagan inquired:

> *First Options* is a case where we said we're not going to treat these delegation clauses in exactly the same way as we treat other clauses. And there was an idea that people don't really think about the question of who decides, and so we're going to hold parties to this higher standard, the clear and unmistakable intent standard.

Id. at 17. Justice Breyer observed:

> So you say step 1. Is there clear and unmistakable evidence that an arbitrator is to decide whether a particular matter X is arbitrable? Is that right?
>
> . . . .
>
> Step 1 is we have to decide . . . whether there is a clear and unmistakable commitment to have this kind of matter decided in arbitration.

Id. at 20, 24. Justice Gorsuch in turn asked:

> [T]here's just maybe a really good argument that clear and unmistakable proof doesn't exist in this case of a desire to go to arbitration and have the arbitrator decide arbitrability?

Id. at 42.

It is a sign of the importance of this predicate question that members of the Court raised the issue, de-

spite not having granted certiorari on it and the parties not having focused on it in their briefs.

Nevertheless, the Fifth Circuit on remand failed to make the determination that this Court requested. Instead, it simply followed its prior decision in *Petrofac, Inc.* v. *DynMcDermott Petroleum Operations Co.*, 687 F.3d 671, 675 (5th Cir. 2012), which had already held, without any reasoning, that "an arbitration agreement that incorporates the AAA Rules 'presents clear and unmistakable evidence that the parties agreed to arbitrate arbitrability.'" Pet. App. 7a.

This important question has now come back to this Court for the second time.

As demonstrated more fully below, the proper answer to the question is that the presence of a simple competence-competence provision in rules the parties incorporate by reference in their arbitration agreement does not rise to the level of "clear and unmistakable" evidence of a delegation under *First Options*.

First, as a purely textual matter, the competence-competence clause in this case, as in virtually all cases, simply confers authority on a tribunal to determine arbitrability. It does nothing more. Nor does it follow from the fact that arbitrators have that authority that courts do not. Given parties' fundamental right, enshrined in this Court's case law, to an independent judicial determination of arbitrability, abandonment of that right should not be arrived at by so questionable an inference.

Second, the meaning of competence-competence in U.S. law, which is well-established, does not permit the use to which lower courts have put it. Competence-competence has consistently been understood in the U.S. as simply conferring on tribunals jurisdiction

to determine their jurisdiction, and nothing more. It empowers tribunals, but does not disempower courts.

Third, the proposition that a competence-competence clause in incorporated rules of procedure amounts *per se* to "clear and convincing" evidence of a delegation does violence to the very principle enunciated in *First Options*. Virtually every set of institutional rules now contains a competence-competence provision. So too does every modern international arbitration law. Treating such a provision as if it were "clear and convincing" evidence effectively reverses the presumption that *First Options* established.

Finally, even if a competence-competence clause could be viewed as a delegation – and it cannot – such a clause cannot be regarded as "clear and unmistakable" when it is buried in a lengthy and detailed set of procedural rules that are merely incorporated by reference. Delegation is so serious a matter, in terms of party consent, that it should be conspicuous, and therefore found in the arbitration agreement itself rather than relegated to a set of procedural rules that, realistically, few parties will study prior to agreeing to arbitrate.

For all these reasons, it comports neither with the letter nor the spirit of *First Options* to treat a competence-competence provision in a set of incorporated institutional rules as "clear and unmistakable" evidence of an intention to deprive parties of access to an independent judicial determination of arbitrability.

ARGUMENT

I. *FIRST OPTIONS* ENTITLES PARTIES TO AN INDEPENDENT JUDICIAL DETERMINATION OF ARBITRABILITY UNLESS THEY HAVE "CLEARLY AND UNMISTAKABLY" AGREED OTHERWISE

A. The *First Options* Test

The issue raised here is a subspecies of a more general question that has occupied this Court's attention on numerous occasions: who – court or arbitrator – has primary responsibility for deciding issues of arbitrability.

In some cases, a party initially raises an issue of arbitrability before an arbitral tribunal. In that situation, the tribunal, exercising its competence-competence, makes a jurisdictional determination. If it finds jurisdiction and issues an award, the losing party may seek the award's vacatur. The court, upon request, will then make a fully independent determination of arbitrability, without deference to the tribunal's findings.

