No. 21-1244

IN THE

Supreme Court of the United States

BEIJING SHOUGANG MINING INVESTMENT COMPANY, LTD., ET AL.,

Petitioners,

v.

MONGOLIA,

Respondent.

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

BRIEF OF *AMICI CURIAE* ARBITRATION SCHOLARS AND PRACTITIONERS IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE* [1]

The undersigned are scholars and practitioners of international arbitration, who broadly write about and practice in foreign arbitral seats.[2] Many of us have published widely on international arbitration issues, including the international approach to resolving questions of arbitral jurisdiction.[3] We seek to offer another

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[1] *Amici* provided timely notice to the parties of their intention to file this brief. The parties consented to the filing and attached hereto are their letters of consent. Pursuant to Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and no person or entity, other than *amici* and their counsel, made a monetary contribution to the preparation or submission of the brief.

[2] The attached Appendix contains a list of the *amici* along with biographical information for each. *Amici* appear in their individual capacities; institutional affiliations are provided here for identification purposes only.

[3] Chan Leng Sun SC, *Time Limits in Challenging a Tribunal's Jurisdiction*, 23 J. Arb. Studs. 81–99 (2013); Chan Leng Sun SC, Singapore Law on Arbitral Awards (2011); Chan Leng Sun SC, et al., Report of the Law Reform Committee on Right to Judicial Review of Negative Jurisdictional Rulings (2011) (as a member of the Law Reform Committee); Eric De Brabandere, et al., *Overriding Mandatory Provisions and Arbitrability in International Arbitration: The Case of Multilateral and Unilateral Sanctions*, *in* Overriding Mandatory Rules and Compliance in International Arbitration 153–162 (Georges Affaki and Vladimir Khvalei eds. 2022); Eric De Brabandere, *The judgement of the Brussels court of first instance in R. v Mauritius of 30 June 2021 – Reflections on treaty interpretation, dual nationality, and the scope of review of arbitral awards in investment treaty arbitration*, 2021 Belg. Rev. Arb. 366–392 (2022); Eric De Brabandere, et al., *Unilateral Sanctions through an International Arbitration Lens: Procedural and Substantive Issues*, *in* Research Handbook on Unilateral and Extraterritorial Sanctions 342–364 (Charlotte Beaucillion ed. 2021); Eric De Brabandere, *The*

perspective for the Court concerning how the threshold issue of arbitrability is reviewed in other key seats of arbitration. The issue raised by the Petition warrants this Court's review, as the Second Circuit's departure from *First Options* brings that Circuit's law into conflict with other significant centers of arbitration, including England & Wales, Singapore, France, Switzerland, and Sweden, and undermines the predictability and dependability essential to international arbitration.

SUMMARY OF ARGUMENT

Parties to international arbitration and arbitral tribunals themselves value predictability and dependability. This is especially so for threshold questions concerning the authority of an arbitral tribunal to decide disputes over its own jurisdiction. Among international arbitration scholars and practitioners this threshold question is often known by the German term kompetenz-kompetenz, referring to the issue of competence to determine the competence of an arbitral panel to decide a dispute. Kompetenz-kompetenz sets the framework for the arbitration and promotes the value of efficiency that is paramount to the arbitration system. Lack of clarity introduces inefficiencies to the process, particularly in the enforcement of awards.

The common international approach toward kompetenz-kompetenz and the resolution of

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(Ir)relevance of Transnational Public Policy in Investment Treaty Arbitration – A Reply to Jean-Michel Marcoux, 21 J. World Inv. & Trade 847–866 (2020).

jurisdictional challenges is to permit a tribunal to decide its jurisdiction over a dispute and to later provide for a court to conduct *de novo* review. The United States has long been in line with this approach; however, in the Second Circuit's decision below, it has moved wildly out of step. Consideration of the approach in five foreign jurisdictions, which are among the most frequented seats of international arbitration, shows that the Second Circuit has departed from widely accepted norms. If the framework created by the Second Circuit's decision were to stand, it would make New York—as a leading international arbitration seat and the leading U.S.-based seat of arbitration by far—an outlier in the international arbitration community. For these reasons, the Court should review the Petition.

