IN THE
SUPREME COURT OF THE UNITED STATES

No. 19A335

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

Applicants,

v.

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

Respondents.

REPLY BRIEF IN SUPPORT OF APPLICATION FOR RECALL AND STAY OF MANDATE OF THE MISSOURI COURT OF APPEALS PENDING DISPOSITION OF A PETITION FOR WRIT OF CERTIORARI

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TO THE HONORABLE NEIL M. GORSUCH, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE EIGHTH CIRCUIT:

Respondents' opposition attempts to dismiss this case as involving only state law. In reality, it is all about federal law. Specifically, it is about how to reconcile and apply two federal-law principles derived from the Federal Arbitration Act (FAA), one prohibiting special rules disfavoring arbitration and the other requiring clarity before assuming that questions of arbitrability have been delegated to the arbitrator. Respondents actually concede the federal nature of the issue here by repeatedly invoking this Court's cases and by accepting that Missouri law generally allows parties to incorporate rules and codes by incorporation, including rules and codes subject to modification. If the parties had agreed that disputes over the adequacy of the stadium should be governed by the version of a third-party building code "then existing" when the dispute arises, Respondents do not suggest that Missouri law would pose any obstacle to applying the current version of the building code. Thus, if there is any obstacle to applying the current version of the rules of the American Arbitration Association (AAA), which plainly delegate arbitrability questions to the arbitrator, it must come from federal law—namely, a mistaken principle, purportedly derived from this Court's cases, that agreements to delegate arbitrability to arbitrators must be unmistakably clear to a degree not required of building codes or other aspects of arbitration agreements. Indeed, the Missouri Supreme Court plainly recognized the federal nature of the issue when it effectively "GVR'ed" the Missouri Court of Appeals' first decision in light of this Court's federal-law decision in *Henry Schein v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019).

Once it is clear that the issue here is one of federal law, the case for a stay becomes equally clear. The lower courts are divided over whether delegations by incorporation are sufficient to delegate questions of arbitrability to the arbitrator. The majority view (and the uniform view of the federal courts) is that delegations by incorporation are sufficient as long as state law would honor any comparable delegation on a different matter. Those courts believe that this Court's cases interpreting the FAA and rejecting special rules disfavoring arbitration demand as much. A minority of courts (all state courts) find such delegations insufficient, grounding their decisions in this Court's cases interpreting the FAA to require clarity that the parties delegated questions of arbitrability to the arbitrator. In fact, the courts are divided on this issue not only generally, but as to the very arbitration agreement at issue here. A federal court would send arbitrability questions under this agreement to a AAA panel, while the state courts claim the power to dispose of such questions themselves. That split cries out for this Court's review. And there is little question that if this Court were to grant review, it would reverse. The minority view is deeply mistaken and evinces the precise judicial hostility to arbitration that the FAA was designed to eliminate.

The remaining equitable factors plainly favor a stay. Indeed, Respondents barely suggest otherwise. Respondents do not claim that a stay would harm them, nor could they, given that they seek only monetary relief. The Rams, by contrast, will lose the benefits of bargained-for, neutral arbitration just when they are needed the most. This Court should grant a stay pending the filing of a petition for certiorari.

I. There Is A Reasonable Probability That This Court Will Grant Certiorari And Reverse The Judgment Below.

As explained in the application, *see* Appl.23-25, the lower courts are divided over the import of the "clear and unmistakable" standard articulated in this Court's cases dealing with delegation of questions of arbitrability to the arbitrator. *See, e.g.*, *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 69 n.1 (2010); *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944-45 (1995). While every federal court to consider the issue has concluded that this standard neither requires nor permits courts to deviate from the general FAA rule that courts may not apply special rules that disfavor arbitration, *see, e.g.*, *Wells Fargo Advisors, LLC v. Sappington*, 884 F.3d 392, 395-99 (2d Cir. 2018); *Grynberg v. BP P.L.C.*, 585 F. Supp. 2d 50, 55 (D.D.C. 2008); *Pikes Peak Nephrology Assocs. v. Total Renal Care, Inc.*, No. 09-cv-00928, 2010 WL 1348326, at *6-7 (D. Colo. Mar. 30, 2010); *Congress Constr. Co. v. Geer Woods, Inc.*, No. 3:05CV1665, 2005 WL 3657933, at *3 (D. Conn. Dec. 29, 2005); *Brandon, Jones, etc. v. MedPartners, Inc.*, 203 F.R.D. 677, 684-85 (S.D. Fla. 2001), the decision below joins at least two other state courts in concluding that this Court's cases compel application of special anti-arbitration principles in the delegation-of-arbitrability context, *see Flandreau Pub. Sch. Dist. No. 50-3 v. G.A. Johnson Constr., Inc.*, 701 N.W.2d 430 (S.D. 2005); *Gilbert St. Developers, LLC v. La Quinta Homes, LLC*, 94 Cal. Rptr. 3d 918 (Cal. App. 2009).