This was exactly the situation in *First Options*. There, the district court confirmed an award, finding that a couple that had not signed an arbitration agreement concluded by their wholly-owned company was bound by that agreement. The Court of Appeals reversed, deciding, upon *de novo* review of the record, that the couple was not bound by the agreement. In so doing, it affirmed that courts "should independently decide whether an arbitration panel has jurisdiction over the merits of any particular dispute." *Kaplan* v. *First Options of Chi., Inc.,* 19 F.3d 1503, 1509 (3d Cir. 1994). In an opinion by Justice Breyer, this Court unanimously affirmed:

> Courts should not assume that the parties agreed to arbitrate arbitrability unless there is "clea[r] and unmistakabl[e]" evidence that they did so.
>
> . . . .
>
> [The] "who (primarily) should decide arbitrability" question is rather arcane. A party often might not focus upon that question or upon the significance of having arbitrators decide the scope of their own powers. . . . And, given the principle that a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration, one can understand why courts might hesitate to interpret silence or ambiguity on the "who should decide arbitrability" point as giving the arbitrators that power, for doing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide."

First Options, 514 U.S. at 944–45. On the merits, the Court agreed with the Court of Appeals that the Kaplans had not clearly and unmistakably conferred on arbitrators exclusive authority to determine arbitrability. *Id.* at 946.

In sum, the Court took as its uncontroversial point of departure that issues of arbitrability, due to their fundamental importance, call for independent judicial determination. At the same time, the Court left open the possibility that the parties, in an exercise of party autonomy, could agree to forego independent judicial review on issues of arbitrability – provided they do so "clearly and unmistakably."

The Court has reiterated this fundamental proposition that "courts presume that the parties intend courts, not arbitrators, to decide . . . disputes about

'arbitrability'" unless "the parties clearly and unmistakably provide otherwise" *BG Grp., PLC* v. *Republic of Arg.*, 572 U.S. 25, 34 (2014); *Howsam*, 537 U.S. at 84.

In other cases, unlike *First Options*, but like the present one, a party resisting arbitration raises its arbitrability objections before a court *before* arbitration, asking it to stay an action and/or compel arbitration based on a putative arbitration agreement. See 9 U.S.C. §§ 3–4. If the plaintiff then contests the dispute's arbitrability, the court must independently determine that question. Such was the situation in *Rent-A-Center*, where this Court reaffirmed that, in order to constitute a delegation, the language used by the parties must unambiguously establish their "manifestation of intent" to withdraw from courts authority to determine arbitrability. 561 U.S. at 69 n.1.

Thus, whether a party chooses to contest arbitrability in a court prior to arbitration or before a tribunal, it is entitled to an independent judicial determination of arbitrability – an entitlement so strong that it cannot be overcome with anything less than "clear and unmistakable" evidence.

B. Application of *First Options*

In most delegation cases thus far, litigants have argued that, if an arbitration agreement incorporates by reference institutional rules containing a competence-competence clause, that fact alone renders "clear and unmistakable" the parties' intention to give tribunals exclusive authority to determine arbitrability.

The Fifth Circuit's position in this case is illustrative. The arbitration clause contained no language, much less "clear and unmistakable" language, suggestive of a delegation:

> Any dispute arising under or related to this Agreement (except for actions seeking injunctive relief and disputes related to . . . intellectual property of Pelton & Crane), shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association.

Pet. App. 3a.

There is nothing in the language of this arbitration agreement that puts a party on notice of a delegation. A party reading it would have no idea whatsoever that, by signing the agreement, it was relinquishing its right of access to a court to demonstrate that it never consented to arbitration, *i.e.*, that the agreement was never formed, is invalid or inapplicable to it or to its dispute. Yet, that is a right to which, under this Court's consistent case law, a party is entitled.

This arbitration agreement should be contrasted with the clause in *Rent-A-Center*, the only case before this one presenting this Court with a putative delegation. The *Rent-A-Center* clause provided that:

> [t]he Arbitrator, *and not* any federal, state, or local court or agency, shall have *exclusive* authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this [Arbitration] Agreement including, but not limited to any claim that all or any part of this [Arbitration] Agreement is void or voidable.

561 U.S. at 66 (emphasis added). This clause expressly conferred on the tribunal *exclusive* authority to decide upon the arbitration agreement's formation, interpretation, and applicability. Thus, the parties clearly relinquished their right to an independent judicial determination of those matters. Indeed, the

question whether there had been a valid delegation was never even raised.

By contrast, the arbitration agreement in the present case contains nothing approaching the language in *Rent-A-Center*. In order to find a delegation, the Fifth Circuit was reduced to treating incorporation by reference of the AAA Rules containing a standard competence-competence clause as if it met *First Options'* demanding standard.

