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 CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and other federal laws. CAC has a strong interest in the proper interpretation of the Federal Arbitration Act, including the important role it assigns the courts in deciding questions of arbitrability, and accordingly has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Under the Federal Arbitration Act (FAA), Pub. L. No. 68-401, 43 Stat. 883 (1925), codified as amended at 9 U.S.C. § 1 et seq., the parties to a contract may agree to resolve their disputes via arbitration rather than in court. This case concerns the question of whether the parties to a contract have agreed to arbitrate, and if so, for what issues. Specifically, the parties here disagree over who should decide the arbitrability of their dispute: a court or an arbitrator.

The contract at issue provides that "[a]ny dispute arising under or related to this Agreement (except for actions seeking injunctive relief . . .), shall be resolved

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[1] The parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

by binding arbitration in accordance with the arbitration rules of the American Arbitration Association [(AAA)]." J.A. 114. These AAA rules include a jurisdictional provision stating 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." *Id.* at 135. Seizing upon that jurisdictional provision in the AAA rules, Petitioners argue that the parties agreed that an arbitrator would decide the arbitrability of any dispute arising under their contract. Pet'r Br. 8.

The court below disagreed. Although the court concluded that the reference to the AAA rules meant that the parties had agreed to arbitrate *some* arbitrability questions, it held that courts should decide arbitrability for actions within the carve-out clause of the contract: "actions seeking injunctive relief." *See* Pet. App. 11a (the "plain language" of the contract "incorporates the AAA rules—and therefore delegates arbitrability—for all disputes *except* those under the carve-out").

This Court should affirm, but not for the reason given by the court below. Under the text of the Federal Arbitration Act and this Court's precedents, parties to a contract cannot delegate the question of arbitrability to an arbitrator simply by referencing arbitral rules like the AAA rules in their contract. Because the parties did not agree to arbitrate arbitrability for *any* dispute, this Court need not even reach the question whether the parties agreed to arbitrate arbitrability for issues falling within the carve-out. *See* Resp. Br. 11 ("The AAA incorporation issue is an antecedent question; it falls squarely within the umbrella of the question presented; and it presents an alternative ground for affirmance.").

Congress passed the FAA to permit parties to agree to arbitrate their disputes. Importantly, however,

Congress left a key role for the courts—deciding the question of arbitrability. Indeed, the text of the Act requires courts to let arbitrators decide disputes, but only "upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement." 9 U.S.C. § 3; *see id.* § 4 ("[i]f the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, *the court* shall proceed summarily to the trial thereof," and either the court or a jury "shall hear and determine such issue" (emphasis added)).

This Court's precedents confirm that under the FAA, "courts presume that the parties intend[ed] courts, not arbitrators, to decide what we have called disputes about 'arbitrability.'" *BG Grp., PLC v. Republic of Argentina*, 572 U.S. 25, 34 (2014); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) ("the first task *of a court* asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute" (emphasis added)). To be sure, the Court has held that the parties can contract around this presumption and require an arbitrator to decide the arbitrability question. However, "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is *'clea[r] and unmistakabl[e]' evidence* that they did so." *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (emphasis added) (quoting *AT&T Techs., Inc. v. Commc'n Workers of Am.*, 475 U.S. 643, 649 (1986)). Said another way, "silence or ambiguity about the question '*who* (primarily) should decide arbitrability'" means that the courts—not an arbitrator—should decide that question. *Id.* at 944-45.

Under this standard, the contract at issue here could not possibly provide clear and unmistakable evidence that the parties wished to delegate the

arbitrability question to an arbitrator. The plain language of the contract itself says nothing whatsoever about who decides arbitrability, let alone clearly and unmistakably reserves that question for an arbitrator. *See id.* at 944 ("silence or ambiguity" means a court decides arbitrability).