ARGUMENT

I. Stability of Approach Is Critical to a Premier Seat of Arbitration

The Second Circuit's ruling in the case below deviates from an international norm for judicial review of arbitration by allowing only deferential review of a core jurisdictional question. Although a notable feature of arbitration law is deferential judicial review of awards by arbitral tribunals related to the merits of a case, the international norm favors stricter court review of procedural issues, including the exercise by an arbitral tribunal of kompetenz-kompetenz.

Predictability is foundational to international arbitration. Indeed, as arbitration is a creature of contract, predictability is essential to honoring the parties' intent. The formal legal infrastructure,

including procedural arbitration law, is one of the key determining factors in selecting a choice of seat in arbitration. *See* White & Case LLP and Queen Mary University of London, *International Arbitration Survey: Choices in International Arbitration* (2010), at 21–22, available at https://arbitration.qmul.ac.uk/media/arbitration/docs/2010_InternationalArbitrationSurveyReport.pdf.

The approaches to judicial review of arbitrability in five jurisdictions, which include leading seats of international arbitration, show how the Second Circuit's approach is an outlier. This is not to say that this Court should adopt the standard of any one of these jurisdictions. Rather, these approaches highlight how this issue impacts an international norm, and thus affects the perception of whether New York and the United States should be preferred seats for international arbitration. This consideration makes the issue an important one for *certiorari*.

II. *First Options* Aligned with a Common International Approach to Arbitrability

This Court's decision in *First Options of Chicago, Inc. v. Kaplan* aligned the United States with a growing international norm in determining arbitrability. 514 U.S. 938 (1995). There, this Court upheld the long-standing principle of kompetenz-kompetenz, recognizing the power of arbitral tribunals to determine issues of their own jurisdiction in the first instance. But unless clear evidence showed that the parties unmistakably agreed to have the arbitral tribunal conclusively determine its own jurisdiction, parties could still seek judicial review of the tribunal's jurisdictional

decision to ensure that the intent of the parties' agreement was faithfully followed. The review of jurisdictional decisions, unlike review on the merits, would be *de novo*.

This standard, which allows the tribunal to determine its jurisdiction in the first instance but vests ultimate authority for this determination with a court later exercising *de novo* review, is reflected in the legal structure of most preferred seats of international arbitration. The legal structures of five such jurisdictions are highlighted to show this norm.

A. England & Wales

With London tied as the most preferred seat for international arbitrations, the law of England & Wales ("English law") is influential in understanding the international approach to arbitrability. White & Case LLP and Queen Mary University of London, *International Arbitration Survey: Adapting arbitration to a changing world* (2021), at 6, available at https://www.whitecase.com/sites/default/files/2021-06/qmul-international-arbitration-survey-2021-web-single-final-v2.pdf.

Much like the approach endorsed by *First Options*, English law empowers arbitral tribunals to make determinations of arbitrability in the first instance. Section 30(1) of the English Arbitration Act 1996 provides:

> Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to (a) whether there is a valid arbitration agreement; (b) whether the tribunal is properly constituted, and

> (c) what matters have been submitted to arbitration in accordance with the arbitration agreement.

English Arbitration Act 1996, c. 23, § 30(1).

This grant of authority to an arbitral tribunal to rule on its own substantive jurisdiction, however, does not divest the English courts of jurisdiction to review that decision. Section 30(2) states that "[a]ny such ruling may be challenged by any available arbitral process of appeal or review or in accordance with the provisions of this Part." The Court of Appeal of England & Wales confirmed this understanding: "[I]t will, in general, be right for the arbitrators to be the first tribunal to consider whether they have jurisdiction to determine the dispute." *Fiona Trust & Holding Corp. v. Privalov* [2007] EWCA (Civ) 20 [34] (Eng. Ct. App.), *aff'd*, [2007] UKHL 40 (House of Lords).

