No. 21-1244

IN THE

Supreme Court of the United States

BEIJING SHOUGANG MINING INVESTMENT COMPANY, LTD., CHINA HEILONGJIANG INTERNATIONAL ECONOMIC AND TECHNICAL COOPERATIVE CORP., QINHUANGDAOSHI QINLONG INTERNATIONAL INDUSTRIAL CO. LTD.,

Petitioners,

v.

MONGOLIA,

Respondent.

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

BRIEF OF THE NEW YORK CITY BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

LOUIS B. KIMMELMAN
Counsel of Record
BROOKLYN LAW SCHOOL
250 Joralemon Street
Brooklyn, New York 11201
(917) 254-7869
louis.kimmelman@brooklaw.edu

Counsel for Amicus Curiae

April 29, 2022

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTEREST OF *AMICUS CURIAE* [1]

The New York City Bar Association (the "City Bar") is a private, non-profit organization of approximately 24,000 members professionally involved in a broad range of law-related activities. Founded in 1870, the City Bar is one of the oldest bar associations in the United States.

New York City is a preeminent seat of domestic and international arbitration as well as a frequent venue for enforcing arbitration awards. Two standing committees of the City Bar, the Arbitration Committee and the International Commercial Disputes Committee, focus on domestic and international arbitration. The members of these two committees include arbitration practitioners, arbitrators, and academics who are engaged in the arbitration of domestic and international commercial disputes and the enforcement of awards. Through these committees, the City Bar follows arbitration developments in the state and federal courts in New York, issues reports on matters of concern to the arbitration community, and educates the bar and the public about legal issues arising under the Federal Arbitration Act (9 U.S.C. § 1 *et seq.*, the "FAA") and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (9 U.S.C. § 201 *et seq.*, the "New York Convention"). The City Bar also files amicus briefs in cases that impact its members and the practice of law in New York.

---

[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus* or its counsel, make a monetary contribution intended to fund the preparation or submission of this brief. This brief is submitted pursuant to the consent provided by petitioners and respondent, who were timely notified of our intent to file this brief under this Court's Rule 37.2.

The City Bar is interested in this case because it presents a direct conflict with settled Supreme Court precedent on a fundamental issue in domestic and international arbitration. As a result, the Second Circuit decision undermines the certainty and predictability of federal arbitration law and will make New York a less desirable place for the conduct of arbitration and the enforcement of arbitration awards.

SUMMARY OF ARGUMENT

This case presents the fundamental question of who, court or arbitrator, has primary responsibility to resolve issues of arbitrability. State and federal courts in New York regularly address this issue. The Court settled this question in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), stating a rule to be applied in all cases under the FAA. But when the petitioner advanced the *First Options* rule here, the Second Circuit expressly rejected it. This conflict with settled law warrants review and reversal of the Second Circuit.

ARGUMENT

The Second Circuit in its decision below expressly rejected, as a matter of law, this Court's rule articulated in *First Options* regarding the division of authority between arbitrators and courts with regard to issues of arbitrability. This direct conflict with controlling precedent on a fundamental issue of arbitration law warrants the Supreme Court's review.

I. THE *FIRST OPTIONS* INQUIRY FOCUSES ON WHETHER THE PARTIES CLEARLY AND UNMISTAKABLY GRANTED THE ARBITRAL TRIBUNAL THE "PRIMARY POWER" TO DECIDE ARBITRABILITY

In *First Options of Chicago, Inc. v. Kaplan*, the Court addressed the fundamental question of whether the power to decide arbitrability "belong[s] *primarily* to the arbitrators (because the court reviews their arbitrability decision deferentially) or to the court (because the court makes up its mind about arbitrability independently)." *First Options*, 514 U.S. at 942 (emphasis added). The Court held that the answer to this question involves two issues. First, there is a presumption that courts rather than arbitrators have primary responsibility to resolve issues of arbitrability. Second, to overcome this legal presumption, "the question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about *that* matter." *Id.* at 943.

The *First Options* rule starts with the presumption that "parties intend courts, not arbitrators," to primarily decide issues of arbitrability. *BG Group PLC v. Republic of Argentina*, 572 U.S. 25, 34 (2014). This presumption distinguishes issues of arbitrability from all other merits-related disputes decided in arbitration. Parties can design their own arbitration process by reversing the *First Options* presumption to give arbitrators the *primary* power to decide arbitrability. But to do so they must "clearly" agree to overcome the *First Options* presumption. *First Options*, 514 U.S. at 946. This is the heart of the *First Options* rule: the presumption that gives primary responsibility to the court applies unless the parties clearly and

unmistakably agree to give primary responsibility to decide issues of arbitrability to the arbitrator.

Based on this rule, the Supreme Court emphasized that "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." *Id.* (emphasis added). Thus, a party can participate in an arbitration and argue arbitrability to the arbitrator (either in favor or against) without thereby forgoing independent judicial review and being "effectively bound" by the arbitrator's decision. That is exactly what the respondents did in *First Options*, and the Supreme Court concluded that they "did not clearly agree to submit the question of arbitrability to arbitration." *Id.* at 947.