Nor can the contract's reference to the AAA rules provide such clear and unmistakable evidence. For one thing, it is doubtful that a mere reference to generic arbitral rules, no matter what they say, could provide evidence that the parties *clearly and unmistakably* decided to let an arbitrator decide the question of arbitrability. *See id.* at 945 (arbitrability is an "arcane" issue that "[a] party often might not focus upon," so parties must provide "clear and unmistakable evidence" of their intent). In any event, the text of the AAA rules provides simply that the arbitrator has "the power to" rule on jurisdiction, not that the arbitrator shall have *exclusive* jurisdiction over questions of arbitrability or that courts are precluded from making such decisions. Simply referencing rules that provide an arbitrator with jurisdiction to hear questions of arbitrability cannot, in itself, provide clear and unmistakable evidence that the parties both considered the question of who decides arbitrability and wished to strip courts of that power. Indeed, because most contracts reference arbitral rules with a jurisdictional provision, holding otherwise would mean that most contracts implicitly delegate arbitrability to an arbitrator, contravening Congress's plan reflected in the text of the FAA that courts should ordinarily decide that issue.

As such, the jurisdictional provision of the AAA rules cannot overcome the presumption that courts decide questions of arbitrability. At best for Petitioners, the provision is ambiguous or silent on the matter, and

ambiguity cuts in favor of retaining courts' ordinary jurisdiction to decide questions of arbitrability. This Court should hold that the parties to a contract do not clearly and unmistakably agree to arbitrate arbitrability simply because their contract references generic arbitral rules with a jurisdictional provision.

ARGUMENT

I. THE TEXT OF THE FEDERAL ARBITRATION ACT CREATES, AND THIS COURT'S PRECEDENTS RECOGNIZE, A STRONG PRESUMPTION THAT THE PARTIES TO A CONTRACT DO NOT DELEGATE QUESTIONS OF ARBITRABILITY TO AN ARBITRATOR.

In 1925, Congress passed the Federal Arbitration Act, Pub. L. No. 68-401, 43 Stat. 883 (1925), codified as amended at 9 U.S.C. § 1 et seq., which permitted parties to a contract to agree to arbitrate contractual disputes. Although the Act expanded the ability of arbitrators to *resolve* contractual disputes, the Act's text nevertheless retained a key role for courts, providing that courts, not arbitrators, should generally decide questions of arbitrability. And while this Court has held that parties can delegate the question of arbitrability to an arbitrator, it has explained that "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." *First Options*, 514 U.S. at 944 (quoting *AT&T Techs.*, 475 U.S. at 649). This clear-and-unmistakable standard derives from the text of the Act and is firmly cemented in this Court's precedents.

1. The Federal Arbitration Act was passed to "overrule the judiciary's longstanding refusal to enforce agreements to arbitrate." *Dean Witter Reynolds, Inc.*

v. Byrd, 470 U.S. 213, 219-20 (1985). As the House explained when it passed the Act, English courts had "refused to enforce specific agreements to arbitrate upon the ground that the courts were thereby ousted from their jurisdiction," and that common-law rule persisted in the United States. H.R. Rep. No. 96, 68th Cong., 1st Sess., 1-2 (1924). Though the rule prohibiting arbitration had been criticized, American courts "felt that the precedent was too strongly fixed to be overturned without legislative enactment." *Id* at 2. The Act was therefore passed to "declare[] simply that such agreements for arbitration shall be enforced, and provide[] a procedure in the Federal courts for their enforcement." *Id.*

The key passage of the Act, Section 2, provides:

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

9 U.S.C. § 2. In other words, the provision places arbitration agreements "upon the same footing as other contracts." H.R. Rep. No. 96, at 1.

Importantly, however, although the Act permits parties to agree to resolve disputes by arbitration, the Act's text also leaves a critical role for courts in deciding the threshold question of arbitrability—that is, whether and for which issues the parties agreed to arbitrate. First, Section 3 of the Act provides that courts must send contractual disputes to an arbitrator, but only once the court has determined that the parties in fact agreed to submit disputes to arbitration:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, *upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement*, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement.