Unable to deny this disagreement, Respondents attempt to dismiss all of these cases—including this one—as turning solely on "issue[s] of state law." Opp.14. But that claim is belied by their own arguments. Respondents do not and cannot deny

that generally applicable principles of Missouri contract law allow contracting parties to incorporate matters into their contract by reference. *See, e.g.*, *Dunn Indus. Grp., Inc. v. City of Sugar Creek*, 112 S.W.3d 421, 435 n.5 (Mo. 2003) (en banc) (per curiam) ("In Missouri, matters incorporated into a contract by reference are as much a part of the contract as if they had been set out in the contract in haec verba."). Respondents further concede that, when it comes to "incorporation generally" under Missouri law, contracting parties "are free" to incorporate rules that "may change in the future." Opp.13; *see also, e.g.*, *City of St. Joseph v. Lake Contrary Sewer Dist.*, 251 S.W.3d 362, 367-69 (Mo. Ct. App. 2008). There is thus no dispute here that if the parties had incorporated future changes to a rule governing something *other than* arbitrability, like a building code subject to ongoing updates, that incorporation would be fully enforceable.

Respondents ground their defense of the decision below not in any state-law cases, but in this Court's decisions in *Rent-A-Center* and *First Options*, which they maintain impose "a 'caveat' to the principle that ordinary state-law rules of contract interpretation apply," and require "[t]he question of who decides arbitrability [to be] treated somewhat differently than other questions of contractual formation." Opp.11. In other words, Respondents contend (and the court below agreed) that federal law *displaces* ordinary state contract law when it comes to delegability, and compels courts to refuse to enforce what would otherwise be a valid effort to incorporate a future rule if that rule involves delegability. Indeed, Respondents are quite candid about that. *See* Opp.10 ("Applicants argue that the Missouri Court of Appeals singled

out such agreements for disfavored treatment by requiring heightened proof, *beyond standard contract principles*, to manifest contractual intent to arbitrate arbitrability. The Missouri Court of Appeals' approach, however, stems directly from this Court's cases." (emphasis added and citation omitted)).

Unfortunately, the Missouri Court of Appeals is not alone in embracing that mistaken view. In *Flandreau*, the South Dakota Supreme Court interpreted *First Options* to require parties to include delegation-of-arbitrability language in the arbitration agreement itself, and therefore rejected the argument that incorporating AAA rules by reference suffices. 701 N.W.2d at 436-37 & n.6. The court did not suggest that its result flowed from generally applicable rules of state contract law that precluded incorporation by reference, but rather derived that rule from this Court's cases. Likewise, in *Gilbert Street Developers*, the California Court of Appeal concluded that an arbitration agreement signed before the AAA delegation-of-arbitrability rule took effect did not "clearly and unmistakably" delegate arbitrability to the arbitrator, even though the agreement incorporated "any amendment" to the AAA rules, and even though the AAA delegation-of-arbitrability rule was in effect at the time of the dispute. 94 Cal. Rptr. 3d at 919-26 & n.5. In the court's view, "*First Options* specifically *contrasted* (a) 'ordinary state-law principles that govern the formation of contracts' with (b) the clear and unmistakable rule." *Id.* at 922; *see also id.* at 926 ("*First Options* made explicit … the importance of the parties *specially focusing* on the issue").