The tribunal's jurisdictional award is thus subject to judicial review. This review may occur before a final award by consent of the parties or the tribunal, *see* English Arbitration Act 1996, c. 23, § 32(4), or following the entry of a final award, *see* English Arbitration Act 1996, c. 23, § 67. Generally, judicial consideration of arbitrators' jurisdictional determinations is *de novo*. *See Metal Distribs. (U.K.) Ltd. v. ZCMM Inv. Holdings Plc* [2005] EWHC (Comm) 156 [16] (Eng. High Ct.); *Amec Civil Eng'g Ltd. v. Sec'y of State for Transp.* [2004] EWHC (TCC) 2339 [38] (Eng. High Ct.); *Peterson Farms Inc. v. C&M Farming Ltd.* [2004] EWHC (Comm) 121 [17–19] (Eng. High Ct.); *Peoples' Ins. Co. of China, Hebei Branch v. Vysanthi Shipping Co.* [2003] EWHC (Comm) 1655 [25] (Eng. High Ct.); *Electrosteel Castings Ltd. v. Scan-Trans Shipping & Chartering*

SDN BHD [2002] EWHC (Comm) 1993 [19–23] (Eng. High Ct.). Indeed, an English court previously found that "a challenge such as is made under section 67 is indeed a complete rehearing." *A v. B* [2010] EWHC (Comm) 3302 [25] (Eng. High Ct.). This standard of review applies to both positive—finding that jurisdiction does exist—and negative—finding that it does not—jurisdictional awards under section 67. English Arbitration Act 1996, c. 23, § 67(1)(a) (judicial power to set aside "any award of the arbitral tribunal as to its substantive jurisdiction"); *see also* David Sutton, Judith Gill & Matthew Gearing, Russell on Arbitration ¶ 8–064 (24th ed. 2015).

The Supreme Court of the United Kingdom enforced this review regime in the seminal *Dallah* case. *Dallah Real Estate and Tourism Holding Co. v. Government of Pakistan* [2010] UKSC 46 [24–25] (U.K. Sup. Ct.) (citing *First Options of Chicago, Inc.*, 514 U.S. at 944); *id.* ¶¶ 71–98 (opinion of Lord Collins). Although mainly a case regarding enforceability of an award against a non-signatory, the Supreme Court based its determination on an independent investigation of the tribunal's jurisdiction. In doing so, the Court found that it was neither bound nor restricted by the tribunal's determination of its own jurisdiction, and that the tribunal's decision "has no legal or evidential value." *Id.* ¶ 30. *See also GPF GP S.à.r.l. v. Republic of Poland* [2018] EWHC (Comm) 409 [70] (Eng. High Ct.) ("[A] hearing under section 67 is a re-hearing[.]"). Thus, it unanimously held that the court was entitled to fully re-consider the validity of the arbitration agreement and the tribunal's jurisdiction.

This approach generally aligns with the U.S. approach as established in *First Options*. When it comes to jurisdictional questions, English courts will conduct a robust review rather than deferring to the arbitral tribunal's decision.

By contrast, the English approach significantly conflicts with the Second Circuit's decision here. The English Arbitration Act's empowerment of positive kompetenz-kompetenz, or first review of a tribunal's jurisdiction by the tribunal itself, logically requires that parties participate in the arbitration proceedings. This does not demonstrate an intent to waive judicial review, especially when the parties had merely agreed to a procedural order. What is required is only that a party objecting to a tribunal's jurisdiction, including through a challenge to the validity of the arbitration agreement, does so no later than the time the party "takes the first step in the proceedings to contest the merits of any matter in relation to which he challenges the tribunal's jurisdiction." English Arbitration Act 1996, c. 23, § 31(1). Once a party raises the objection, the tribunal may decide whether to rule on its own jurisdiction as a preliminary question, or deal with the objection in its award on the merits. Indeed, under the English Arbitration Act, the party would only have waived its objection to the jurisdiction challenge if it took part, or continued to take part, in the proceedings without making the objection to jurisdiction within the time permitted. *See* English Arbitration Act 1996, c. 23, § 73. It is obvious from these provisions that, having raised the jurisdictional objection within time, a party's continued participation in the proceedings is not deemed a waiver of the right to

challenge the tribunal's jurisdiction or bring the issue to the court for decision.

