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 ARBITRATORS, ARBITRATION PRACTITIONERS, AND ARBITRATION SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

Amici are arbitrators, arbitration practitioners, and scholars whose practice, teaching, and scholarship focus on arbitration. *Amici* are concerned that the ruling in this case may undermine the equitable administration of arbitration proceedings, the framework established by the Federal Arbitration Act (FAA) governing the allocation of power between courts and arbitrators, and the foundation of consent recognized in and required by the FAA. *Amici* file this brief to provide additional context regarding the delegation of threshold arbitrability matters to an arbitrator. It explores several reasons why such a delegation does not exist in this case.

SUMMARY OF ARGUMENT

The petitioner's entire argument rests on the flawed assumption that a clear and unmistakable delegation of arbitrability matters exists in this case. However, no such delegation exists for multiple

[1] *Amici* file this brief in their individual capacities, not as representatives of any organizations with which they are affiliated, and no counsel for a party authored this brief in whole or in part. Also, no person or entity made a monetary contribution to the preparation or submission of the brief, except for Professor Szalai, who used his professorship funds for the printing and filing of this brief. All parties have consented to the filing of this brief, and letters of consent have been filed with the Court. The names and titles of *amici* appear in the appendix.

reasons, and the Court should affirm the Fifth Circuit's finding that no delegation occurred here.

First, a clear and unmistakable agreement for delegation cannot exist in this case because there is no agreement at all between the petitioner and respondent. Second, the agreement on which petitioner relies fails to specify a particular set of arbitration rules that should apply and, instead, vaguely refers to "arbitration rules" of the American Arbitration Association (AAA). As explained below, the AAA's website lists more than two hundred sets of active and archived arbitration rules, and not all of the AAA rules permit an arbitrator to resolve arbitrability issues. Third, even if the purported agreement incorporates by reference a specific set of arbitration rules, and even if such rules contain a delegation provision, the contract does not clearly and unmistakably incorporate that delegation provision, as opposed to rules governing arbitration procedure, arbitrator selection, and arbitrator qualification. Fourth, the AAA periodically and unilaterally amends its own rules. Even if the contract here incorporates by reference a specific set of arbitration rules, the clear and unmistakable standard cannot be satisfied because AAA arbitration rules can be unilaterally modified at any time, making the incorporation by reference a moving target and rendering it equivocal and unclear as a matter of law. Fifth, even assuming the contract incorporates a delegation provision contained in AAA rules, a mere incorporation by reference cannot satisfy the heightened standard of clear and unmistakable evidence because of concerns about impartiality,

conflicts of interest, and constitutional problems. Finally, reversing the Fifth Circuit and finding a delegation in this case may negatively impact millions of small businesses, consumers, and workers.

ARGUMENT

I. The Court Should Affirm The Fifth Circuit's Decision Because The Parties Never Entered Into Any Agreement, And Without An Agreement, It Is Impossible To Satisfy The Clear And Unmistakable Delegation Standard

Two key principles of arbitration law can easily resolve this case. First, "the foundational FAA principle [is] that arbitration is a matter of consent." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684 (2010). Second, as the Court has repeatedly held, "parties may delegate threshold arbitrability questions to the arbitrator, so long as the parties' agreement does so by 'clear and unmistakable' evidence." *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 530 (2019) (citations omitted). In the landmark case of *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), the Court applied these two principles and addressed a situation that failed to satisfy the clear and unmistakable standard. *First Options* is instructive when addressing the current case.

Like the current case, *First Options* involved nonsignatories to an arbitration agreement. In *First*

Options, a dispute arose out of the 1987 stock market crash between First Options of Chicago, Inc., a stock clearing firm, and three related parties, Manuel Kaplan, his wife Carol Kaplan, and Manuel's wholly owned investment company, MK Investments, Inc. (MKI). *Id.* at 940. The critical fact relevant to the current case is that out of these four parties, only MKI and First Options were parties to an arbitration agreement. *Id.* at 941. The Court's opinion addressed whether Mr. and Mrs. Kaplan, who were non-signatories, were bound to arbitrate, and more particularly, who resolved whether the Kaplans had to arbitrate. Turning to the clear and unmistakable delegation standard, the Court found that "First Options cannot show that the Kaplans clearly agreed to have the arbitrators decide (*i.e.*, to arbitrate) the question of arbitrability." *Id.* at 946. Thus, a court would decide whether the Kaplans were bound to arbitrate their dispute with First Options.

In *First Options*, there was no clear and unmistakable evidence that the Kaplans had agreed to delegate arbitrability issues to the arbitrator. First, and most significant to the current case, the Kaplans were not parties to the arbitration agreement. *Id.* at 941, 946 (recognizing that the only reason the Kaplans appeared at the arbitration hearing was because Mr. Kaplan's wholly owned company was bound to arbitrate pursuant to its workout agreement with First Options). Second, the Kaplans strongly objected to the arbitrator's jurisdiction. *Id.* at 946. The Kaplans were simply not signatories to the governing arbitration

agreement, and they were not bound to arbitrate arbitrability.