The procedural history here is instructive. The district court found in the competence-competence clause of the AAA rules no clear and unmistakable evidence of a delegation. The Fifth Circuit disagreed, relying entirely on earlier circuit precedent that simply agreed with "most of [its] sister circuits," without any analysis, that "the express adoption of [the AAA Rules] presents clear and unmistakable evidence that the parties agreed to arbitrate arbitrability." *Petrofac*, 687 F.3d at 675.[2] It is on this shaky premise alone that the Fifth Circuit found a delegation.

Although the view that incorporation of such rules meets the *First Options* test has won favor among the Courts of Appeals,[3] none of those decisions offers se-

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[2] *See, e.g.*, *Oracle Am., Inc.* v. *Myriad Grp., A.G.*, 724 F.3d 1069, 1074–75 (9th Cir. 2013) (incorporation of UNCITRAL rules is "clear and unmistakable evidence" of intent to arbitrate arbitrability); *Awuah* v. *Coverall N. Am., Inc.*, 554 F.3d 7, 11 (1st Cir. 2009) (same with respect to AAA rules).

[3] *See, e.g.*, *Oracle*, 724 F.3d at 1074–75 (the "prevailing view" is that incorporation of the UNCITRAL rules "is clear and unmistakable evidence that the parties agreed the arbitrator would decide arbitrability"); *Green* v. *SuperShuttle Int'l, Inc.*, 653 F.3d 766, 769 (8th Cir. 2011) ("By incorporating the AAA Rules, the parties agreed to allow the arbitrator to determine threshold questions of arbitrability"); *Awuah*, 554 F.3d at 11 (incorpora-

rious reasons for reaching that conclusion. They simply assume that if arbitrators *have* authority to determine arbitrability, then courts necessarily *do not*. As shown below, that is not the case.

II. COMPETENCE-COMPETENCE LANGUAGE IN ARBITRATION RULES DOES NOT CONSTITUTE "CLEAR AND UNMISTAKABLE" EVIDENCE UNDER *FIRST OPTIONS*

Courts are fundamentally mistaken in inferring from a grant of authority to the arbitrators a withdrawal of all such authority from the courts for four principal reasons. First, the language of the competence-competence provision in this case, as in others, fails to support any such inference. Second, it is well established that competence-competence in U.S. law signifies only that tribunals may determine their authority; it does not make that authority exclusive. Third, treating a standard competence-competence clause as sufficient to establish "clear and unmistakable" evidence effectively reverses *First Options*' strong presumption that parties are entitled to an independent judicial determination of arbitrability. Fourth, to be truly "clear and unmistakable," a delegation clause belongs in an arbitration agreement itself, not buried in referenced rules of arbitral procedure.

A. The Language of the Delegation Clause

The AAA Commercial Arbitration Rules contain in Rule 7 a standard competence-competence clause:

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tion of AAA rules provides "clear and unmistakable evidence" that parties meant to arbitrate arbitrability).

That said, multiple lower federal courts and state courts have concluded that the mere incorporation of institutional rules is insufficient. *See infra* pp. 17–20.

> The arbitrator tribunal 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(s).

AAA Commercial Arbitration Rules & Mediation Procedures, R. 7 (2013). Rule 7 confers on arbitrators authority to determine their jurisdiction, but that is all it does. It gives no indication of also divesting courts of their presumptive authority to make that determination if so requested. In order to reach that result, one must read into Rule 7 the word "exclusive." That is a big and very serious leap, and one that parties could easily accomplish by instead (a) placing a clause that addresses who decides arbitrability in the arbitration agreement itself, rather than in incorporated rules and (b) expressly stating in that clause that the tribunal's competence is "exclusive." Taking those two simple steps is all one needs to do if one truly wants to render an intention to delegate arbitrability "clear and unmistakable."

Thus, the arbitration agreement in this case differs significantly from the agreement in *Rent-A-Center*. Here, unlike in *Rent-A-Center*, they *neither* placed the delegation clause in the arbitration agreement itself *nor* stated that the arbitrators' authority to determine arbitrability was "exclusive."

It should not be supposed that authorizing a tribunal to determine its own competence is not without value. In its absence, a tribunal whose jurisdiction is challenged on arbitrability grounds might be stopped in its tracks because the party challenging arbitrability could have recourse to a court for a determination of the matter. The tribunal would likely suspend proceedings pending that determination. The resulting delay and expense would compromise two of arbitration's strongest selling points: speed and economy.