Most importantly, questions of jurisdiction are afforded *de novo* review, not the deferential standard that the merits may warrant. The Second Circuit's departure from the *First Options* approach has resulted in misalignment with English law.

B. Singapore

Rising in popularity over the last decade, Singapore is tied with London as the most preferred seat of international arbitration. White & Case LLP and Queen Mary University of London, *International Arbitration Survey (2021)*, *supra*, at 6. This increased exposure has also brought increased attention and respect for Singapore's approach to arbitration law. With legislation based on the UNCITRAL Model Law on International Commercial Arbitration ("Model Law"), Singapore is particularly well suited to clarify international trends.

The principle of kompetenz-kompetenz is included in Singapore law through the adoption of the Model Law. Article 16(1) of the Model Law as adopted provides that "[t]he arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement." Thus, tribunals are authorized to perform an initial review of jurisdictional issues, including questions of arbitrability and the arbitral tribunal's competence to assess jurisdiction.

This initial determination is subject to judicial review. The Model Law allows judicial intervention only where provided for in the Model

Law. *See* Model Law, art. 5. Review of jurisdictional decisions are within this category. *See* Model Law, arts. 16(3); 34(2)(a)(iii), (iv); *see also* UNCITRAL Model Law on International Commercial Arbitration, Explanatory Note by the UNCITRAL Secretariat ¶ 25 ("The competence of the arbitral tribunal to rule on its own jurisdiction, (i.e. on the very foundation, content and extent of its mandate and power), is, of course, subject to court control."). Thus, participation in an arbitration, provided that parties preserve their objections to jurisdiction under Article 16(2), does not, by its very nature, waive the judicial review of jurisdictional issues that is statutorily provided.

The text of the Model Law does not specify the standard of judicial review; however, the text implies *de novo* judicial consideration of jurisdictional issues.[4] Article 16(3) states:

> The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall

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[4] The Supreme Court of the Philippines, also a Model Law jurisdiction, likewise has applied a *de novo* standard of review in determinations of jurisdictional issues and the existence of arbitration agreements. *See* Philippine Supreme Court Administrative Matter No. 07-11-08-SC (Sept. 1, 2009) (interpreting Rule 2.4 of the Special Rules of Court on Alternative Dispute Resolution).

> be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

Section 10(3) of the Singapore International Arbitration Act 1994 amends Article 16(3) of the Model Law to provide judicial review for both positive and negative jurisdictional decisions. Further, Article 34 provides that an arbitral award may be set aside where the arbitration agreement is not valid or where the award deals with a dispute not contemplated by or beyond the scope of the arbitration agreement. To set aside the award, Article 34 requires that a party "furnishes proof," which would imply that the court must open the record and review beyond the tribunal's original evidence and reasoning.

Singaporean courts have agreed with this interpretation of the Model Law and have generally adopted a *de novo* standard of review for proceedings under Articles 16(3) and 34(2)(a) as they relate to procedural issues of law. *See, e.g.*, *Sanum Invs. Ltd. v. Government of the Lao People's Democratic Republic*, [2016] SGCA 57 [40], [44] (Sing. Ct. App.) ("[Appellant] accepts that the Judge was entitled in principle to undertake a de novo review of the Tribunal's award on jurisdiction. . . . The Judge did not err in holding that he was not required to defer to the findings of the Tribunal. It is of course the case that many of these rulings on jurisdiction will be made in the first instance by arbitration tribunals of great eminence. But it is the cogency and quality of their reasoning rather than their standing and eminence that will factor in the Judge's evaluation of the matter."); *AKN v. ALC* [2015] SGCA 18 [112]