Because the Kaplans had no pre-existing arbitration agreement at all with First Options, *id.* at 941, there was only one method for the Kaplans to engage in a clear and unmistakable delegation of arbitrability issues to the arbitrator: through a *post-dispute* submission of the narrow issue of arbitrability. However, there was no post-dispute submission in *First Options*:

> [While the Kaplans] fil[ed] with the arbitrators a written memorandum objecting to the arbitrators' jurisdiction[,] . . . merely arguing the arbitrability issue to an arbitrator does not indicate a clear willingness to arbitrate that issue, *i.e.*, a willingness to be effectively bound by the arbitrator's decision on that point. To the contrary, insofar as the Kaplans were forcefully objecting to the arbitrators deciding their dispute with First Options, one naturally would think that they did *not* want the arbitrators to have binding authority over them.

514 U.S. at 946 (emphasis in original).

Just like the Kaplans were not signatories to any arbitration agreement with First Options, *id.* at 941, the respondent here never entered into any arbitration agreement with petitioner, much less an agreement that clearly and unmistakably delegates arbitrability issues to an arbitrator. Petitioner and respondent are horizontal competitors in the distribution of dental equipment and appear to have never entered into any

contractual relationship with each other. The only arbitration agreement in the record involves a dealer contract between respondent and a vertical supplier of dental equipment who is not a party before the Court. Joint Appendix (JA) 105. Without any binding agreement between the parties, they could not have agreed to arbitrate anything at all, including questions of arbitrability.

In order to satisfy the heightened clear and unmistakable standard in this case where there is no predispute agreement between the parties, there would have to be an unreserved, post-dispute submission of the arbitrability issue to arbitration or a post-dispute agreement between petitioner and respondent explicitly and unreservedly granting authority to the arbitrator to resolve arbitrability matters. In *First Options*, the Kaplans and First Options were never parties to an arbitration agreement with each other, and the Kaplans did not unreservedly submit the arbitrability issue to the arbitrators. Under the circumstances, there was no clear and unmistakable delegation. 514 U.S. at 941, 946.

Similarly, the petitioner and respondent are not parties to any contract with each other. As a result, it is impossible for the parties here to have clearly and unmistakably agreed that arbitrators shall resolve threshold arbitrability matters between them. *First Options* easily resolves this case.

II. The Contract's Reference To The AAA, Without Any Specific Selection Or Incorporation Of Particular AAA Rules, Cannot Satisfy The Clear And Unmistakable Standard

As explained above, the heightened clear and unmistakable standard cannot be satisfied in this case because no agreement at all exists between the parties. However, even assuming that the respondent had entered into an arbitration agreement with the petitioner, a clear and unmistakable delegation still does not exist.

Although the arbitration agreement relied on by petitioner (the "Arbitration Agreement") provides for arbitration "in accordance with the arbitration rules of the American Arbitration Association," the petitioner's purported Arbitration Agreement fails to identify and incorporate by reference a specific set of rules administered by the AAA. JA 114. This lack of specificity is fatal to the petitioner's claim that the Arbitration Agreement satisfies the clear and unmistakable standard for delegation. As explained below, the AAA's website has more than two hundred sets of active and archived arbitration rules, and not all the AAA rules permit an arbitrator to resolve arbitrability issues.

The Arbitration Agreement's reference to unspecified "arbitration rules" is vague and problematic because the AAA's website currently lists fifty-six (56) sets of "active" rules and one hundred sixty-two (162)

sets of "archived" rules.[2] Out of this entire universe of more than two hundred AAA rules, it is critical to recognize that while some AAA rules permit an arbitrator to determine threshold arbitrability issues, other AAA rules are silent and do not grant that power to the arbitrator. Because the Arbitration Agreement fails to identify and select a particular set of AAA rules, there is uncertainty or ambiguity regarding which AAA rules are supposed to apply to the complex antitrust claims in this case.

The Joint Appendix sets forth two sets of AAA rules: (1) the AAA's "Commercial Arbitration Rules and Mediation Procedures" (the "Commercial Rules"); and (2) the AAA's "Procedures for Large, Complex Commercial Disputes" (the "Complex Rules"). JA 117-173. Out of all the AAA rules, these two sets of rules are likely candidates to govern the underlying antitrust dispute in this case.[3] However, there is a critical difference

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[2] https://www.adr.org/active-rules (last visited Oct. 7, 2020); https://www.adr.org/ArchiveRules (last visited Oct. 7, 2020).

[3] Some AAA rules are designed for particular disputes or industries, such as disputes involving the wireless industry or healthcare industry. *See*, *e.g.*, https://www.adr.org/active-rules (last visited Oct. 7, 2020). These specialized AAA rules for other industries are likely inapplicable to the complex antitrust claims in the current case. However, because of the foundational principle that arbitration is a matter of consent, *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1416 (2019), parties theoretically could choose to arbitrate pursuant to rules designed for another industry. With the contract's vague reference to AAA "arbitration rules," it is not clear which rules are applicable to the current case, but the two sets of rules cited in the Joint Appendix are likely candidates.

between these two sets of rules for the purpose of this case. The Commercial Rules permit an arbitrator to resolve threshold arbitrability issues. JA 135. However, the Complex Rules do not grant such a power to the arbitrator. JA 158-161. By failing to specify which set of AAA rules governs, the Arbitration Agreement cannot satisfy the clear and unmistakable standard regarding delegation.