9 U.S.C. § 3 (emphasis added). In other words, courts are called upon to ensure "that the issue involved in such suit or proceeding is referable to arbitration" before sending a matter to an arbitrator. *Id.*

Second, Section 4 of the Act provides that any party "aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court [that would otherwise have jurisdiction] . . . for an order directing that such arbitration proceed in the manner provided for in such agreement." *Id.* § 4. Much like Section 3, however, Section 4 requires a court to "hear the parties, and *upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue*, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." *Id.* (emphasis added).

Section 4 also spells out procedures that courts should use in determining whether the parties agreed to arbitrate their dispute. It says that "[i]f the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof," and either the court or a jury "shall hear and determine such issue."

Id. Moreover, "[i]f the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof." *Id.*

Finally, further spelling out the procedures that courts should use in deciding questions of arbitrability, Section 6 of the Act says that "[a]ny application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided." *Id.* § 6.

In short, Congress explicitly reserved in the text of the Act a role for the courts to determine the question of arbitrability. This textual reservation of the arbitrability question to the courts is confirmed by the House Report accompanying the Act, which repeatedly referred to proceedings in federal court to determine whether an "arbitration agreement ever was made." H.R. Rep. No. 96, at 2; *see id.* at 1 ("[w]hether an agreement for arbitration shall be enforced or not is a question of procedure to be determined by the law court in which the proceeding is brought"); *id.* ("[t]he bill declares that such agreements shall be recognized and *enforced by the courts of the United States*" (emphasis added)); *id.* at 2 ("[t]he bill declares simply that such agreements for arbitration shall be enforced, and provides a procedure *in the Federal courts* for their enforcement" (emphasis added)); *id.* ("[t]here is provided a method for the summary trial of any claim that no arbitration agreement ever was made").

2. This Court's precedents confirm what the text of the Federal Arbitration Act says: that it is ordinarily the role of the courts to decide questions of arbitrability. *See BG Grp.*, 572 U.S. at 34 ("courts presume that

the parties intended courts, not arbitrators, to decide what we have called disputes about 'arbitrability'"). As this Court has repeatedly and consistently explained, "[i]t is well settled in both commercial and labor cases that whether parties have agreed to 'submi[t] a particular dispute to arbitration' is typically an 'issue for judicial determination.'" *Granite Rock Co. v. Int'l Brotherhood of Teamsters*, 561 U.S. 287, 296 (2010) (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002)); *see Dean Witter Reynolds*, 470 U.S. at 219 ("the purpose behind [the FAA's] passage was to ensure *judicial* enforcement of privately made agreements to arbitrate" (emphasis added)); *Mitsubishi Motors*, 473 U.S. at 626 ("the first task *of a court* asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute" (emphasis added)).[2]

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[2] The Court has also made this point in the related context of collective-bargaining arbitration for at least 60 years. *See, e.g.*, *AT&T Techs.*, 475 U.S. at 649 ("the question of arbitrability—whether a collective-bargaining agreement creates a duty for the parties to arbitrate the particular grievance—is undeniably an issue for *judicial* determination" (emphasis added)); *Int'l Union of Operating Eng'rs, Local 150, AFL-CIO v. Flair Builders, Inc.*, 406 U.S. 487, 491 (1972) ("whether a union and employer have agreed to arbitration . . . as well as the scope of the arbitration clause, remains a matter for *judicial* decision" (emphasis added)); *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 547 (1964) ("The duty to arbitrate being of contractual origin, a compulsory submission to arbitration cannot precede *judicial* determination that the collective bargaining agreement does in fact create such a duty." (emphasis added)); *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 241 (1962) ("whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined *by the Court* on the basis of the contract entered into by the parties" (emphasis added)); *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960) ("Congress . . . assigned the *courts* the duty of determining whether the

To be sure, that "judicial inquiry" is "strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator power to make the award he made." *Warrior & Gulf*, 363 U.S. at 582. And the Court has explained that "[t]he Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). But it is nonetheless a "judicial inquiry," a responsibility of the court to determine whether the parties agreed to arbitrate a particular grievance.