(Sing. Ct. App.) ("[A]lthough the courts should not, in general, engage with the merits of the dispute when dealing with applications to set aside arbitral awards, an exception arises when the courts are confronted with arguments relating to the jurisdiction of the arbitral tribunal. In such a case, the court undertakes a *de novo* hearing[.]"); *PT First Media TBK v. Astro Nusantara Int'l BV* [2013] SGCA 57 [163] (Sing. Ct. App.) ("The jurisprudence of the Singapore courts has also evinced the exercise of *de novo* judicial review[.]").

This standard of review also applies to negative jurisdictional awards, as Singapore has modified Article 16 of the Model Law to expressly allow judicial review of negative jurisdictional awards. *See also* Gary B. Born, International Commercial Arbitration 1201 (3d ed. 2021) ("[T]here is no reason that the standard of consideration should differ in the two settings.").

As a respected legal system among the eighty-five states that have adopted the Model Law, the Singaporean approach is a bellwether for international trends. The Second Circuit's adoption of a deferential standard of review for purely jurisdictional questions due solely to a party's participation in the arbitral proceedings conflicts with the Model Law approach. Even more so, under the Model Law approach, participation in the arbitration proceeding would not be a waiver of judicial review. The Second Circuit approach is a dramatic departure from the Singapore approach which is largely based on the Model Law.

C. France

Paris is consistently considered in the top five of preferred seats of international arbitration. White & Case LLP and Queen Mary University of London, *International Arbitration Survey* (2021), *supra*, at 6. Like the English and *First Options* approaches, French law authorizes arbitral tribunals seated in France to make the first determination of its jurisdiction. Code de procédure civile [C.P.C.][French Code of Civil Procedure] arts. 1465, 1506; *see also* Born, *supra*, at 1203. French courts have recognized arbitral tribunals' kompetenz-kompetenz, which resembles the French approach to judicial jurisdiction: "[T]he principle is that the judge hearing a dispute has jurisdiction to determine his own jurisdiction. This necessarily implies that when that judge is arbitrator, whose powers derive from the agreement of the parties, he has jurisdiction to examine the existence and validity of such agreement." Born, *supra*, at 1154, 1201 (quoting *Judgment of 29 November 1968, Impex v. PAZ*, 1968 Rev. Arb. 149, 155 (Colmar Cour d'Appel)). Indeed, the French approach generally requires courts to decline jurisdiction to review arbitrability until after an arbitral tribunal has ruled on the issue. *Id.* at 1202–1205.

That said, once an arbitral tribunal has made a jurisdictional award, the parties can seek judicial review of that award under Article 1520 of the French Code of Civil Procedure. One of the grounds on which a party can overturn the award under Article 1520 is where "the arbitral tribunal wrongly upheld or declined jurisdiction." Code de procédure civile [C.P.C.][French Code of Civil Procedure] art. 1520(1). French courts apply a *de novo* standard of

review to a jurisdictional award. Born, *supra*, at 1206, n.374 (collecting cases).

This approach adheres to the common international approach. The Second Circuit's framework is out of step with this accepted approach. Indeed, as French courts are generally required to decline jurisdiction until after a tribunal has rendered a jurisdictional decision, parties would have to participate in the jurisdictional portion of an arbitration, in which case, the Second Circuit approach would say that the parties had agreed to forgo *de novo* judicial review. This cannot be reconciled with the approach under French law.

D. Switzerland

Like Paris, Geneva is consistently in the top five preferred seats of arbitration. White & Case LLP and Queen Mary University of London, *International Arbitration Survey* (2021), *supra*, at 6. Switzerland's approach follows the international approach: arbitral tribunals first determine their own jurisdiction with later judicial review.

