No. 20-695

IN THE
# Supreme Court of the United States

DEREK PIERSING, on Behalf of Himself and All Others Similarly Situated,
*Petitioner,*

v.

DOMINO'S PIZZA FRANCHISING LLC; DOMINO'S PIZZA MASTER ISSUER LLC; DOMINO'S PIZZA LLC; and DOMINO'S PIZZA, INC.,
*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## REPLY BRIEF FOR THE PETITIONER


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Petitioner Derek Piersing asks this Court to examine a question it acknowledges is an open one: Whether providing that a particular set of arbitral rules will govern arbitration is "clear and unmistakable evidence" the parties agreed to delegate arbitrability to the arbitrator. *See Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 531 (2019) (*Henry Schein I*). As explained in his Petition, though the courts of appeals are unanimous on this question, nearly all their opinions lack analysis. And because the prevailing view is contrary to this Court's precedent, this Court's intervention is warranted. Indeed, Respondents' Opposition to the petition for certiorari only emphasizes why this Court should grant certiorari.

### I. That the Federal Courts of Appeal Are Unanimous Demonstrates that this Court's Intervention Is Necessary.

Mr. Piersing and Respondents agree on one thing: Twelve federal courts of appeal have now reached the same conclusion about whether reference to a set of arbitral rules alone can constitute clear and unmistakable evidence of delegation. Pet. 14-18; Opp. 4, 8. The problem, though, is that most of the opinions comprising the federal appellate consensus are devoid of analysis, and they are all inconsistent with this Court's arbitration jurisprudence.

Several of the state court opinions on which Respondents rely are similarly derivative in their analysis, or lack any analysis whatsoever. *West Virginia CVS Pharmacy, LLC v. McDowell Pharmacy, Inc.*, for example, bases its conclusion on the "abundant authority" of the federal appellate

consensus, but provides no independent reasoning. 796 S.E.2d 574, 590 (W. Va. 2017). Other authorities in Respondents' string cite, Opp. 8-9, directly contradict one another. *See Ally Align Health, Inc. v. Signature Advantage, LLC*, 574 S.W.3d 753, 757-58 (Ky. 2019) (criticizing *James & Jackson, LLC v. Willie Gary, LLC*, 906 A.2d 76 (Del. 2006)). And *Garthon Business Inc. v. Stein*, 86 N.E.3d 514 (N.Y. 2017), is a one-sentence memorandum that rests its holding on two earlier opinions, one that says nothing about delegation at all, *Nationwide Gen. Ins. Co. v. Invs. Ins. Co. of Am.*, 332 N.E.2d 333 (N.Y. 1975), and the other involving an express delegation clause that granted the arbitrators "exclusive jurisdiction over the entire matter in dispute, including any question as to its arbitrability," *Monarch Consulting, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 47 N.E.3d 463, 469 (N.Y. 2016).

The fact that an errant branch of law has been permitted to fester for years, gaining momentum, is not a reason to let the error continue unchecked. Nor can the number of courts reaching the same conclusion overwhelm, by brute strength, a lack of reasoning to support that conclusion. To the contrary, as more and more courts join that wrongheaded consensus, it becomes increasingly urgent for this Court to intervene and get the runaway train back on track.

This Court's intervention is also needed to address the inconsistency between federal and state courts deciding the same delegation issues in California, Florida, Montana, New Jersey, and South Dakota. Pet. 18-19. While Respondents quibble with some of these state court decisions, ignoring portions of their

holdings in the process, Opp. 9-10, their quibbles do not change the fact that residents of these states are currently subject to conflicting rules of decision on the same federal question and that only this Court can resolve the conflicts.

## II. Respondents Fail to Persuasively Defend the Prevailing Circuit Approach.

### A. Neither Respondents nor courts adopting delegation-by-rules square that approach with this Court's precedent.

Respondents note that the decision below, like other appellate opinions in whose footsteps it followed, cited to *First Options* and *Rent-A-Center* in the course of its analysis. Opp. 13-14. But citing to a precedent is not the same as engaging with its reasoning. None of these opinions engage with what the "clear and unmistakable" standard actually means, as interpreted by other decisions of this Court. *See* Pet. 21-22. Neither do Respondents.