Moreover, while "a court must defer to an arbitrator's arbitrability decision when the parties submitted that matter to arbitration," *First Options*, 514 U.S. at 943, "[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 (quoting *AT&T Techs.*, 475 U.S. at 649); *see id.* (describing this rule as "an important qualification, applicable when courts decide whether a party has agreed that arbitrators should decide arbitrability"); *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 69 n.1 (2010) (parties must "manifest[] [an] intent" to arbitrate arbitrability). Said another way, "the law treats silence or ambiguity about the question '*who* (primarily) should decide arbitrability' differently from the way it treats silence or ambiguity about the question '*whether* a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement.'" *First Options*, 514 U.S. at 944-45. For the former question, the law assumes that parties wanted *courts* to decide the question of arbitrability unless

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reluctant party has breached his promise to arbitrate." (emphasis added)).

they clearly and unmistakably say otherwise, even though that presumption is reversed for the latter question. *See Howsam*, 537 U.S. at 83 (noting that "there is an exception to th[e] policy" favoring arbitration for the question of arbitrability).

This Court has explained that "this difference in treatment is understandable." *First Options*, 514 U.S. at 945. With regard to arbitrating disputes, "given the law's permissive policies in respect to arbitration, . . . one can understand why the law would insist upon clarity before concluding that the parties did *not* want to arbitrate a related matter." *Id.* But the question of who should decide arbitrability (rather than the merits of an arbitrable dispute) "is rather arcane," and "[a] party often might not focus upon that question or upon the significance of having arbitrators decide the scope of their own powers." *Id.* Thus, "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." *Id.*; *Howsam*, 537 U.S. at 83 (explaining that for questions of arbitrability, "contracting parties would likely have expected a court to have decided the gateway matter" and "are not likely to have thought that they had agreed that an arbitrator would do so").

An example of clear and unmistakable evidence of the parties' intent to arbitrate arbitrability can be found in the contract at issue in *Rent-A-Center*, 561 U.S. at 63; *see id.* at 69 n.1 (noting that the parties did not dispute "that the text of the Agreement was clear and unmistakable" that "the arbitrator [had] the exclusive authority to decide whether the Agreement to Arbitrate [was] enforceable"). There, the contract

stated 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 Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable." *Id*. at 66 (emphasis added). At least two features of that language provide clear and unmistakable evidence that the parties wished to arbitrate arbitrability. First, the provision states that the arbitrator has "exclusive" authority to resolve disputes about "formation" or "applicability" of an agreement to arbitrate. Second, were there any doubt, the provision states that "any federal, state, or local court or agency" shall "not" have that power. The contract is in that way a quintessentially unambiguous expression of the parties' intent to arbitrate arbitrability.

Absent this kind of clear and unmistakable evidence, however, this Court has reaffirmed that "whether parties have agreed to 'submi[t] a particular dispute to arbitration' is typically an 'issue for judicial determination.'" *Granite Rock Co.*, 561 U.S. at 296 (quoting *Howsam*, 537 U.S. at 83). As the next Section shows, the contract at issue here does not provide clear and unmistakable evidence that these parties wished to arbitrate the question of arbitrability.

II. THE INCORPORATION IN A CONTRACT OF ARBITRAL RULES CONTAINING A JURISDICTIONAL PROVISION IS NOT CLEAR AND UNMISTAKABLE EVIDENCE THAT THE PARTIES WISHED TO DELEGATE QUESTIONS OF ARBITRABILITY EXCLUSIVELY TO AN ARBITRATOR.

The contract at issue in this case does not provide clear and unmistakable evidence that the parties wished to delegate questions of arbitrability to an

arbitrator. To the contrary, the contract—along with the rules of the American Arbitration Association (AAA) that the contract references—say nothing about placing the exclusive jurisdiction to decide arbitrability in the arbitrator. Nor do they indicate that courts are precluded from addressing that question. At best for Petitioners, the contract is ambiguous on the question, and "the law treats silence or ambiguity about the question '*who* (primarily) should decide arbitrability'" to mean that courts, not arbitrators, should decide that question. *First Options*, 514 U.S. at 944. Although several courts of appeals have come to the opposite conclusion, those courts offer no persuasive reasoning in support of their position.