As these cases illustrate, the dispute here is plainly one of federal, not state, law. State law is relevant in these cases only in the way that it is relevant in virtually all enforceability disputes under the FAA: It provides the benchmark against which to determine whether a court has "[p]lace[d] arbitration agreements on equal footing with all other contracts" governed by state contracting law. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006). But whether courts must follow that equal-footing rule in the context of determining whether the parties delegated arbitrability (and, if not, how to apply a special delegation standard) are questions of federal, not state, law, on which the lower courts are in intractable conflict. Indeed, Respondents do not dispute that federal and state courts have divided on whether *this precise arbitration agreement* satisfies the "clear and unmistakable" standard. *Compare* Opp.15-16, *with McAllister v. St. Louis Rams, LLC*, No. 4:16-cv-172 (E.D. Mo. Nov. 17, 2017), ECF No. 276. The outcome in this case thus would have been different had it started in the federal courthouse in St. Louis instead of the state courthouse nearby. *See also Hodge v. Top Rock Holdings, Inc.*, No. 4:10CV1432, 2011 WL 1527010 (E.D. Mo. Apr. 20, 2011).

Respondents have nothing to say about the many cases that reject their position, other than to mistakenly insist that they all turn on state, rather than federal, law. Indeed, they directly address only one of those cases—the Second Circuit's decision in *Wells Fargo Advisors*—and even that effort to distinguish (relegated to a footnote) falls flat. Respondents purport to dismiss that case on the ground that the arbitration provisions there were signed "between 2011 and 2014,

after the AAA rules were amended to delegate questions of arbitrability to the arbitrator." Opp.16 n.2. But although the arbitration agreements at issue in *Wells Fargo Advisors* were executed after 2003, they expressly "incorporate[d] *the 1993* [AAA] Rules" by reference. 884 F.3d at 397 (emphasis added). Thus, even though the parties decided *against* incorporating a then-extant, more current version of the AAA rules that expressly delegated arbitrability to the arbitrator, the Second Circuit *still* concluded that by incorporating the earlier 1993 rules (which made "any amendment" applicable), the parties "clearly and unmistakably demonstrate[d] an intent to delegate to an arbitrator any questions of arbitrability." *Id.* at 397-98. That approach could not be farther from the one taken by the Missouri Court of Appeals here.

In short, Respondents simply cannot wish away the clear division among the lower courts over the meaning and application of the "clear and unmistakable" standard as turning entirely on "questions of state law." Opp.1, 10. Indeed, it is hard to take that argument seriously when Respondents cite *First Options* as their principal authority on nearly every single page of their merits discussion (sometimes twice). That argument is also exceedingly difficult to reconcile with the Missouri Supreme Court's decision to essentially GVR the Court of Appeals' first decision in light of this Court's decision in *Henry Schein*, an FAA decision that had exactly nothing to do with Missouri law. *See* Appl. App.26a. Respondents are thus left simply noting their disagreement with "[t]he approach" to delegation of arbitrability "advocated by … some of the cases [the Rams] cite," which they acknowledge differs

from the approach adopted by the court below. Opp.11. But that, of course, is just another way of saying that the lower courts are divided over the central questions in this case—namely, whether the federal "clear and unmistakable" standard demands greater clarity for delegations of arbitrability than general state-law contracting principles would demand for any other delegation (and, if so, whether the clear and unmistakable standard forbids delegations by incorporation). That division is particularly problematic because it cleaves along state-federal lines, with all federal courts resisting special rules disfavoring arbitration and only state courts on the anti-arbitration side of the dispute. In practical terms, that means that parties like the Rams subject to the minority rule are consigned to litigate in the very state courts that are (demonstrably) the most hostile to arbitration. Thus, the split is not just real, but consequential, as it deprives parties required to litigate in state court of the essential protections of their arbitration agreement and the FAA. There is accordingly at least a "reasonable probability" that the Court will grant certiorari to resolve the division over these important federal questions. *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam).[1]

[1] Respondents suggest the need for review is lessened because the decision below arises from a state intermediate appellate court, not a state court of last resort. Opp.14-15. But this Court routinely reviews decisions from state intermediate courts after a state high court has denied discretionary review, *see, e.g.*, *Herrera v. Wyoming*, 139 S. Ct. 1686 (2019), as happened here, *see* Appl. App.4a. That practice is especially critical in the FAA context. If a state intermediate court could apply novel arbitration-only rules to refuse to enforce arbitration agreements according to their terms, and a state high court then could insulate that judicial hostility from this Court's reach simply by denying discretionary review, that would amount to the very sort of "covert[]" effort to evade the FAA that this Court has sought to foreclose. *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426 (2017).