The petitioner may try to argue that the parties to the contract intended the contract's general reference to AAA rules to refer clearly and unmistakably to the AAA's Commercial Rules. Petitioner's argument is undermined by what the AAA's website reveals. If a visitor to the AAA's website has a large, complex antitrust dispute and reasonably examines the Complex Rules as the applicable set of rules, the visitor would have no notice at all that an arbitrator could resolve threshold arbitrability issues. This particular set of rules simply does not purport to grant such powers to an arbitrator. JA 158-161. Although the Joint Appendix presents the AAA's Commercial Rules and the AAA's Complex Rules together as a unit, the AAA's website sets forth the Complex Rules as a distinct set of rules in a separate PDF file and unconnected to the Commercial Rules.[4] In

[4] https://www.adr.org/active-rules (last visited Oct. 7, 2020). The AAA's Complex Rules make only one reference to the Commercial Rules: if the parties cannot agree on the method of appointing arbitrators, arbitrators shall be appointed in the manner provided in the Commercial Rules. *See* Rule L-2, JA 159 ("The AAA shall appoint arbitrator(s) as agreed by the parties. If they are unable to agree on a method of appointment, the AAA shall appoint arbitrators from the Large, Complex Commercial Case

sum, the contract's poorly drafted and open-ended reference to AAA "arbitration rules," JA 114, without

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Panel, in the manner provided in the regular [Commercial Rules]."). Because the AAA's Complex Rules do not refer at all to the AAA's Commercial Rules, except for this one particular contingency when the parties cannot agree on the method of appointment of arbitrators, which may not even occur in any given case, a textual, literal interpretation suggests that the AAA's Complex Rules stand alone as a distinct set of arbitral rules. These particular rules do not permit an arbitrator to resolve threshold arbitrability matters. JA 158-161. A visitor to the AAA's website who has a complex antitrust dispute may only see these Complex Rules and have no expectation at all that an arbitrator would resolve threshold arbitrability matters. Furthermore, if a visitor with a complex antitrust dispute visits the AAA's website and instead first examines the Commercial Rules, the visitor would still have no expectation that an arbitrator would resolve threshold arbitrability matters. The Commercial Rules state that the AAA's Complex Rules govern disputes of $500,000 or more. *See* Rule R-1(c), JA 132. In such situations, the AAA's Complex Rules "shall be applied . . . *in addition to* any other portion of these [Commercial Rules] that is *not in conflict* with the [Complex Rules]." *Id.* (emphasis added). One can argue that there is a conflict between these two sets of rules because the Commercial Rules grant the arbitrator the power to resolve threshold arbitrability issues, JA 135, while the Complex Rules do not. JA 158-161. As a result of this conflict, an arbitrator does not have the power to resolve threshold arbitrability issues for large, complex disputes of $500,000 or more. To summarize, a textual, literal analysis of the Complex Rules excludes application of the Commercial Rules, except for one special circumstance involving the appointment of the arbitrator. Although the text of the Commercial Rules attempts to combine the two sets of rules, there is, at best, an ambiguity whether the combination of these two sets includes the power of an arbitrator to resolve threshold arbitrability issues. With such poor drafting by the AAA of its own rules, there is no clear and unmistakable delegation in this case.

specifying any particular AAA rules, cannot satisfy the clear and unmistakable standard for delegation.

III. The Purported Arbitration Agreement's Text Does Not Clearly And Unmistakably Incorporate By Reference A Delegation Provision

The text of the alleged Arbitration Agreement does not, for additional, independent reasons, clearly and unmistakably delegate arbitrability questions to an arbitrator. Even if the Arbitration Agreement identified, and purported to incorporate by reference, a specific set of AAA rules containing a delegation agreement, at best the Arbitration Agreement's text remains equivocal and otherwise unclear about party intent to arbitrate arbitrability.

A. The Clear And Unmistakable Delegation Rule Requires The Court To Determine Independently, And Without Regard To State Law, Whether The Parties Clearly And Unmistakably Consented To Arbitrate Arbitrability

The question whether the parties "clearly and unmistakably" agreed to arbitrate arbitrability is a federal law "interpretive" rule. *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1415-17, 1418-19 (2019); *First Options*, 514 U.S. at 944-45; *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83-84 (2002). Ordinarily, the interpretation of an arbitration agreement presents a state law

question, but the "clear and unmistakable" delegation rule "qualifi[es]" state law and displaces it to the extent it is inconsistent with the purposes and objectives of the FAA. *Lamps Plus*, 139 S. Ct. at 1415, 1416-17; *First Options*, 514 U.S. at 944-45.

The purposes and objectives of the FAA's clear and unmistakable delegation rule are to ensure that parties are not coerced into arbitrating an issue that they reasonably thought would be reserved for court determination. This Court "will not conclude that" parties agree to arbitrate arbitrability "based on 'silence or ambiguity' in their agreement, because 'doing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide.'" *Lamps Plus*, 139 S. Ct. at 1416-17 (quoting *First Options*, 514 U.S. at 945; citing *Howsam*, 537 U.S. at 83-84; emphasis deleted). The Court in *Howsam* explored some reasons for the clear and unmistakable delegation rule:

> [The clear and unmistakable delegation rule applies] in the kind of narrow circumstance where contracting parties would likely have expected a court to have decided the gateway matter, where they are not likely to have thought that they had agreed that an arbitrator would do so, and, consequently, where reference of the gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate.