1. The arbitration clause in the contract at issue here provides that

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

J.A. 114. There is nothing in this provision that even resembles the language that appeared in the contract in *Rent-A-Car* indicating that an arbitrator has exclusive jurisdiction to decide arbitrability and that courts are precluded from doing so. Indeed, this provision does not even mention arbitrability at all, let alone provide any indication that only an arbitrator can decide the question of arbitrability. *See* Resp. Br. 16 ("the arbitration clause is silent on delegation; it does not utter one syllable on the topic").

Because the actual language of the contract says nothing about arbitrability, and certainly does not

provide clear and unmistakable evidence that the arbitrator must decide that question, Petitioners rely on the AAA rules referenced in the contract. A jurisdictional provision of those rules states 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." *Id.* at 135. Petitioners posit that this single sentence among dozens of AAA rules provides sufficient evidence that the parties wished to arbitrate arbitrability. That theory plainly does not pass the clear-and-unmistakable-evidence test that this Court established in *First Options*.

First, a reference to arbitral rules in a contract is not enough to provide clear and unmistakable evidence of the parties' intent as to arbitrability. As this Court has recognized, arbitrability is an "arcane" issue that "[a] party often might not focus upon," so "clea[r] and unmistakabl[e] evidence" that the parties wished to arbitrate arbitrability is necessary to avoid "forc[ing] unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide." *First Options*, 514 U.S. at 945. Yet in Petitioners view, simply citing generic rules that include a jurisdictional clause granting the arbitrator the ability to decide her own jurisdiction is enough to show that parties specifically contemplated the question of who decides arbitrability and decided that they wished arbitrators to decide it. That makes little sense, especially because the jurisdictional provision is only "a single provision of a comprehensive set of rules of arbitral procedure that the parties thought to include in their arbitration agreement." George A. Bermann, *Arbitrability Trouble*, 23 Am. Rev. Int'l Arb. 367, 377 (2012). Simply referencing those rules in an agreement without any elaboration on the question of

arbitrability cannot provide the sort of clear and unmistakable evidence that would "manifest[] [an] intent" to arbitrate arbitrability, *Rent-A-Center*, 561 U.S. at 69 n.1.

Second, even if referencing generic arbitral rules could in some contexts provide clear and unmistakable evidence that the parties wished to arbitrate arbitrability, the text of the jurisdictional provision in the AAA rules plainly does not provide such evidence. The provision provides simply that the arbitrator has "the power to" rule on her jurisdiction. That language does not say—or even suggest—that the arbitrator shall have *exclusive* jurisdiction over questions of arbitrability. Nor does the language anywhere provide that courts are precluded from making such decisions. *See* Restatement (Third) U.S. Law of Int'l Comm. Arb. § 2.8 reporter's note b(iii), Tentative Draft No. 4 (April 17, 2015) ("this language does not clearly indicate that the authority of the arbitrators to determine their competence is exclusive of the courts' authority to do so"). Rather, the jurisdictional provision is silent about whether it is intended to strip courts of jurisdiction to decide arbitrability.

And significantly, there is an equally good alternative reason for the existence of the jurisdictional provision: it ensures that an arbitration proceeding need not come to a halt simply because a party challenges the arbitrator's jurisdiction. *See id.* (the "principal reason for inclusion of [a jurisdictional] provision in institutional rules was to dispel the notion that arbitrators could only decide their own jurisdiction to the extent that the parties expressly authorize them to do so"); Jan Paulsson, *The Idea of Arbitration* 55 (2013) ("the objective" of these jurisdictional provisions "is only that the arbitral tribunal not be required to stop as soon as it hears a challenge, but may rule on it");

Bermann, *supra*, at 376 (provision has "effect of enabling a tribunal to address jurisdictional challenges rather than having to suspend proceedings and refer the matter to a court of the arbitral situs").

The AAA rules' jurisdictional provision, therefore, cannot overcome the presumption that courts will decide questions of arbitrability. At best for Petitioners, the provision is ambiguous on the question of who decides arbitrability, and ambiguity cuts in favor of retaining courts' ordinary jurisdiction to decide that question. *See* Restatement (Third) U.S. Law of Int'l Comm. Arb., *supra* at § 2.8 reporter's note b(iii) (the "rules do not purport to give arbitrators the exclusive authority to rule on the enforceability of the arbitration agreement").