Comparisons to *Rent-A-Center* illustrate the analytical void. Respondents explain, correctly, that *Rent-A-Center* described delegation provisions as "additional, antecedent agreement[s] the party seeking arbitration asks the federal court to enforce." *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 70 (2010); *see* Opp. 3-4. But neither the Sixth Circuit's opinion nor any other post-*Rent-A-Center* opinion in the federal appellate consensus explains why mere reference to a set of arbitral rules constitutes clear and unmistakable evidence that the parties intended one of those rules to be an antecedent agreement about what disputes are arbitrable, rather than a subsequent agreement about what rules will be used

to govern disputes subject to arbitration. *See* Oral Arg. Tr. *Henry Schein, Inc. v. Archer & White, Inc.*, No. 19-963, 2020 WL 7229731, at *9 (*Henry Schein II*) (Thomas, J., asking petitioner to point to the (nonexistent) delegation language in the agreement).

*Rent-A-Center* itself described the "clear and unmistakable" standard as the quantum of evidence of the parties' manifestation of intent needed to overcome the presumption that threshold questions of arbitrability are for courts to decide. 561 U.S. at 69 n.1. Simply invoking *Rent-A-Center*, without more, does not establish that quantum of evidence, especially since the evidence of delegation in *Rent-A-Center* was far more substantial than reference to a set of arbitral rules.

Nor are *First Options* and *Rent-A-Center* the only two precedents from this Court with which the opinion below, and its predecessors, failed to adequately engage. *First Options* derived the "clear and unmistakable" standard from *AT & T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 649 (1986), which in turn identified it as the second of four principles set forth in a trilogy of labor arbitration cases decided in 1960. *Id.* at 648. In *AT&T*, the Seventh Circuit had allowed an arbitrator to decide in the first instance whether a dispute over layoffs was arbitrable, noting that the collective bargaining agreement contained a "standard arbitration clause" and the parties had not "excluded the arbitrability issue from arbitration." *Id.* at 646-47.

This Court reversed, holding that the Seventh Circuit had gotten the presumptions backwards and misapplied relevant Supreme Court precedents.

Specifically, the opinion observed, *id.* at 649, this Court had reiterated in *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 547 (1964), that "a compulsory submission to arbitration cannot precede judicial determination that the . . . agreement does in fact create such a duty." *AT&T* further observed that "[t]he willingness of parties to enter into agreements that provide for arbitration of specified disputes would be drastically reduced" if standard arbitration terms, rather than an explicit delegation agreement, were deemed sufficient to expand the arbitrator's jurisdiction beyond the disputes the parties agreed to arbitrate. 475 U.S. at 651 (citations and internal quotations omitted).

The same holds true today with respect to the "standard" inclusion of a set of arbitral rules to govern proceedings in arbitration. Relying on this ambiguous, equivocal evidence of delegation instead of an explicit "antecedent agreement," *see Rent-A-Center*, 561 U.S. at 70, violates the "clear and unmistakable" standard this Court has applied to commercial and labor arbitration alike for over half a century. What's more, it risks undermining the legitimacy of arbitration as an alternative dispute resolution process by upending the expectations of contracting parties. *See Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83-84 (2002) (describing *First Options* in terms of whether parties would have expected a court or an arbitrator to decide certain matters).

### B. Respondents' incorporation arguments cannot overcome the structure and language of the agreement.

Respondents' contract construction arguments are illogical and fail to grapple with the arguments made in the Petition. Respondents' arguments rest on the theory that, by providing the AAA rules will govern any arbitral proceeding, the AAA rules are incorporated into the agreement. Opp. 11. But even if that is true, it does *not* follow that the rules are incorporated for *all* purposes—and Respondents fail completely to address Mr. Piersing's arguments and authorities on that point. *See* Pet. 25. The AAA rules, and their supposed delegation clause, may be incorporated for the purpose of *how* arbitration is to be conducted, but that does not mean they are incorporated for the purpose of *whether* arbitration is to be conducted.

That is particularly evident where, as here, the structure of the arbitration agreement indicates that the AAA rules do not come into play unless and until the dispute is one that the parties agreed to subject to arbitration—that is, at the very least, that it is the type of dispute listed in Part 2 of the agreement. *See* Pet. 23-24. Again, Respondents have no sound answer here.

Rather, their attempt makes logical leaps unwarranted by the text of the agreement. Respondents describe the agreement, in part, then say, "Consequently, the single contract executed by Petitioner stated both that all claims arising from the contract would be subject to arbitration and that the incorporated AAA rules would govern arbitral issues,

including jurisdictional challenges to the arbitrator's authority." Opp. 12. But that is factually wrong and does not follow logically. The agreement does not say that all claims arising from the contract are subject to arbitration—it covers claims arising out of the employment and then expressly exempts certain listed types of claims. App. 41-42.