There is also at least a "fair prospect" that, if the Court grants review, it would reverse, as the state-court decisions adopting the minority view reflect the precise hostility to arbitration the FAA was enacted to redress. *See Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018). As all of the federal courts to consider the question have recognized, it would be more than passing strange to interpret the FAA as *mandating* the displacement of ordinary state contract law for one particular aspect of arbitration agreements when the entire point of the FAA was to place "arbitration contracts 'on equal footing with all other contracts." *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 468 (2015). Instead, the far more sensible reading of *First Options* and *Rent-A-Center* is the one embraced by the majority of lower courts (and all the federal courts): Provisions that delegate arbitrability to an arbitrator must satisfy a "heightened" standard, but that standard is heightened only as compared to the *presumption* that a court is supposed to apply when deciding whether a dispute falls within the scope of an arbitration agreement. *First Options*, 514 U.S. at 944-45. Put differently, courts may neither "assume" that parties have delegated arbitrability to the arbitrator nor apply a pro-delegation presumption, but if parties elect to delegate arbitrability by the same "clear and unmistakable" evidence that would suffice to delegate any other non-arbitration-related responsibility under general state-law contracting principles, then no more is required. *Id.*; *see also Rent-A-Ctr.*, 561 U.S. at 69 n.1.

Applying that standard, the decision below is plainly incorrect. In the 1995 Contracts, the Rams and Respondents incorporated by reference the "then existing"

rules of the AAA, and Respondents do not dispute that the "then" in "then existing" references the time the dispute is submitted to arbitration. *See* Appl.21. In other words (as the court below agreed), the parties clearly incorporated by reference "whatever rules are in use by AAA … at the time of a dispute." Appl. App.18a. And for good measure, the AAA rules in effect at the time of contracting in 1995 (*i.e.*, the 1993 rules) expressly provided that parties would have to adhere to "any amendment of them." AAA Commercial R-1 (1993). Respondents acknowledge that the AAA amended its rules in 2003 to delegate arbitrability to the arbitrator with unmistakable clarity, and they cannot deny that the Rams sought to arbitrate this dispute only after Respondents filed suit in state court two-and-a-half-years ago—that is, nearly 15 years after the AAA delegation-of-arbitrability rule came into effect. Opp.15. By refusing to honor an incorporation provision in an arbitration agreement that Missouri law would recognize as perfectly valid in *all other contracting contexts*, the Missouri Court of Appeals quite obviously "single[d] out arbitration agreements for disfavored treatment," in violation of the FAA and this Court's precedent.[2]

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[2] Respondents argue at length that the 1995 Contracts, including the arbitration provision within them, are "unrelated" to their lawsuit." *See, e.g.*, Opp.3-5. To the extent Respondents mean to suggest that it is wholly groundless to argue that the 1995 Contracts apply to this dispute, that argument is foreclosed by *Henry Schein*. 139 S. Ct. at 527-28. To the extent Respondents mean to suggest that the court's refusal to send the threshold arbitrability question to an arbitrator was harmless because this dispute should not be arbitrated at all, they are sorely mistaken, as the merits of this dispute belong in arbitration no matter who decides the arbitrability question. *See* Appl.32 n.6; *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 650 (1986). The Rams seek to defend against Respondents' claims by arguing, among other things, that the 1995 Contracts are fully integrated and "represent the entire agreement between the parties," D15 §8.5, meaning they supersede any rights Respondents purport to have against the Rams under the earlier 1984 NFL policy. Similarly, several of the allegedly fraudulent statements either mention or relate to the parties' rights and obligations under the 1995 Contracts, *see* D2 ¶¶26, 77, so interpreting the 1995 Contracts is necessary to evaluate both the statements' alleged falsity and whether Respondents' supposed

Kindred Nursing, 137 S. Ct. at 1425; *see also Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) ("Courts may not … invalidate arbitration agreements under state laws applicable *only* to arbitration provisions.").