537 U.S. at 83-84.

Implementing the clear and unmistakable delegation rule consistent with its purposes and objectives requires courts to determine independently, as a matter of federal law, whether such clear and unmistakable evidence exists. That determination should not turn on the vagaries of whatever body of state law contract interpretation rules may apply, but on whether there is clear and unmistakable evidence that the parties meaningfully, knowingly, and deliberately consented to arbitrate arbitrability.

B. The Text Of The Purported Arbitration Agreement Does Not Clearly And Unmistakably Incorporate By Reference A Delegation Agreement

The petitioner's purported Arbitration Agreement provides, in pertinent part, 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." JA 114.

The first phrase of that sentence defines the scope of the arbitration agreement—that is, what disputes the parties agreed to arbitrate. That phrase does not clearly and unmistakably evidence an intent to arbitrate disputes about arbitrability because it could be reasonably construed to indicate the parties' intent to arbitrate a broad range of *merits* disputes arising out

of or relating to the parties' agreement, but not arbitrability disputes. The Fifth Circuit's decision underscored this point by basing its clear and unmistakable delegation decision on AAA rules and not on the scope provision of the Arbitration Agreement. *See Archer & White Sales, Inc. v. Henry Schein, Inc.*, 935 F.3d 274, 280 (5th Cir. 2019).

The balance of the Arbitration Agreement—the parties' undertaking to arbitrate "in accordance with the arbitration rules of the American Arbitration Association"—likewise does not evidence a clear and unmistakable intent to arbitrate arbitrability. The Arbitration Agreement certainly demonstrates that they considered carefully what disputes should be submitted to arbitration, for they defined those broadly, and by way of the carveout, expressly excluded certain ones from coverage.

But the purported Arbitration Agreement, apart from a requirement that covered disputes be arbitrated "in accordance with the arbitration rules of the [AAA]," is silent on whether the parties agreed to arbitrate arbitrability. Assuming (contrary to fact) (see Point II) that all AAA rules contain a rule requiring the arbitration of arbitrability, the provision requiring arbitration "in accordance with" AAA rules does not clearly and unmistakably incorporate by reference any arbitration rule delegating arbitrability to arbitration.

The Arbitration Agreement's undertaking to arbitrate "in accordance with" AAA rules can be reasonably interpreted to mean that the parties agreed to

arbitrate "in accordance with" AAA rules governing arbitration procedure, arbitrator selection, and arbitrator qualifications, not rules that would expand the scope of the arbitration agreement.

That is especially so because the text of the Arbitration Agreement quite carefully and deliberately defines the universe of disputes that are to be submitted to arbitration—those "arising under or related to" the parties' agreement, save for certain disputes that are excluded from arbitration. Arbitrating "in accordance with [AAA] rules" may mean that arbitration should proceed "in accordance with" AAA rules governing procedural and arbitrator-selection-related rules, but it does not necessarily mean that the parties must have intended to make part of the Arbitration Agreement a AAA rule that would expand the scope of that Agreement.

There is at least one other reasonable interpretation of the undertaking to arbitrate "in accordance with" AAA rules that does not require the arbitration of arbitrability. The undertaking can reasonably be interpreted to mean that the AAA rules apply only to arbitration of disputes that fall within the arbitration agreement's scope and are not excluded by the carveout.

Under this interpretation, the parties are not deemed to incorporate a delegation contained in provider rules because: (a) the provider rules do not apply at all to disputes that are outside the scope of the Arbitration Agreement; and (b) the delegation provision

of the provider rules does not apply to disputes that are within (and not excluded from) the scope of the Arbitration Agreement.

The delegation provision would not apply to disputes that are within (and not excluded from) the Arbitration Agreement (category (b), above) because to determine whether the delegation provision applied at all a court would have to resolve a fundamental arbitrability dispute, which is the one at issue in this case: whether the dispute was within the scope of the Arbitration Agreement. Once a court decides that a dispute is at least arguably within the scope of an arbitration agreement, then there is no scope issue left for an arbitrator to decide. *See*, *e.g.*, *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995) ("[W]hen a court interprets . . . [scope] provisions in an agreement covered by the FAA, 'due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration.'" (quoting *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 476 (1989))); *Moses H. Cone Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).

That means that under this interpretation of the Arbitration Agreement, the parties have not clearly and unmistakably delegated arbitrability questions to the arbitrator. Rule 7(a) of the AAA's Commercial Rules purports to delegate arbitrability disputes about the scope of an arbitration agreement, as well as other arbitrability disputes, such as ones about the enforceability of an arbitration agreement. JA 135.

But under this interpretation of the Arbitration Agreement, it would be unreasonable to conclude that the parties agreed to incorporate Rule 7(a) into their Agreement, even though it would be reasonable to conclude that the parties agreed to incorporate by reference other AAA rules concerning arbitration procedure and arbitrator selection and qualification. At best, the parties might be deemed to incorporate Rule 7(a), but only to the extent it relates to issues other than the scope of the Arbitration Agreement, such as the enforceability of the Arbitration Agreement.

This interpretation of the Arbitration Agreement is very similar to the one the Fifth Circuit adopted, save in one respect. The Fifth Circuit's interpretation posited that a delegation provision contained in a particular set of AAA rules applied to disputes within the scope provision of the agreement but not disputes that are excluded from arbitration by the carveout. *Archer*, 935 F.3d at 281. *Amici*'s interpretation is that the parties did not clearly and unmistakably agree to the incorporation of Rule 7(a) irrespective of whether the dispute falls within or without the Arbitration Agreement.