The Fifth Circuit and other courts have offered no serious support for the proposition that an incorporated competence-competence provision meets *First Options*' "clear and unmistakable" evidence test. They arrive at that result perfunctorily. In one of the earliest such decisions, *FSC Sec. Corp.* v. *Freel*, 14 F.3d 1310 (8th Cir. 1994), the Court of Appeals said only this:

> [T]he parties expressly agreed to have their dispute governed by the NASD Code of Arbitration Procedure. . . . [W]e hold that the parties' adoption of this provision *is* a "clear and unmistakable" expression of their intent to leave the question of arbitrability to the arbitrators.

Id. at 1312–13.

Worse yet, the great majority of decisions to come later do not even purport to address the issue. All they do is rely on a decision from another circuit. Even the earlier Fifth Circuit opinion on which the panel in this case relied neglected to address the issue. It did no more than "join" other circuits:

> We agree with most of our sister circuits that the express adoption of these rules presents clear and unmistakable evidence that the parties agreed to arbitrate arbitrability.

Petrofac, 687 F.3d at 675. Other courts of appeals have done the same.[4] They all make the same unex-

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[4] *See, e.g.*, *Oracle*, 724 F.3d at 1074–75 ("We see no reason to deviate from the prevailing view that incorporation of the UNCITRAL arbitration rules is clear and unmistakable evidence that the parties agreed the arbitrator would decide arbitrability"); *Qualcomm Inc.* v. *Nokia Corp.*, 466 F.3d 1366 (Fed. Cir. 2006) ("We agree with the Second Circuit's analysis …and likewise conclude that the 2001 Agreement, which incorporates the AAA Rules . . . clearly and unmistakably shows the parties' in-

plained assumption that, if arbitrators *have* authority to determine arbitral jurisdiction, then the courts necessarily *do not*.

One federal district court very recently bucked the trend among the Courts of Appeals:

> It is hard to see how an agreement's bare incorporation by reference of a completely separate set of rules that includes a statement that an arbitrator has authority to decide validity and arbitrability amounts to 'clear and unmistakable' evidence that the contracting parties agreed to . . . preclude a court from answering them. To the contrary, that seems anything but 'clear.' And the AAA rule itself does not make the purported delegation of authority any more 'clear' or 'unmistakable.' The AAA rule simply says that the arbitrator has the authority to decide these questions. It does not say that the arbitrator has the sole authority, the exclusive authority, or anything like that. The language of the rule does not suggest a *delegation* of authority; at most it indicates that the arbitrator possesses authority, which is not the same as an agreement by the parties to give him sole authority to decide those issues.[5]

Another federal district court followed the trend, but not without strongly condemning it as "incongruous," "ridiculous" and "bordering on the absurd." It added: "[h]ow this could be considered clear and unmistakable can only be explained if the true meaning

tent to delegate the issue of determining arbitrability to an arbitrator.").

[5] *Taylor* v. *Samsung Elecs. Am., Inc.*, No. 19 C 4526, 2020 WL 1248655, at *4 (N.D. Ill. Mar. 16, 2020).

of 'clear' and 'unmistakable' are ignored." The court nevertheless felt obliged to follow the trend.[6]

The only reason any court has advanced in support of its position is that the AAA amended the language of its rules in order to meet the *First Options* test.[7] That may well be so, but is of little import. It does not matter what *the AAA* thought it was doing. What matters is what *parties signing an arbitration agreement* think they are doing. That the AAA thinks its amended rule constitutes clear and unmistakable evidence does not mean that it does. It does not.

The meaning of *First Options* also arises regularly in state courts, since the FAA does not create federal subject-matter jurisdiction, much less exclusive jurisdiction. Some of these courts have rightly avoided the facile assumption that a grant to arbitrators of authority to determine arbitrability necessarily divests courts of that authority. A Florida appellate court recently stated:

> [W]e find something missing. This [institutional] rule confers an adjudicative power upon the arbitrator, but it does not purport to make that power exclusive. Nor does it purport to contractually remove that adjudicative power from a court of competent jurisdiction.
>
> . . . .
>
> We respectfully disagree with [holdings finding otherwise] because we do not believe they comport with what *First Options* requires. . . . [N]one of these cases have ever examined how or why

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[6] *Ashworth* v. *Five Guys Operations, LLC*, No. 3:16-06646, 2016 WL 7422679, at *3 (S.D. W.Va. Dec. 22, 2016).

[7] *Blanton* v. *Domino's Pizza Franchising LLC,* 962 F.3d 842, 849–50 (6th Cir. 2020).

> the mere "incorporation" of an arbitration rule such as the one before us . . . satisfies the heightened standard the Supreme Court set in *First Options*, nor how it overcomes the "strong pro-court presumption" that is supposed to attend this inquiry. Most of the opinions have simply stated the proposition as having been established with citations to prior decisions that did the same.