More importantly for the question presented here, the agreement also does not say that the AAA rules will govern all arbitral issues when those issues arise outside of arbitration. On the contrary, the agreement states that "the *arbitration* will be conducted in accordance with" the AAA employment rules. App. 43 (emphasis added). Thus, according to the agreement itself, there is no role for the AAA rules unless the parties are *in* arbitration—and, indeed, it would be contrary to the parties' intent to have arbitral rules govern disputes that the parties expressly did not intend to arbitrate. *See Henry Schein II*, 2020 WL 7229731, at *16-17, *19-20, *21-22, *30-31 (Alito, Sotomayor, Kagan, Barrett, J.J., asking questions on this issue). Respondents' theory of incorporation and breezy "[c]onsequently" cannot overcome the text and structure of the agreement itself.

Carve-outs from arbitration like the ones in Part 3 of this agreement are not unique. *See, e.g.*, *Henry Schein II*, No. 19-963 (U.S.); Pet. App'x 39a, *Comcast Corp. v. Tillage*, No. 19-1066 (U.S.). As such, the prevailing view that arbitral rules apply to all disputes, regardless whether parties contracted to make only certain disputes arbitrable, has far-reaching effects. And when parties *do* decide to expressly delegate arbitrability issues to the arbitrator, they sometimes exempt certain

arbitrability questions from arbitration. *See, e.g.*, *RCN Customer Terms and Conditions* ¶ 25(e)(2), https://www.rcn.com/hub/about-rcn/policies-and-disclaimers/customer-terms-and-conditions/.

Further, Mr. Piersing's argument is not, contrary to Respondents' contention (Opp. 14), that the agreement invokes the AAA rules only where arbitration has been court ordered. Rather, under the contract's plain language, the AAA rules—including the rule authorizing arbitrators to determine their jurisdiction—apply in arbitration, regardless of whether the claims were initially filed in arbitration or ordered there by a court. *See* Pet. 29.

Finally, neither *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995), nor *Preston v. Ferrer*, 552 U.S. 346 (2008), helps Respondents. *See* Opp. 12-13. If anything, *Mastrobuono* supports Mr. Piersing. After a careful analysis of the contractual language, *Mastrobuono* applied the selected arbitral rules *to the arbitration proceeding*, which is exactly what Mr. Piersing contends should happen here—specifically, that the AAA rules should be limited to governing arbitration proceedings. Moreover, analogously to the petitioners in *Mastrobuono*, it is unlikely that Mr. Piersing was aware of the delegation-by-rules doctrine or that he intended to upend the usual presumption that the court decides questions of arbitrability by agreeing to a standard-form contract that did not expressly mention delegation.

*Mastrobuono* involved whether an arbitrator could award punitive damages when the arbitral rules permitted punitive damages, but the New York state law designated by the general choice-of-law provision prohibited arbitrators from awarding them. 514 U.S.

at 55. This Court held that the arbitrator could award punitive damages because "the best way to harmonize the choice-of-law provision with the arbitration provision is to read 'the laws of the State of New York' to encompass substantive principles that New York courts would apply, but not to include special rules limiting the authority of arbitrators." *Id.* at 63-64. In reaching that conclusion, *Mastrobuono* analyzed the structure of the agreement, concluding that the parties did not intend for New York law to govern arbitration because the parties had chosen arbitral rules to govern arbitration instead. *Id.* at 60-61. At most, this Court explained, the contract was ambiguous as to whether it incorporated the no-punitive-damages-in-arbitration state-law rule and that ambiguity should be construed against the drafter: "As a practical matter, it seems unlikely that petitioners were actually aware of New York's bifurcated approach to punitive damages, or that they had any idea that by signing a standard-form agreement to arbitrate disputes they might be giving up an important substantive right. In the face of such doubt, we are unwilling to impute this intent to petitioners." *Id.* at 63.