This interpretation underscores that the parties did not clearly and unmistakably incorporate by reference Rule 7(a). Even if the purported Arbitration Agreement might be construed to incorporate by reference Rule 7(a) to the extent it requires arbitration of arbitrability disputes concerning enforceability of the Arbitration Agreement, the Arbitration Agreement's incorporation by reference of Rule 7(a) is, at best, unclear and equivocal, not clear and unmistakable. Did

the parties intend not to incorporate it by reference at all? To incorporate it in part only, except for scope issues? To incorporate it in full? There are no clear and unmistakable answers to these questions.

IV. The Changing Nature Of The AAA Rules Prevents A Clear And Unmistakable Delegation In This Case

Even if a contract references a specific set of outside arbitration rules, which is not the situation here, a clear and unmistakable delegation cannot exist if such rules can be unilaterally changed at any time. The AAA periodically and unilaterally amends its rules. For example, it appears that the AAA has at least five versions, and possibly more, of its Commercial Rules, dated 2003, 2005, 2007, 2009, and 2013.[5] The AAA's website for active rules lists a date of April 7, 2017, for the AAA's Complex Rules, and the text of these rules on the AAA's website further mentions that these rules were amended on September 1, 2007.[6] On the page for archived rules, one can see several other

[5] At least four older versions appear on the AAA's webpage for its archived rules, https://www.adr.org/ArchiveRules (last visited Oct. 7, 2020), while a fifth and current version appears on the AAA's webpage for active rules, https://www.adr.org/active-rules (last visited Oct. 7, 2020). The webpage for archived rules also contains three other sets of rules, titled "Commercial Dispute Resolution Procedures," dated 2000, 2002, and 2003. It appears these rules may be precursors to the Commercial Rules. Thus, the AAA's Commercial Rules may have gone through at least eight different versions since 2000.

[6] https://www.adr.org/active-rules (last visited Oct. 7, 2020).

examples of AAA rules that have been amended over time. It appears that the AAA applies the most recent version of rules in existence at the time a dispute arises in the future, instead of the version of the rules in force when a contract is originally made.[7]

The changing nature of AAA rules is problematic for the petitioner's arguments that the purported Arbitration Agreement at issue clearly and unmistakably delegates arbitrability issues to the arbitrator. The contract at issue is dated October 4, 2007, JA 105, but if a dispute arises several years later, the AAA may have unilaterally amended the governing rules by that future time. Even if a set of rules currently allows for an arbitrator to resolve threshold arbitrability issues, the AAA may unilaterally amend these terms in the future and no longer provide for such a delegation. A contract that incorporates by reference a shifting, ever-changing set of arbitration rules cannot demonstrate by clear and unmistakable evidence that the parties intended to delegate arbitrability issues to an arbitrator. A current arbitral rule allowing for delegation may not even be in existence years later when a dispute eventually arises. Moreover, as explained in the prior section, the purported Arbitration Agreement makes no reference at all to a particular set of AAA rules, and even more problematic, the petitioner and respondent

[7] *See*, *e.g.*, Important Notice to the Commercial Arbitration Rules and Mediation Procedures ("These rules and any amendment of them shall apply in the form in effect at the time the administrative filing requirements are met for a demand for arbitration or submission agreement received by the AAA."), JA 118.

never entered into any contractual relationship at all. Even if they did, the Arbitration Agreement does not clearly and unmistakably incorporate by reference a delegation agreement. As a result, it is impossible for the parties here to have agreed, through clear and unmistakable evidence, that arbitrators shall resolve threshold arbitrability matters between them.

V. Because Of Concerns About Impartiality, Conflicts Of Interest, And The Constitutional Right To A Jury Trial, Mere Incorporation By Reference Of Outside Arbitration Rules Cannot Satisfy The Heightened Standard Of Clear And Unmistakable Evidence

As explained above, the petitioner cannot demonstrate a clear and unmistakable delegation agreement with respondent because there is no agreement between them at all. Moreover, the alleged Arbitration Agreement fails to select any particular AAA rules, the AAA can unilaterally change its rules at any time, and, in any event, there is no clear and unmistakable incorporation of a delegation agreement. As a result, the contract cannot satisfy the heightened standard of clear and unmistakable evidence. However, even if the Arbitration Agreement incorporated by reference a particular set of AAA rules frozen in time, an incorporation by reference cannot satisfy the heightened standard of the clear and unmistakable delegation rule because of concerns about impartiality, conflicts of interest, and constitutional problems concerning the

Seventh Amendment to the U.S. Constitution and the interrelationship between section 4 of the FAA and the Seventh Amendment.

A. Concerns About Impartiality And Conflicts Of Interest

"No man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity." James Madison, Federalist No. 10.