Doe v. *Natt*, No. 2D19-1383, 2020 WL 1486926, at *7–9 (Fla. 2d Dist. Ct. App. Mar. 25, 2020). The Florida court is not alone.[8]

Petitioner contends that the competence-competence clause in the present case is worded "unambiguously" – indeed is "about as 'clear and unmistakable' as language can get," quoting *Awuah*, 554 F.3d at 11.[9] This is obviously not so. It would be far clearer and less mistakable if drafters *both* announced their intention to delegate arbitrability in the arbitration clause itself *and* made that authority

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[8] *See Ajamian* v. *CantorCO2e L.P.*, 137 Cal. Rptr. 3d 773, 782–783 (Cal. Dist. Ct. App. 2012):

> The "clear and unmistakable" test reflects a "heightened standard" of proof. That is because the question of who would decide the unconscionability of an arbitration provision is not one that the parties would likely focus upon in contracting, and the default expectancy is that the court would decide the matter. Thus . . . a contract's silence or ambiguity about the arbitrator's power in this regard cannot satisfy the clear and unmistakable evidence standard. . . .
>
> Appellants . . . point[] primarily to . . . the arbitration provision['s] . . . proviso that arbitration may be conducted according to the rules of the AAA (under which an arbitrator has the power to determine the validity of an arbitration agreement). [Appellee] disagrees with appellants' arguments . . . [Appellee] – and the trial court—have it right.

[9] Br. for Cross-Respondent in Opp. at 11.

expressly "exclusive." The drafters in *Rent-A-Center* did just that; in the present case, the drafters did neither.

B. The Meaning of Competence-Competence in U.S. Law

Especially problematic for the proposition advanced by Petitioner is the fact that competence-competence simply does not have the meaning in U.S. arbitration law that Petitioner ascribes to it. Competence-competence has been consistently understood in the U.S. to authorize an arbitral tribunal to determine its jurisdiction if challenged, and nothing more.[10] The existence of that authority is neither negligible nor to be taken for granted. In the absence of competence-competence, a tribunal whose jurisdiction is challenged might have to suspend proceedings and await a court determination of arbitrability before proceeding further – a recipe for delay and expense, to arbitration's great detriment. The competence-competence principle thus contributes importantly to arbitration's efficacy as a dispute resolution mechanism.

In point of fact, there has never been any inconsistency in U.S. law between competence-competence, on the one hand, and access to a court on issues of ar-

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[10] Ashley Cook, Kompetenz-Kompetenz: Varying Approaches and a Proposal for a Limited Form of Negative Kompetenz-Kompetenz, 2014 Pepp. L. Rev. 17, 25 (2014) (U.S. law does not "even contemplate[e] negative Kompetenz-Kompetenz"); William Park, Challenging Arbitral Jurisdiction: The Role of Institutional Rules, 15 Bos. Univ. School of Law Scholarly Commons (2015) ("[C]ourts will provide early decisions on the validity of a dispute resolution clause alleged to be void *ab initio* because, for instance, the person signing the contract lacked authority to commit the company sought to be bound.").

bitrability, on the other. Decades before arbitral institutions put competence-competence provisions in their rules, courts uniformly subscribed to the competence-competence principle, and they clearly viewed that principle as entirely compatible with independent judicial determination of arbitrability prior to arbitration if requested.

The fact that competence-competence does not preclude access to a court on arbitrability issues is built into the key instruments of domestic and international arbitration law. The FAA, 9 U.S.C. § 4, specifically calls upon courts to compel arbitration only if they are "s*atisfied that the making of the agreement for arbitration . . . [was] not in issue*." (Emphasis added). Similarly, under Article II of the New York Convention, courts do not refer parties to arbitration if they find the arbitration agreement to be "*null and void*, *inoperative or incapable of being performed*." 9 U.S.C. § 201 (emphasis added). Courts could not possibly perform their obligations under the FAA or the New York Convention if competence-competence operated to negate judicial authority to make arbitrability determinations.

In sum, the principle of competence-competence in U.S. law has never entailed the corollary that, if arbitrators *may* decide arbitrability, courts *may not*, and there is no warrant for altogether redefining it merely because it is inserted into a set of procedural rules.

The understanding of competence-competence in U.S. law contrasts sharply with the understanding of competence-competence that prevails in certain other countries, which view competence-competence as *both* vesting tribunals with authority to determine arbitrability *and* divesting courts of that authority. The jurisdiction that most resolutely adheres to this approach (but not the only one to adopt it) is France.