Third, holding that a jurisdictional provision like the one in the AAA rules provides clear and unmistakable evidence delegating arbitrability to arbitrators would defy Congress's plan in the FAA to generally reserve arbitrability questions for the courts. Jurisdictional provisions like this one "are ubiquitous in modern arbitration rules." *Id*. at § 2.8. Indeed, most contracts calling for arbitration reference a set of arbitration rules to govern the dispute as an easy way for parties to set the terms of arbitration without having to detail all of the procedures in their contract. *See* Resp. Br. 17 ("parties incorporate the AAA rules for an obvious reason, and it has nothing to do with delegation: *to provide the ground rules for any arbitration*").

If this Court were to hold that referencing arbitration rules that contain an ambiguous jurisdictional provision like the one at issue here manifests a clear and unmistakable intent to arbitrate arbitrability, arbitrators would end up deciding arbitrability in most contracts that provide for arbitration. That would reverse the presumption that arbitrability is ordinarily

decided by courts, leaving arbitrators—not courts—to decide arbitrability in the mine run of cases. That cannot be right. *See* Bermann, *supra*, at 377 ("If the *First Options* presumption can be overcome so easily, it is far from the strong presumption that the Supreme Court portrayed it as being and almost certainly intended it to be."); Restatement (Third) U.S. Law of Int'l Comm. Arb., *supra* at § 2.8 reporter's note b(iii) ("If [such provisions] were deemed to constitute 'clear and unmistakable evidence,' the presence of such evidence would cease to be exceptional, but rather become practically routine.").

In short, nothing about the jurisdictional provision in the AAA rules, let alone the contract at issue in this case that references those rules, even suggests that the parties wished to arbitrate arbitrability. And the contract certainly does not provide clear and unmistakable evidence of such intent. This Court should hold that the parties did not agree to arbitrate arbitrability.

2. Even though referencing arbitration rules with a jurisdictional provision like the one at issue here plainly fails to meet this Court's clear-and-unmistakable-evidence standard, several courts of appeals have held that it does. Notably, however, these courts have offered little reasoning to support this position, and instead have largely cited one another as the only sources of authority in favor of that view.

The rule seems to have originated in a First Circuit decision that predates this Court's decision in *First Options*. In *Apollo Computer, Inc. v. Berg*, 886 F.2d 469 (1st Cir. 1989), the First Circuit held that the parties agreed to arbitrate arbitrability where their contract provided that disputes would be settled by binding arbitration "in accordance with the rules of arbitration of the International Chamber of Commerce," a different set of arbitral rules. *Id.* at 473. The

International Chamber of Commerce (ICC) rules state that if a party "raise[s] one or more pleas concerning the existence or validity of the agreement to arbitrate," the arbitrator "may . . . decide that the arbitration shall proceed." *Id.* They also state that "the arbitrator shall not cease to have jurisdiction by reason of any claim that the contract is null and void or allegation that it is inexistent provided that he upholds the validity of the agreement to arbitrate." *Id.* Thus, much like the AAA rules at issue here, the ICC rules at issue in *Apollo* granted jurisdiction to the arbitrator to decide questions of arbitrability, but did not provide explicitly that such jurisdiction was exclusive or that courts lacked jurisdiction to decide such questions.

The First Circuit acknowledged that "[o]rdinarily, [the plaintiff] would be entitled to have these issues resolved by a court." *Id.* Nonetheless, the court decided that not only do these provisions in the ICC rules "allow the arbitrator to determine her own jurisdiction," but that courts were *divested* of their ability to address these questions. *Id.* at 473-74. Without any analysis, the court simply concluded that "[t]he arbitrator should decide whether a valid arbitration agreement exists between [the plaintiff] and the defendants under the terms of the contract" and refused to opine on the arbitrability question. *Id.* That conclusion conflicts directly with this Court's supervening decision in *First Options*, which held that "ambiguity about the question '*who* (primarily) should decide arbitrability" means that courts should decide that question. 514 U.S. at 944.