The heightened standard of clear and unmistakable evidence helps alleviate serious concerns about conflicts of interest and fairness in the arbitration process. There is a fundamental conflict of interest inherent in allowing an arbitrator to decide a gateway question of arbitrability because the arbitrator has a direct economic interest in the outcome of this determination. Arbitrators are typically paid by the hour, and an arbitrator's determination that the underlying case is not arbitrable means the arbitrator will likely lose substantial fees by not hearing the underlying case. The text of the FAA avoids this conflict of interest by providing for a court to make threshold determinations whether parties are obligated to arbitrate certain disputes. 9 U.S.C. § 4. While a judge does not have a direct financial interest in the outcome of an arbitrability determination, an arbitrator does have a direct financial interest in resolving an arbitrability dispute in favor of arbitration.

In several prior cases, the Court has upheld the disqualification of judges who had a conflict of interest based on financial motives comparable to the motives of an arbitrator ruling on arbitrability. For example, in *Tumey v. Ohio*, 273 U.S. 510 (1927), a mayor served as a judge for a "liquor court" during Prohibition, and for his services as a judge, the mayor-judge was paid from funds derived from fines he levied upon convictions. *Id.* at 520. The mayor-judge, who received $12 for convicting the defendant, had a direct financial interest in convicting people for unlawful possession of liquor; he would not receive such funds if he decided to acquit a defendant. *Id.* at 520, 523. The fines imposed in *Tumey* also funded the village's general treasury. *Id.* at 522-23. The Court mandated disqualification of the mayor-judge under these circumstances "both because of the [mayor-judge's] direct pecuniary interest in the outcome, and because of his official motive to convict . . . to help the financial needs of the village." *Id.* at 535. It violates fundamental fairness in a dispute to have an adjudicator with a direct economic interest in reaching a certain outcome, such as the mayor-judge in *Tumey* who pocketed fees for every decision to convict or an arbitrator who stands to receive significant fees for finding that the parties are obligated to arbitrate.

While *Tumey* involved an adjudicator with a direct financial interest in the outcome, the Court has also disqualified adjudicators with indirect financial interests as well. For example, in the case of *Ward v. Monroeville*, 409 U.S. 57 (1972), a mayor who was in charge of the financial affairs of a village also served in a

judicial capacity with respect to traffic offenses. A significant part of the village's funding came from the fines imposed by the mayor through this traffic court. *Id.* at 58. While the mayor-judge in *Tumey* received a direct financial benefit from each decision to convict, the mayor-judge in *Ward* had an indirect financial interest. Although the $50 fines in *Ward* went to the village's general treasury, not the mayor's personal pocket, the Court still found that the mayor-judge in *Ward* could not be impartial and had to be disqualified. *Id.* at 57, 61-62. The mayor-judge faced a "possible temptation" arising from his "executive responsibilities for village finances." *Id.* at 60 (citation omitted).

As demonstrated by *Tumey* and *Ward*, the Court has been vigilant in safeguarding the neutrality and impartiality of various tribunals. Similarly, in *Gibson v. Berryhill*, 411 U.S. 564 (1973), the Court upheld the disqualification of a board of optometrists from presiding over a hearing which could revoke the licenses of competing optometrists. Such a hearing could not be fair and impartial because the optometrists serving in a judicial capacity had a personal financial stake in the outcome of the case involving competing optometrists. *Id.* at 579. As recognized by the Court, "[i]t is sufficiently clear from our cases that those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes." *Id.* (citing *Tumey* and *Ward*). In *Tumey*, *Ward*, and *Gibson*, the Court found that an adjudicator's financial interest, both direct and indirect, in the outcome of his or her decision-making

prevents the adjudicator from being fair and impartial and provides an immediate basis for disqualification.

Similarly, there is an understandable and indisputable financial interest for the AAA and its arbitrators to rule in favor of arbitration when resolving threshold arbitrability matters. *Ward* involved a $50 indirect financial incentive, while *Tumey* involved a $12 direct financial incentive, and these amounts pale in comparison to the hourly rates AAA arbitrators can earn for ruling in favor of arbitrability and continuing to hear the merits of a dispute. *Weiler v. Marcus & Millichap Real Estate Inv. Servs., Inc.*, 22 Cal. App. 5th 970, 975 (2018) (three-person panel of AAA arbitrators charged $1,450 per hour); *Monfared v. St. Luke's Univ. Health Network*, 2016 WL 6525411, at *1 (E.D. Pa. Nov. 2, 2016) (list of AAA arbitrators set forth rates ranging from $250 and $550 per hour); Deborah Rothman, *Trends in Arbitrator Compensation*, DISP. RESOL. MAG. 8-11 (Spring 2017) (AAA arbitrators may earn from $300 per hour to more than $1,000 per hour). Because of such a clear conflict of interest with an arbitrator ruling on his or her own jurisdiction, there is a reasonable expectation that a judge or jury, not an arbitrator, should resolve threshold arbitrability matters, as demonstrated by the text of the FAA. 9 U.S.C. § 4. However, this reasonable expectation can be reversed upon the heightened showing of the clear and unmistakable standard for delegation, which helps alleviate these concerns about an arbitrator's direct pecuniary interest in resolving arbitrability matters in favor of arbitration.