*Preston*, like *Mastrobuono*, dealt with a special state law limiting arbitration. *Preston*, 522 U.S. at 363. In *Preston*, there was no dispute that the underlying dispute—the validity or legality of the contract—was subject to arbitration under the terms of the arbitration clause. *Id.* at 361. Indeed, the contract expressly stated that disputes about the validity or legality of the contract were to be arbitrated in accordance with the AAA rules, which, in turn, also provide that the arbitrator can determine the validity of the contract. *Id.* at 361-62. As in

*Mastrobuono*, this Court looked to the contractual language and applied the parties' selected arbitral rules *in the arbitration proceedings*. Again, that is exactly what Mr. Piersing argues should happen here: As the contract provides, the arbitral rules should govern arbitration proceedings, and no more.

In sum, neither *Mastrobuono* nor *Preston* supports Respondents' view that the arbitral rules the parties agree will govern arbitration proceedings should also, unsupported by the text of the agreement, govern a court's analysis of whether arbitration should proceed in the first place.

### C. Respondents' arguments regarding the language of the AAA rule itself are circular and ignore authority.

Respondents attempt to dismiss Mr. Piersing's construction of AAA Employment Rule 6(a) as conferring concurrent rather than exclusive jurisdiction on the arbitrator, arguing in conclusory fashion that "the specific identification of the arbitrator's authority necessarily excluded any sharing of that authority with the courts." Opp. 15. Respondents do not acknowledge the long history of jurisdictional provisions like this one as competence-competence clauses, a history even acknowledged by the Sixth Circuit opinion, App. 16-17, and discussed at length by the chief reporter of the ALI's Restatement of the U.S. Law of International Commercial and Investor-State Arbitration. *See* Amicus Br. of Prof. George A. Bermann. Nor do Respondents acknowledge or attempt to distinguish any of Mr. Piersing's cited authorities on how the phrase "shall have jurisdiction" or "shall have power" has been interpreted to confer concurrent, not

exclusive, jurisdiction when used in statutes and Constitutional provisions. Pet. 27-29.

The main argument Respondents do bother to make is circular. To say that courts may not rule on questions assigned by contract to the arbitrator begs the very question at hand—whether the question of arbitrability has, in fact, been assigned by contract to the arbitrator. *See* Opp. 15.

Thus, just as with the other substantive arguments, Respondents' failure to effectively defend the (largely unreasoned) prevailing approach only emphasizes the need for this Court's intervention.

## III. That Delegation-By-Rules Is Very Likely to Arise in the Context of Form Contracts Is an Additional Reason for Granting Review.

None of Mr. Piersing's arguments against delegation-by-rules depend on the sophistication level of the contracting parties. Even sophisticated parties in commercial disputes argue that designating the AAA or JAMS rules as the rules governing any arbitration does not, standing alone, evince an intent to delegate questions of arbitrability to an arbitrator. *See, e.g.*, *Henry Schein II*; *Simply Wireless, Inc. v. T-Mobile U.S., Inc.*, 877 F.3d 522, 527-28 (4th Cir. 2017), *cert denied*, 139 S. Ct. 915 (2019). Indeed, in commercial, employment, and consumer settings, it is customary to designate a particular set of rules to govern arbitration—regardless whether the parties also intend to delegate arbitrability to the arbitrator.

Nevertheless, for the reasons explained in the Petition (at 30-35), the absurdity of the prevailing view is most evident in the employment and consumer

contexts, in which one of the parties generally does not have a sophisticated understanding of the latest arbitration jurisprudence. And the impact of the prevailing view weighs heavily on employees and consumers, who are typically unable to negotiate the terms of their contracts—highlighting the need for the Court's review.

But, *in the alternative*, as a number of district courts have held, even if sophisticated commercial entities making business-to-business contracts can be said to appreciate the hidden implications of designating a set of arbitral rules, the same cannot be said of consumers and employees. *See, e.g.*, *Calzadillas v. Wonderful Co., LLC*, No. 119-cv-00172-DAD-JLT, 2019 WL 2339783, at *4 (E.D. Cal. June 3, 2019); *Ingalls v. Spotify USA, Inc.*, No. 16-cv-03533-WHA, 2016 WL 6679561, at *3 (N.D. Cal. Nov. 14, 2016) (collecting cases).

In short, the unremarkable fact that parties stipulate a popular set of arbitration rules will govern any arbitration is not "clear and unmistakable evidence" they intended to do something very different—and that is especially true in the context where the non-drafting party is unlikely to appreciate the consequences of the prevailing delegation-by-rules approach.

## CONCLUSION

For these reasons, and the reasons stated in the petition for certiorari, the Court should grant certiorari.

Respectfully submitted,

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