In short, the decision below not only adds to a divide in the lower courts regarding this Court's "clear and unmistakable" standard, but is plainly wrong. The first two stay factors thus support a stay of the mandate pending the timely filing of a petition for certiorari, just as they did in *Henry Schein*. *See Henry Schein v. Archer & White Sales, Inc.*, 138 S. Ct. 1185 (2018) (mem.).[3]

II. Applicants Will Suffer Irreparable Harm In The Absence Of A Stay, And The Equities Favor A Stay.

Respondents' arguments on the first two stay factors are unpersuasive; their arguments on the latter two are practically nonexistent. Respondents devote all of two paragraphs to the irreparable-harm and balance-of-equities factors, and neither actually addresses the balance of equities. Respondents notably do not contend that *they* will suffer any harm if this Court were to grant a stay. Nor do they assert that the public interest will be disserved through the granting of a stay. *See* Opp.21-22. They are wise to concede both points. As the Rams have explained, Respondents have sought only money damages in their lawsuit, which are by definition reparable, and

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reliance on them was reasonable. In short, it is impossible to resolve this case on the merits without reference to the 1995 Contracts. This dispute therefore belongs before an arbitrator.

[3] Respondents claim that *Henry Schein* was more deserving of a stay because the "wholly groundless" exception applied by the Fifth Circuit had generated a conflict in the lower courts, and because that exception "was not included in the statutory text." Opp.16. But the issue here—the import of the "clear and unmistakable" standard—has likewise generated a conflict, and the "clear and unmistakable" standard is likewise nowhere to be found in the FAA. Moreover, this Court remanded in *Henry Schein* for the Fifth Circuit to apply the "clear and unmistakable" standard, 139 S. Ct. at 531, so this case is the perfect follow-up to a question that *Henry Schein* did not resolve.

Congress has emphatically declared through the FAA that there is a strong national interest in encouraging arbitration. Appl.35-36.

Rather than grapple with the balance of equities, Respondents claim that "allowing this case to move forward" would "not result in any inefficiencies or wasted expense" because the Rams "would be facing comparable discovery obligations over the next few months regardless of whether the case proceeds in court or in arbitration." Opp.21. But Respondents notably cite no authority for their bald assertion that discovery in arbitration would be "comparable" to the 300-plus discovery requests that they have already served on the Rams in state court. In fact, discovery in arbitration, which is at the discretion of the arbitrator, not only is typically much more streamlined, but unlike most discovery in litigation, would be confidential. *See, e.g.*, AAA Commercial R-22; 1 Alt. Disp. Resol. §10:6 (4th ed.) ("Discovery is very limited in arbitration proceedings."). Indeed, "[a]voiding the expense of discovery under the Federal Rules of Civil Procedure and their state-law equivalents is among the principal reasons why people agree to arbitrate." *Hyatt Franchising, L.L.C. v. Shen Zhen New World I, LLC*, 876 F.3d 900, 901-02 (7th Cir. 2017).

Finally, Respondents close with the remarkable claim that "Applicants have fully vindicated their right to seek arbitration," insisting that an erroneous opinion from the Missouri Court of Appeals and a denial of review from the Missouri Supreme Court is "all that … is necessary to protect [the Rams'] right to arbitration." Opp.21-22. Respondents even go so far as to claim that the *only* context in which "courts have

recognized the need for stays to preserve the benefits of contracted-for arbitration" is "while … a direct appeal is pursued." Opp.21. That claim is difficult to reconcile with the fact that this Court granted a stay to preserve those benefits pending the filing of a petition for certiorari *just this past Term* in *Henry Schein*. *See* 138 S. Ct. 1185. As that stay reflects, *this* Court is the ultimate arbiter of whether a lower court's refusal to compel arbitration is consistent with the FAA, and parties have a right to ask this Court to answer that question.

Here, the state court invoked this Court's delegability precedents to justify refusing to enforce the terms of the parties' arbitration agreement according to ordinary contract law principles. In doing so, the court deepened the division among the lower courts on whether those precedents require courts to set aside ordinary contract law when considering delegability. This case thus presents an excellent opportunity for this Court to resolve a split in the lower courts on an important and recurring question of federal law. Accordingly, rather than subject the Rams to court-ordered proceedings that deny the Rams the bargained-for and federally protected right to arbitrate, the Court should stay those proceedings so that it may review that federal question on the same terms as the Missouri courts did below.[4]

[4] Alternatively, as the Rams have suggested, this Court could construe the stay application as a petition for certiorari and set this case for prompt briefing and argument. It could also summarily reverse. *See* Appl.19 n.3.

CONCLUSION

For the foregoing reasons, Applicants respectfully request that this Court recall and stay the mandate of the Missouri Court of Appeals pending the timely filing and disposition of a petition for writ of certiorari.

Respectfully submitted,

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