B. Constitutional Concerns About A Jury Trial

Section 4 of the FAA provides, without any exception, that a court determines whether the parties have a binding agreement to arbitrate a particular dispute.[8] Section 4 preserves the right to a jury trial for this determination about arbitrability, and the drafters of the FAA inserted this provision regarding jury trials because of constitutional concerns. S. Rep. No. 536 (May

[8] Textually, section 4 does not allow for delegation of arbitrability matters to an arbitrator. But, as succinctly observed by the Court, "that ship has sailed." *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 530 (2019). Unfortunately, the ship has sailed with respect to several arbitration doctrines developed by the Court over the years. The Court's interpretations of the FAA are no longer consistent with the text of the FAA in several critical ways. For example, despite the text of the FAA limiting its coverage to contractual disputes, 9 U.S.C. § 2 (FAA's coverage is limited to written provisions in a contract "to settle by arbitration a controversy thereafter arising out of such contract"), the Court has incorrectly expanded the FAA's coverage to virtually all types of claims, such as statutory claims or tort claims which can be asserted without reference to a contract. *See*, *e.g.*, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (FAA covers statutory civil rights claims); *Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 1421 (2017) (applying the FAA to wrongful death claims involving a nursing home). If one engages in a textual analysis of the FAA, the antitrust claims in this case, which involve allegations of price-fixing and a group boycott, do not even fall within the scope of the FAA's coverage. Also, there is much evidence that the FAA was never intended to apply to employment disputes or in state court. *See generally* Imre S. Szalai, *Outsourcing Justice: The Rise of Modern Arbitration Laws in America* (2013); Ian R. Macneil, *American Arbitration Law: Reformation, Nationalization, Internationalization* (1992). Many ships have sailed when it comes to the text of the FAA.

1924) ("Section 4 provides a simple method for securing the performance of an arbitration agreement. The aggrieved party may apply to the proper district court on five days' notice and the court will order the party to proceed. The constitutional right to a jury trial is adequately safeguarded."); *see also Bills to Make Valid and Enforceable Written Provisions or Agreements for Arbitration of Disputes Arising Out of Contracts, Maritime Transactions, or Commerce Among the States or Territories or With Foreign Nations: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong. 17 (1924) (Section 4 provides for a jury trial to satisfy constitutional concerns regarding the resolution of threshold arbitrability issues, such as whether a party authorized the arbitration agreement to be signed, whether the arbitration agreement is valid, or whether the arbitration agreement was properly delivered). The FAA's drafters were troubled by potential Seventh Amendment violations arising from a court's order wrongfully forcing non-consenting parties to arbitrate whether they agreed to arbitrate. To help ensure that no one is stripped of their Seventh Amendment rights, section 4 of the FAA guarantees a jury trial for arbitrability issues. Rigorous enforcement of the clear and unmistakable standard will help ensure all constitutional rights waivers are knowing, informed, and intentional. *Cf. Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665 (2015) (waiver of the right to Article III adjudication must be "knowing and voluntary").

VI. The Court Should Impose A Heightened Clear And Unmistakable Standard In Cases Where The Parties Allegedly Incorporate By Reference A Delegation Provision Contained In Provider Rules

Imposing and maintaining a heightened standard of clear and unmistakable evidence regarding a delegation helps alleviate all of the previously discussed concerns about unclear and equivocal Arbitration Agreement terms, improper financial motives, conflicts of interest, and one's constitutional right to a jury trial.

The clear and unmistakable rule, as articulated by *First Options*, demands the kind of clear and unmistakable evidence of intent that requires parties to arbitrate arbitrability only if they have consciously and deliberately opted out of the default rule that courts decide arbitrability questions. Ordinarily that means courts should not find clear and unmistakable evidence of delegation unless the parties to a contract expressly provided for delegation in the body of their agreement. *See*, *e.g.*, *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 65-66 (2010) (clear and unmistakable delegation provision set forth in body of parties' agreement).

The Court should not allow a contract's mere incorporation by reference of outside arbitral rules to satisfy the clear and unmistakable standard. The Court should adopt a bright-line rule in this case to be certain of the parties' intent: the parties' contract must itself contain a clear and unmistakable delegation

clause explicitly recognizing that an arbitrator has the power to rule on threshold arbitrability issues.

Adopting such a bright-line standard would prevent years of future, continued litigation regarding the FAA and delegation issues. This complex antitrust case was filed in 2012, and the parties have been litigating at every level of the federal judiciary whether they are obligated to arbitrate. Such prolonged litigation undercuts the values of arbitration as a potentially efficient, cost-effective method of dispute resolution. Without a clear, bright-line rule established by this case, the Court is likely to see future cases, perhaps a series of sequels, *Henry Schein III*, *IV*, and *V*, where parties dispute several issues, such as: whether an incorporation by reference of outside arbitral rules can satisfy the clear and unmistakable standard; whether the clear and unmistakable standard can be satisfied in connection with non-signatories; and whether arbitral rules that can be unilaterally amended at any time satisfy this heightened standard.

Even in the absence of a bright-line rule for which *amici* advocate, the Court should emphasize and require that lower courts exercise great care when applying the clear and unmistakable rule in a situation where an arbitration agreement purports to incorporate by reference arbitration provider rules containing a delegation provision. *First Options* recognized that parties "might not focus" on the "arcane" question of who gets to decide arbitrability questions "or upon the significance of having arbitrators decide the scope of their own powers." *First Options*, 514 U.S. at 945. The

danger that "unwilling parties" will be forced into arbitrating arbitrability disputes they did not clearly and unmistakably intend to arbitrate is particularly acute when a court determines that parties incorporated by reference a delegation provision contained in arbitral rules.