Nonetheless, in recent years, other courts of appeals have adopted the First Circuit's rule that these types of ambiguous jurisdictional clauses in arbitration rules meet the clear-and-unmistakable-evidence standard without meaningfully analyzing the *First*

Options decision. For instance, in *Shaw Group Inc. v. Triplefine International Corp.*, the Second Circuit held that identical ICC rules "specifically provide[] for the [International Court of Arbitration], the arbitral body of the ICC, to address questions of arbitrability." 322 F.3d 115, 122 (2d Cir. 2003). The Court never addressed whether the ICC rules grant *exclusive* jurisdiction over arbitrability questions to an arbitrator, or whether they unambiguously preclude courts from addressing questions about arbitrability. Rather, the court simply cited *Apollo* and a Hawaii district court decision for the proposition that such language clearly and unmistakably provides evidence that the parties wished to arbitrate arbitrability. *Id.* (citing *Apollo Computer, Inc.*, 886 F.2d at 472-73 and *Daiei, Inc. v. United States Shoe Corp.*, 755 F. Supp. 299, 303 (D. Haw. 1991)).

Several courts of appeals then came to the same conclusion regarding references to the AAA rules at issue in this case, relying on nothing more than these prior decisions interpreting references to the ICC rules. For instance, interpreting a contract that referenced the AAA rules, the Second Circuit held that when "parties explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability, the incorporation serves as clear and unmistakable evidence of the parties' intent to delegate such issues to an arbitrator." *Contec Corp. v. Remote Solution, Co.*, 398 F.3d 205, 208 (2d Cir. 2005). The court failed to consider whether simply referencing rules that *empower* arbitrators to decide arbitrability unambiguously means that the parties wished the arbitrator to have *exclusive* jurisdiction over that issue.

Similarly, the Eleventh Circuit held that a reference to the AAA rules means that "the parties clearly and unmistakably agreed that the arbitrator should

decide whether the arbitration clause is valid." *Terminix Int'l Co. v. Palmer Ranch Ltd. Partnership*, 432 F.3d 1327, 1332 (11th Cir. 2005). The Court cited the Second Circuit's decision in *Contec* and the First Circuit's decision in *Apollo* without any further analysis.

The Federal Circuit likewise held that a reference to the AAA rules in a contract, specifically its jurisdictional provision, provides clear and unmistakable evidence that the parties wished to arbitrate arbitrability. *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366, 1373 (Fed. Cir. 2006). The Court said simply that it "agree[d] with the Second Circuit's analysis in *Contec*" without elaboration. *Id.* So too with the Eighth Circuit, which held that "the arbitration provision's incorporation of the AAA Rules . . . constitutes a clear and unmistakable expression of the parties' intent to leave the question of arbitrability to an arbitrator." *Fallo v. High-Tech Inst.*, 559 F.3d 874, 878 (8th Cir. 2009). The Eighth Circuit cited *Qualcomm*, *Terminix*, *Contec*, and *Apollo* without any further analysis.

The First Circuit too addressed incorporation of the AAA rules in 2009 and cited its prior decision in *Apollo*, as well as the Eleventh Circuit's decision in *Terminix*, to justify a finding that such incorporation constituted clear and unmistakable evidence to arbitrate arbitrability. *Awuah v. Coverall North Am., Inc.*, 554 F.3d 7, 11 (1st Cir. 2009). The First Circuit even acknowledged that "[i]t is doubtful that many people read the small print in form contracts, let alone the small print in arbitration rules that are cross-referenced by such contracts, however explicit the cross-reference." *Id.* at 12. But the court was undeterred, still holding that such a cross-reference constituted clear and unmistakable evidence of the parties' intent to arbitrate arbitrability.

The Fifth Circuit followed suit, holding in 2012 that it "agree[d] with most of [its] sister circuits that the express adoption of [AAA] rules presents clear and unmistakable evidence that the parties agreed to arbitrate arbitrability." *Petrofac, Inc. v. DynMcDermott Petroleum Operations Co.*, 687 F.3d 671, 675 (5th Cir. 2012).