Article 186(1) of the Swiss Federal Act on Private International Law provides that "the arbitral tribunal shall decide on its own jurisdiction." Once an arbitral tribunal has made its decision on its jurisdiction, the parties can seek judicial review of that decision under Article 190 of the Swiss Federal Act on Private International Law. One of the grounds on which a party can overturn the award under Article 190(2) is where "the arbitral tribunal wrongly accepted or declined jurisdiction." Swiss Federal Act on Private International Law, art. 190(2)(b). The Swiss Federal Tribunal applies a *de novo* standard of review to jurisdictional

determinations; however, the court is bound by the tribunal's factual findings. Born, *supra*, at 1213 n.409 (collecting cases).

Like the jurisdictions above, participation in an arbitration by entry into a procedural order does not waive a party's right to *de novo* review of a tribunal's jurisdiction because the enabling statute expressly provides for judicial review *after* participation in an arbitration and rendering of an award.

E. Sweden

Stockholm is thought of as a prominent seat for arbitration—in the top ten preferred seats according to a recent survey—particularly for those arbitration proceedings involving parties from Eastern Europe. *See* White & Case LLP and Queen Mary University of London, *International Arbitration Survey* (2021), *supra*, at 6. It is also a jurisdiction that has not adopted the Model Law.

Sweden recently revised the Swedish Arbitration Act by legislative amendment in 2019, which continues to support an approach of arbitrability in the first instance, with the opportunity for judicial review. Swedish law expressly provides for the doctrine of kompetenz-kompetenz. 2 § Lag om skiljeförfarande (SFS 1999:116) ("Swedish Arbitration Act") ("The arbitrators may rule on their own jurisdiction to decide the dispute."). Thus, tribunals generally make decisions on their own jurisdiction in the first instance. To support this point, the revised Swedish Arbitration Act more stringently controls interlocutory review of jurisdictional issues. As a result, it is even more common for tribunals to rule

on their own jurisdiction, and to have judicial intervention only after a final award.

The Swedish Arbitration Act expressly provides for judicial review of a tribunal's jurisdictional decisions, whether they are negative jurisdictional decisions, through Section 2, or positive jurisdictional decisions, through Section 36. 2, 36 §§ Swedish Arbitration Act (SFS 1999:116). Traditionally, all jurisdictional decisions are reviewed under a *de novo* standard of review. *See* Kaj Hobér, International Commercial Arbitration in Sweden 187 (2d ed. 2021); *see also* Högsta Domstolen [HD][Swed. Sup. Ct.] 2016-04-21 Ö 1429-15 (Decision) ("The most obvious interpretation of this provision [i.e. Section 2 of the Swedish Arbitration Act] is that the jurisdictional issues that can be considered by the court are the same as those that can considered by the arbitral tribunal. Thus, the wording of the provision would imply that the scope of the arbitral tribunal's and the court's jurisdictional review is intended to be identical."). Finally, the Swedish Arbitration Act allows for parties to agree to finally submit jurisdictional issues to arbitration, like the approach of *First Options*. 2, 4 §§ Swedish Arbitration Act (SFS 1999:116).

Sweden's statutory structure resembles the approach adopted by *First Options*. It does not, however, provide that if parties participate in arbitration or enter a procedural order to schedule jurisdictional hearings, they waive their right to further judicial review, as held by the Second Circuit. Rather, the Swedish Arbitration Act provides the opposite. Judicial review is a

mechanism available in most cases after a final award on jurisdiction is rendered.

III. Deviation from the Internationally Accepted Approach Upends Predictability and Warrants Review

As illustrated through the above review of the approach in these five jurisdictions, there is an internationally accepted approach to arbitrability: arbitral tribunals are always vested with initial authority to determine their own jurisdiction, and this does not waive subsequent judicial review *de novo*. States, pursuant to Article II(3) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the "New York Convention"), have always reserved the possibility for one of the parties to seek judicial review challenging the arbitral agreement for nullity and voidness, inoperation, or incapability of being performed. The judicial review contemplated under Article II(3) is inherently *de novo* in nature. In some jurisdictions, such as in England, there is also support for allowing parties to agree to submit arbitrability for final and binding determination by a tribunal. *See, e.g.*, *LG Caltex Gas Co. v. China Nat'l Petroleum Co.* [2001] EWCA (Civ) 788 [31] (Eng. Ct. App.) (requiring express agreement to grant tribunal power to decide own jurisdiction finally). This all rings familiar considering the approach established in *First Options* and widely followed in the United States for decades.