A reasonable person could, with or without reviewing arbitral rules, simply and reasonably assume that those rules are what their title suggests: arbitration rules governing arbitration procedure, arbitrator selection, and arbitrator qualification. A reasonable person could, with or without reviewing the rules, further conclude that the rules would not purport to expand the scope of the arbitration agreement beyond what the parties had already—quite carefully and deliberately—agreed it would be.

If the Court does not adopt the preferred, brightline rule discussed above, it should require that the parties' arbitration agreement itself (not the allegedly incorporated rules) provide "clear and unmistakable evidence" that the parties intended to incorporate *all* of the rules as part of their agreement, including any rules purporting to form a separate, antecedent delegation agreement.

VII. Reversing The Fifth Circuit And Finding A Delegation Here May Negatively Impact Millions Of Unsophisticated Business Owners, Consumers, And Workers

Sophisticated parties may perhaps understand the "arcane" issue of who decides threshold arbitrability matters. *First Options*, 514 U.S. at 945. Or if sophisticated parties cannot understand, they may have access to specialized arbitration counsel who could explain this hypertechnical issue of arbitration law. However, the ruling in this case may impact hundreds of millions of arbitration agreements involving unsophisticated small businesses, consumers, and employees.[9]

Treating the clear and unmistakable evidence standard as satisfied because of a contract's mere incorporation by reference of outside arbitration rules would be problematic for small businesses, consumers, and employees. There is evidence that an average person may not even be aware of or understand the significance of arbitration clauses in his or her contracts.

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[9] Imre S. Szalai, *The Prevalence of Consumer Arbitration Agreements by America's Top Companies*, 52 U.C. Davis L. Rev. Online 233 (2019) (81% of America's largest companies have used arbitration agreements for consumer transactions, and by conservative estimates, there are more than 826 million consumer arbitration agreements in America); Imre S. Szalai, The Emp. Rts. Advoc. Inst., *The Widespread Use of Workplace Arbitration Among America's Top 100 Companies* (Mar. 2018) (80% of America's largest companies have used arbitration agreements for employment disputes); Alexander J.S. Colvin, Economic Policy Institute, *The Growing Use of Mandatory Arbitration* (2018) (more than 60 million American workers are bound by arbitration agreements).

Consumer Financial Protection Bureau, *Arbitration Study, Report to Congress, Pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act §1028(a)*, at § 1.4.2 (2015) ("Consumers are generally unaware of whether their credit card contracts include arbitration clauses. Consumers with such clauses in their agreements generally either do not know whether they can sue in court or wrongly believe that they can do so."); *id*. at § 3.4.3 (finding that 93% of consumers with arbitration agreements either do not know whether they can sue in court or wrongly believe they can do so). If an average person is unlikely to understand the significance of a basic arbitration provision, how much less would a person understand an antecedent delegation agreement to arbitrate buried in a separate set of complex arbitration rules? It would be comical fiction piled on top of science fiction to conclude that an unsophisticated consumer or employee clearly and unmistakably agreed to arbitrate the issue of whether they agreed to arbitrate, in an agreement they did not sign, through a contract's mere incorporation by reference of an arbitration provider's rules found outside of the contract. *Cf. Allstate Ins. Co. v. Toll Bros., Inc.*, 171 F. Supp. 3d 417, 429 (E.D. Pa. 2016) (to conclude that an agreement's incorporation by reference of outside rules is clear and unmistakable evidence that the parties agreed to arbitrate arbitrability would be tantamount to "tak[ing] a good joke too far." (citation omitted)). Such a ruling would be contrary to the expectations of a reasonable small or midsize business owner, or an average person. *First Options*, 514 U.S. at 945 ("A party often might not focus upon that

question [of who decides threshold arbitrability matters.]").

If the courthouse door is easily shut in such a manner, through a fantastical assumption that a small or midsize business owner, consumer, or employee agreed to arbitrate threshold arbitrability matters because changeable arbitral rules found outside of a contract say so, such a ruling could have an adverse impact on the administration of justice. Sensible businesses may reject arbitration as their safest, most cost efficient decision. Unsophisticated parties who never consented to arbitrate may be forced to arbitrate whether they agreed to arbitrate. Such a Kafkaesque ruling built on the foundation of arcane legal fictions weakens public trust in the courts and in the arbitration process itself.

CONCLUSION

The petitioner's merits brief rests on a deeply flawed assumption. There is no clear and unmistakable delegation of arbitrability matters with the facts of this case. However, the petitioner attempts to manufacture a clear and unmistakable agreement to delegate by relying on someone else's contract to which petitioner is not even a party and by relying on two sets of ambiguous AAA rules that are not even mentioned in that contract, rules which can, without notice, be unilaterally changed at any time.

The facts of this case demonstrate an ambiguous, poorly drafted arbitration agreement signed by parties

other than those before this Court. One must leap through several hurdles to concoct a strained argument that the petitioner and respondent agreed with each other, through clear and unmistakable evidence, to arbitrate arbitrability. No such clear and unmistakable agreement exists in this case. *Cf. United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 587 (1960) ("The terms of the [arbitration] agreement are not to be strained to discover [the arbitrator's power]. They must be clear and unmistakable to oust the jurisdiction of the courts." (citation omitted)). *Amici* respectfully ask the Court to affirm the Fifth Circuit's decision finding no delegation occurred here.

Respectfully submitted,

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