Under settled French law, competence-competence has *both* a "positive" *and* a "negative" dimension.[11] The former affirmatively confers on tribunals authority to determine their jurisdiction, while the latter deprives courts, prior to arbitration, of that authority. Significantly, however, even under French law, negative competence-competence is not entirely unreviewable. The Civil Procedure Code expressly authorizes courts to decline to enforce an arbitration agreement if they find it "manifestly void or manifestly not applicable."[12] This difference between the U.S. version of competence-competence ("positive" only) and the French version (both "positive" and "negative") pervades the international arbitration literature. The fact that competence-competence in U.S. law has a positive dimension is simply uncontested.[13]

In short, whether incorporated in institutional rules or not, competence-competence as indisputably understood in U.S. law does not deprive courts of the authority, when asked, to determine the arbitrability of a dispute prior to arbitration – much less deprive them of that authority "clearly and unmistakably."

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[11] *See generally* Emmanuel Gaillard & Yas Banifatemi, *Negative Effect of Competence-Competence: The Rule of Priority in Favor of the Arbitrators, in* Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice 257 (Emmanuel Gaillard & Domenico Di Pietro eds., 2008).

[12] Code De Procédure Civile [C.P.C.] art. 1448 (Fr.).

[13] *See, e.g.*, Jack M. Graves & Yelena Davydan, *Competence-Competence and Separability-American Style*, in Int'l Arb. and Int'l Commercial Law: Synergy, Convergence and Evolution (2011).

C. A Reversal of Presumptions

The Court in *First Options* deliberately made judicial authority to determine arbitrability the rule, and deprivation of that authority the exception, out of a commitment to the principle of party consent lying at the heart of U.S. arbitration law. Parties must decidedly "go out of their way" to withdraw from courts the authority to decide issues of arbitrability that they ordinarily enjoy. The "clear and unmistakable" standard cannot be understood any other way.

The Court's purpose would be frustrated if the mere inclusion of a competence-competence clause in procedural rules referenced in an arbitration agreement were treated as "clear and unmistakable" evidence of a delegation under *First Options*. Today, competence-competence provisions are ubiquitous. They are found in virtually every modern set of institutional rules; the AAA Rules are by no means exceptional. They are also found in virtually every modern arbitration law that States enact to regulate international arbitral activity conducted on their territory. Under the leading model law of international arbitration, widely adopted around the world and even by a good number of U.S.:

> [t]he arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.

UNCITRAL Model Law, art. 16(1).

As a result, it is the rare international arbitration indeed that is conducted in the absence of a competence-competence provision. Such provisions have become, for all practical purposes, "boiler-plate." Parties do not need to "go out of their way" to subject their

arbitrations to competence-competence. All modern arbitration laws and rules do that for them.

Treating competence-competence provisions as "clear and mistakable" evidence does nothing short of destroying the strong presumption in favor of judicial determination of arbitrability that *First Options* created. That simply cannot be the result that this Court had in mind in establishing the *First Options* framework and describing it as a "heightened standard." *Rent-A-Center*, 561 U.S. at 69 n.1.

The inescapable conclusion from all that precedes is that a competence-competence provision, wherever placed, is altogether too oblique a means of informing parties of a matter as momentous as loss of the right of access to a court on arbitrability issues – a right of access that they have every reason to believe they have. Again, this Court made clear in *First Options* that predicating a delegation on anything less than "clear and unmistakable" evidence would "too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide." 514 U.S. at 945. It is worth recalling here the concern voiced by Justice Kagan when this case was last before the Court:

> [I]f you look at *First Options*, *First Options* is a case where we said we're not going to treat these delegation clauses in exactly the same way as we treat other clauses. And there was an idea that people don't really think about the question of who decides, and so we're going to hold parties to this higher standard, the clear and unmistakable intent standard.

O.A. Tr. at 17.

The entire delegation question received sustained attention at the time the recently-adopted ALI Re-

statement of the U.S. Law of International Commercial and Investment Arbitration was prepared. The Reporters, the ALI Council and the ALI membership at large faced directly the question whether the incorporation of competence-competence language from a set of arbitral rules constituted "clear and unmistakable" evidence of an intention to withdraw from courts their authority to determine arbitrability.

In its lengthy deliberations, the ALI closely examined the proposition that the presence of competence-competence provisions in incorporated institutional rules satisfies the *First Options* test. It looked at the proposition from every angle, carefully weighing both the strengths and weaknesses of the proposition. The Reporters concluded with confidence that the proposition was unsustainable,[14] and their position was unanimously adopted by both the ALI Council and the ALI membership when the entire Restatement was approved in May 2019.[15]

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[14] Restatement of the U.S. Law of Int'l Commercial and Investor-State Arb. § 2.8, art. *b,* Reporter's n. *b (iii),* (Am. L. Inst. 2019).