But the Second Circuit's decision here risks upending that alignment across the major international seats of arbitration. By applying a different standard of review, and for the first time finding that participation in jurisdictional

proceedings before a tribunal and agreeing to a schedule for submission of jurisdictional objections waives a party's right to subsequent *de novo* review of the tribunal's threshold jurisdictional determination, the Second Circuit has sown confusion regarding the proper approach to a threshold issue of arbitration in the United States. Parties are left to wonder whether selecting New York as their seat of arbitration, or seeking to enforce arbitral decisions rendered abroad in the Second Circuit, will provide robust judicial review consistent with international norms or broad, deferential review that would make New York an outlier. Parties with arbitrations seated in New York must also ask themselves whether it is then prudent to participate in the arbitral proceedings when they are established, as would be allowable under *First Options*, or whether to forgo all participation and run into court, as would seem to be demanded by the Second Circuit. This confusion only grows when that party is the claimant and is essentially left with no avenue to the courthouse.

Further, when the parties do not select a seat in the formation of the contract and are thus not able to determine whether arbitrability will be subject to the international norm or the Second Circuit's outlier approach, then the parties are subject to a commercially intolerable level of uncertainty as to what approach will apply. Contract interpretation aims to honor the intentions of the parties, and parties to commercial disputes rely on predictability in clarifying those intentions. Here, the United States is at risk of disjointed approaches to a fundamental procedural step in resolving disputes through arbitration. And it is a party's best guess what the outcome might be. For that reason, this

Court should grant the petition for *certiorari* and promote a consistent understanding of the United States' approach to arbitrability and its review that adheres to *First Options* and prevailing international norms.

CONCLUSION

Because the Second Circuit's approach is incompatible with the approaches of other leading arbitral seats, this Court should grant the petition.

Respectfully submitted,

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April 29, 2022

Appendix A

List of Amici

Professor Dr. Crina Baltag is Associate Professor in International Arbitration at Stockholm University and director of the Master in International Commercial Arbitration Law at Stockholm University. For over eighteen years, Professor Baltag has focused her research, teaching, and practice on international dispute resolution, and in particular on international commercial and investment arbitration, international commercial litigation and alternative dispute resolution. Professor Baltag is a recognized thought leader, and her numerous works are extensively cited by arbitral tribunals, counsel, and scholars. She is frequently appointed as arbitrator and legal expert in commercial and investment arbitrations. Professor Baltag is member of the Board of the Stockholm Chamber of Commerce Arbitration Institute, Vice-Chair of the Academic Council of the Institute for Transnational Arbitration, and editor of leading journals and book series in the field of international dispute resolution. Professor Baltag has previously served at the Secretary General of the AmCham Brazil Arbitration and Mediation Centre.

Professor Dr. Eric De Brabandere holds the Chair in International Dispute Settlement and Director of the Grotius Centre for International

Legal Studies at Leiden University Law School and is a founding partner of De Meulemeester & De Brabandere Law Firm (DMDB Law) based in Brussels. He is specialised in international arbitration and international investment law. He has been appointed as presiding arbitrator, sole arbitrator, and co-arbitrator in international arbitrations, regularly acts as expert in international proceedings, has acted as counsel in investment treaty arbitrations under the ICSID Convention and the UNCITRAL Arbitration Rules, and regularly advises investors and States on international arbitration, investment law, and international dispute settlement.