Most recently, the Sixth Circuit addressed this question in *Blanton v. Domino's Pizza Franchising LLC*, 962 F.3d 842 (6th Cir. 2020), and similarly held that merely referencing the AAA rules is sufficient evidence that the parties wished to arbitrate arbitrability. Though the court provided more analysis than other courts of appeals, its reasoning also falls flat. First, the court took the position that even though the jurisdictional provision does not grant *exclusive* jurisdiction to the arbitrator, "the expression of one thing often implies the exclusion of other things," and suggested that exclusive jurisdiction is implied by the phrase "[t]he arbitrator shall have the power to rule on his or her own jurisdiction." *Id.* at 849. The court also suggested that a contrary reading would render the jurisdictional provision in the AAA rules "superfluous." *Id.* at 847. But as explained above, saying that the arbitrator "shall have the power to rule on his or her own jurisdiction" does nothing more than *permit* an arbitrator to decide questions of arbitrability when the parties have agreed to the arbitrator deciding the question. *See supra* at 15-16. There is nothing superfluous about reading the AAA jurisdictional provision as granting jurisdiction, but not exclusive jurisdiction, to the arbitrator to decide arbitrability.

The Sixth Circuit also held that the parties in that case clearly and unmistakably delegated arbitrability to an arbitrator when they referenced the AAA rules because "almost every circuit court in the country . . .

had held that this rule or similar ones gave arbitrators the exclusive authority to arbitrate 'arbitrability.'" *Blanton*, 962 F.3d at 850. But that turns the *First Options* test on its head. The point of the clear-and-unmistakable test is that arbitrability is an "arcane" issue and the parties "often might not focus upon that question." *First Options*, 514 U.S. at 945. Thus, this Court demanded clear and unmistakable evidence that the parties considered the question of arbitrability and wished to arbitrate it. To hold that parties clearly and unmistakably wished to delegate arbitrability to an arbitrator because *court decisions* interpreting similar contracts held as much assumes a level of sophistication in parties to a contract that *First Options* explicitly rejected.

Finally, other courts have held that this same conclusion regarding referencing arbitral rules applies to a contract that incorporates the rules of the United Nations Commission on International Trade Law (UNCITRAL). *See Oracle Am., Inc. v. Myriad Grp. A.G.*, 724 F.3d 1069, 1074-75 (9th Cir. 2013) (the "prevailing view" is that incorporation of UNCITRAL rules "is clear and unmistakable evidence that the parties agreed the arbitrator would decide" issues of arbitral jurisdiction); *Schneider v. Kingdom of Thai.*, 688 F.3d 68, 72-73 (2d Cir. 2012) (incorporation of UNCITRAL rules serves as "clear and unmistakable evidence" that parties intended for the arbitrator to decide issues of arbitral jurisdiction); *Rep. of Arg. v. BG Grp. PLC*, 665 F.3d 1363, 1370-71 (D.C. Cir. 2012) (same). Like the AAA rules, the UNCITRAL rules state that "[t]he arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement." *Oracle Am., Inc.*, 724 F.3d at 1073.

In short, the courts of appeals have nearly uniformly held that a mere reference to arbitral rules that have an ambiguous jurisdictional provision is enough to provide clear and unmistakable evidence of parties' intent to arbitrate the question of arbitrability. *But see Riley Mfg. Co. v. Anchor Glass Container Corp.*, 157 F.3d 775 (10th Cir. 1998) (holding that a contract that referenced the AAA rules did not provide clear and unmistakable evidence of an intent to arbitrate arbitrability, although the court did not address whether the AAA reference could provide that evidence). These courts are wrong and have provided little reasoning in favor of their position. This Court should correct these courts' mistakes and hold that a cross-reference to ambiguous arbitral rules is not sufficient to provide clear and unmistakable evidence of the parties' intent to arbitrate arbitrability.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be affirmed.

Respectfully submitted,

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