[15] Petitioner may, as it did previously in its submission during the certiorari process (Br. for Cross-Respondent in Opp. at 13 n.2), attempt to undermine the relevance of the ALI Restatement by suggesting that the final version of the Restatement retreated from a stronger position on the point taken in an earlier draft. Petitioner observed that the final draft of the Restatement did not state that it "reject[s] the majority line of cases . . . as based on a misinterpretation of the institutional rules being applied." This observation is disingenuous. First, it is the Comments, not the Reporters' notes, that state the official position of the ALI, and Comment *b* to the relevant section in the draft of the Restatement as approved states unequivocally that "the rules . . . do not expressly give the tribunal exclusive authority over these issues." As for the Reporters' notes, note b(iii)) examines at length the relevant language of a large number of institutional rules similar to the AAA's and observes that not a

Commentators also recognize the anomaly, in light of what this Court meant to achieve in *First Options*, of treating a competence-competence provision in incorporated rules as "clear and unmistakable" evidence:

> A [] conclusion from *First Options* is that absent rebuttal of the anti-arbitration presumption – and any such rebuttal will surely be very rare– existence and validity questions will not be subject to a negative competence-competence doctrine in the United States. This conclusion is not affected by whether one party has initiated arbitral proceedings or whether arbitrators have been seized of the matter. Court jurisdiction to decide arbitrability [prior to arbitration] will also be full and not limited by a prima facie standard.[16]

That author elsewhere described the courts' position as "startling" and "misguided." He notes that parties include in their arbitration agreement institutional rules containing a competence-competence clause "almost as a matter of course." Treating such a clause as barring independent judicial review, he writes, "seems unwise and unlikely to have been intended by parties when they opt for institutional arbitration."

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single one constitutes "clear and unmistakable" evidence within the meaning of *First Options*. There was no need to state a global summary of that finding. As Chief Reporter of the Restatement, I can affirm that this amicus brief accurately reports the ALI's position.

[16] John J. Barceló III, *Who Decides the Arbitrators' Jurisdiction? Separability and Competence-Competence in Transnational Perspective,* 36 Vand. J. Transnat'l L. 1115, 1133 (2003). *See generally* Stavros Brekoulakis, *The Negative Effect of Compétence-Compétence: The Verdict has to be Negative*, 2009 Austrian Arb. Ybk. 237.

Significantly, he concludes: "It will fall to the [Supreme] Court itself to correct this error in a future decision."[17]

D. A "Clear and Unmistakable" Delegation Belongs in Arbitration Agreements, not in Incorporated Rules

A further and even more fundamental problem with treating competence-competence clauses in arbitral rules as "clear and unmistakable" evidence of a delegation is that, given its profound implications for party consent, a delegation clause is properly placed in an *arbitration agreement* itself and not relegated to a set of *incorporated procedural rules*. The arbitration agreement is where drafters would place a delegation if they genuinely wanted it to be "clear and unmistakable."

Parties can reasonably be expected to read a contractual arbitration clause carefully before agreeing to it. But they cannot realistically be expected to scrutinize lengthy and detailed rules of arbitral procedure incorporated by reference in an arbitration clause. Practically speaking, for most parties, rules of arbitral procedure assume importance only once arbitration is initiated. For a delegation to be "clear and unmistakable," it needs to be conspicuous. A competence-competence clause buried in rules incorporated by reference in a set of rules of arbitral procedural is anything but.

Why would a party look to rules of *procedure* to find principles that address the relationship between

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[17] John James Barcelo, *Kompetenz-Kompetenz and Its Negative Effect—A Comparative View*, Cornell Legal Studies Research Paper No. 17-40 (2017), p. 23.

arbitral and *judicial jurisdiction*, which is clearly not a procedural matter? Parties have no reason to suppose that, in agreeing to arbitrate, they relinquished all access to a court to question the arbitration agreement's enforceability. As this Court stated in *First Options* itself, relegating a delegation clause to incorporated rules of procedure "might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide." 514 U.S. at 945. This Court called the whole matter "arcane." *Id.*

But even if a party did entertain any doubts as to its right of access to a court for these purposes, the place it would look is the agreement to arbitrate. It would not look to a separate instrument denominated "rules of procedure," even if referred to in the arbitration agreement.