Chan Leng Sun is a Senior Counsel of the Supreme Court of Singapore and a Chartered Arbitrator practising with Duxton Hill Chambers. He is a member of the Singapore International Arbitration Centre Court of Arbitration and the ICC Commission on Arbitration and ADR. He is formerly the Global Head of Arbitration of Baker McKenzie and President of the Singapore Institute of Arbitrators (SIArb). He is the Deputy Chairman of the SGX Appeals Board. Leng Sun is qualified in Malaysia, Singapore, and England. He has a broad commercial practice and has acted as counsel or sat as arbitrator in arbitrations seated in Asia, Europe, and USA. Leng Sun had also served as a legal officer of the United Nations Compensation Commission in Geneva and represented Singapore at the UNCITRAL Working Group on Arbitration. Leng Sun is the author of the book, *Singapore Law on Arbitral Awards* and co-editor of *Conflict of Laws in*

Arbitration. He is recognized among the top lawyers worldwide by legal directories. He is described by WWL as being "*among the very best disputes lawyers in the world*" and lauded as one of ALB Asia's Super 50 Dispute Lawyers, which reported him to be "*spectacular, with exceptional knowledge and depth of insight*."

Professor Diana Correa is a Civil Law and International jurist with extensive experience in Public, Economic, and Private International Law as well as International Arbitration in both fields: Investment and Commercial. She holds a PhD from University of Paris II on Public International Law, and three more postgraduate degrees in the fields of Private International Law, Economic International Law, as well as Liability Law and Damages. As a former associate of international law firms, particularly Derains & Gharavi (Paris), she has collected a rich experience working with experts in international law, well-known international arbitrators, lawyers from both civil and common law systems, and clients in several industries, including oil, mining, energy, construction, joint ventures, and telecommunications. Professor Correa has participated in more than 40 simple and complex disputes, multi-party and multi-contract proceedings conducted under the ICC, ICSID, UNCITRAL, PCA, and Chamber of Commerce of Bogotá arbitration rules. Professor Correa is a Professor of the University Externado of Colombia where she teaches International Law and International Arbitration. She often participates as a speaker in public academic events on International

Arbitration and International Law. She has been an invited Professor-Researcher at the Universities of Cambridge, Miami, Paris II, and Granada. Professor Correa writes for the Revue Générale de Droit International on an annual basis to report the Colombian judicial news related to Public International Law, as well as for GAR Know How in Commercial Arbitration where she reports the Colombian Chapter. She is the founding partner of Diana Correa International SAS where she acts as Consultant and Arbitrator in local and international proceedings. In its 2022 ranking, Who's Who Legal positioned her as a global arbitration practitioner.

Professor Diane Desierto (JSD, Yale) is Professor of Law and Global Affairs, Faculty Director of the LLM in International Human Rights Law, at Notre Dame Law School, with a joint appointment as full professor at the Keough School of Global Affairs, University of Notre Dame, where she also holds five Faculty Fellow appointments (Klau Center for Civil and Human Rights, Kellogg Institute of International Studies, Liu Institute for Asia and Asian Studies, Pulte Institute of Global Development, Nanovic Institute of European Studies) and is Co-Principal Investigator of the Notre Dame Reparations Design and Compliance Lab. She holds a further appointment as Professor of International Law and Human Rights at the Philippines Judicial Academy. Professor Desierto is a Member of the Editorial Boards of the European Journal of International Law, the Journal of World Investment and Trade, and International Law Studies, and two Asian journals of international law.

She is presently appointed by the United Nations to serve as Chair-Rapporteur at the United Nations Expert Drafting Group on the Right to Development. Professor Desierto previously clerked at the International Court of Justice and served as Director of Studies and faculty at the Hague Academy of International Law. She is an Academic Council Member of the Institute of Transnational Arbitration, Co-Chair of the Oxford Investment Claims Summer Academy, Listed Arbitrator at the British Virgin Islands Arbitration Centre, and Expert for various international organizations. To date, she has authored (and/or edited) five books and around 140 law review articles, book chapters, book reviews, and shorter works on international law, international economic law and development, international human rights law, maritime security, ASEAN law, and international arbitration and dispute settlement.

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