The contract drafters in *Rent-A-Center* did what anyone intent on making a delegation "clear and unmistakable" would do. They specifically stated *in their arbitration agreement* that the delegation to the arbitral tribunal was *exclusive*.

In sum, the stakes associated with delegations of authority to determine arbitrability are great. Unfortunately, notwithstanding the magnitude of the stakes, courts have failed to give them any serious consideration.

III. THE EFFECT OF A DELEGATION IS TO FULLY DISABLE COURTS FROM ENSURING THE ARBITRABILITY OF A DISPUTE

It would be a great mistake to assume that, if courts lose their authority to ensure the arbitrability of a dispute prior to arbitration, they will recover it at the end of the process. Under U.S. law, once a proper delegation is made, courts are sidelined, not only pre-

arbitration but also in post-award review. The case law holds that, under a proper delegation, courts also cannot, in a vacatur or confirmation action, meaningfully ensure that the award debtor consented to arbitration. They owe extreme deference to a tribunal's determination whether an arbitration agreement exists, is valid, is applicable to a non-signatory and encompasses the dispute at hand. *Schneider* v. *Kingdom of Thai.*, 688 F.3d 68, 71 (2d Cir. 2012); *Chevron Corp.* v. *Republic of Ecuador*, 949 F. Supp. 2d 57, 65–67 (D.D.C. 2013). According to the Restatement, Section 4.12, Reporters' note *d*, in order to be overturned, a tribunal's finding of arbitrability must be "baseless," resting this conclusion on this Court's ruling in *Oxford Health Plans LLC* v. *Sutter*, 569 U.S. 564, 569 (2013).

Accordingly, under a delegation, *at no point* in the arbitration life-cycle will parties have the benefit of an independent judicial determination whether they indeed consented to arbitrate. That is too drastic a result to follow from the mere presence of a standard competence-competence provision only found in the rules of procedure referenced in an agreement to arbitrate.

A comparison with French law in this regard is here too highly illuminating. As noted, under French law, courts have virtually no role in ensuring that a dispute is arbitrable before compelling parties to arbitrate. For all practical purposes, a dispute will proceed to arbitration on the merits if a tribunal, in its exercise of competence-competence, finds a dispute to be arbitrable. The involvement of a court at this stage is negligible.

However, French law justifies this result precisely on the ground that, *after* an arbitration comes to a close and an award is rendered, a party that failed to

convince the tribunal to dismiss a case on arbitrability grounds has access to a court to have the resulting award annulled or denied enforcement on those same grounds. Moreover, the inquiry into arbitrability that a French court performs on that occasion is completely *de novo*.[18] In other words, courts fully regain at the end of the process the role they were denied at the outset. Under a delegation clause, U.S. courts do not.

This makes it all the more important that the very high bar set by the Court for a valid delegation in *First Options* be maintained by this Court.

IV. THE PRESUMPTIVE AUTHORITY OF COURTS TO DETERMINE THE ARBITRABILITY OF A DISPUTE IS CENTRAL TO ARBITRATION'S LEGITIMACY AS A MEANS OF INTERNATIONAL DISPUTE RESOLUTION

Depriving parties of a right of access to a court on matters of arbitrability is inimical to the fundamental principles that (a) parties are not required to submit their claims to arbitration without their consent and that (b) they are entitled, upon request, to an independent judicial determination of that matter.

But there is more. Preserving that right, absent "clear and unmistakable" evidence that a party has abandoned it, is essential to the legitimacy of arbitration itself.[19] Issues of arbitrability, such as the question whether the parties actually and validly agreed to arbitrate a particular dispute, go to the heart of that legitimacy. It is not news that arbitration is in-

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[18] Ina C. Popova, Patrick Taylor & Romain Zamour, *France*, in European Arbitration Review 2020, p. 29.

[19] George A. Bermann, *The "Gateway Problem" in International Commercial Arbitration*, 37 Yale J. Int'l L. 1 (2012).

creasingly under attack.[20] That makes it all the more essential that, to the fullest extent possible, nothing is done to place that legitimacy at risk.

CONCLUSION

For the foregoing reasons, the Court should vindicate the important purposes animating the *First Options* decision by rejecting the notion that the mere incorporation by reference of rules containing a standard competence-competence provision meets the "clear and unmistakable" evidence test established by that decision.

Respectfully submitted,

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[20] *See generally*, *Practising Virtue: Inside International Arbitration* (David D. Caron, Stephan W. Schill, Abby Cohen Smutny & Epaminontas E. Triantafilou, eds. Oxford Univ. Press 2015).