Before the court below, the petitioners invoked the very distinction emphasized by the Supreme Court in *First Options*. Petitioners argued to the Second Circuit that "the question is not how thoroughly [the petitioners] argued [the issue of arbitrability] or whether they 'sought the tribunal's ruling,' but rather whether they evinced any intent to give the Tribunal the *primary power* to determine arbitrability." Appellants' Reply, 2020 WL 4933726, at *16. The Second Circuit rejected this essential part of the *First Options* rule as a matter of law:

> Petitioners-Appellants nonetheless object that even if they argued arbitrability issues to the arbitrators, *de novo* [judicial] review is still required because they did not give the tribunal "primary power" over arbitrability issues. In making this argument, Petitioners-Appellants attempt to draw a distinction between intending to submit arbitrability issues

> to arbitration and intending to submit arbitrability issues to arbitration *without the possibility of independent judicial review*. We have, however, previously rejected this argument.

Pet. App. 24a (citing cases). However, the "distinction between intending to submit arbitrability issues to arbitration and intending to submit arbitrability issues to arbitration *without the possibility of independent judicial review*" is the precise point that the Supreme Court recognized and resolved in *First Options*.

Thus, the Second Circuit below flatly rejected the *First Options* rule and created a direct legal conflict with settled precedent. That the Second Circuit relied on prior circuit precedent that also conflicts with *First Options* makes the conflict with governing precedent even more significant and worthy of the Supreme Court's attention.[2]

---

[2] The court below cited *Schneider v. Kingdom of Thailand*, 688 F.3d 68 (2d Cir. 2012), and *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384 (2d Cir. 2011). In each of those cases, the parties had agreed that their arbitrations would be governed by the UNICITRAL rules, which provide that the tribunal has "the power to rule on objections that it has no jurisdiction." *Schneider*, 688 F.3d at 72–73; *Republic of Ecuador*, 638 F.3d at 393. In both cases, the Second Circuit failed to determine, as *First Options* requires, whether the parties granted the arbitrators "primary power" to decide arbitrability, *First Options*, 514 U.S. at 942, and instead inquired only whether the parties granted the arbitrators any power to rule on arbitrability. *Schneider*, 688 F.3d at 72–74; *Republic of Ecuador*, 638 F.3d at 391–395.

II. CONSENT IS THE SINE QUA NON OF ARBITRAL AUTHORITY

The *First Options* rule rests on the bedrock tenet of arbitration that arbitrators lack any authority absent consent.

One of the principles that underlies *First Options* is that both courts and arbitral tribunals have a role to play in determining issues of arbitrability. Often the question of whether the parties have agreed to arbitrate or agreed to arbitrate a particular dispute is initially presented to an arbitral tribunal for decision, as was the case in *First Options* and here. It is commonplace that a tribunal may be called upon to determine its own jurisdiction, and therefore a party's participation in an arbitral tribunal's jurisdictional determination should not be afforded particular significance.[3] Thereafter, an arbitral tribunal's decision on the question of arbitrability may be challenged in court in connection with award enforcement proceedings, as was also the case in *First Options* and here. That is why the *First Options* rule is framed in terms of who has "primary" authority to determine issues of arbitrability. *First Options*, 514 U.S. at 942.

---

[3] Likewise, arbitral rules recognizing an international arbitral tribunal's power to evaluate its own jurisdiction are consistent with what the Supreme Court of the United Kingdom has recognized as the "well established" general principle of arbitration law that "a tribunal in an international commercial arbitration has the power to consider its own jurisdiction." *Dallah Real Estate & Tourism Holding Co. v. Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46, ¶ 84. As that court emphasized, "[t]he principle that a tribunal has jurisdiction to determine its own jurisdiction does not deal with, or still less answer, the question whether the tribunal's determination of its own jurisdiction is subject to review, or, if it is subject to review, what that level of review is or should be." *Id.* ¶ 83.

Since both a court and arbitrator have power to resolve this issue, the critical question is who has the *primary* power to resolve this issue and thereby effectively bind the parties. *Id.* at 946. This question has real practical importance. The Supreme Court observed that who has the primary authority regarding the issue of arbitrability "can make a critical difference" to a party resisting the decision of an arbitrator. *Id*. at 942.

The *First Options* rule also reflects an important presumption regarding the relationship between courts and arbitrators: courts have primary responsibility to determine arbitrability unless the parties clearly and unmistakably agree otherwise. *First Options*, 514 U.S. at 944. This presumption is fundamental to arbitration. The rule is based on Supreme Court precedent recognizing that "the question of arbitrability . . . is undeniably an issue for judicial determination . . . [u]nless the parties clearly and unmistakably provide otherwise." *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 649 (1986) (cited in *First Options*, 514 U.S. at 943–44). As a result, courts have primary responsibility to determine whether there is a contractual obligation to arbitrate unless parties grant this primary responsibility to determine arbitrability to the arbitrator. The need for an agreement to reverse this legal presumption follows "inexorably from the fact that arbitration is simply a matter of contract between the parties." *First Options*, 514 U.S. at 943; *see also Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1416 (2019) ("Consent is essential under the FAA . . . . ").

The Second Circuit's decision not to apply the *First Options* rule undermines both basic principles of arbitration that are essential to its legitimacy.

III. THE SECOND CIRCUIT'S REFUSAL TO APPLY THE *FIRST OPTIONS* RULE WILL ADVERSELY IMPACT BOTH DOMESTIC AND INTERNATIONAL ARBITRATION

The *First Options* rule is a pillar of domestic and international arbitration under the FAA. This rule applies to domestic and international cases under the FAA. *See, e.g.*, *First Options*, 514 U.S. 938 (domestic); *BG Group*, 572 U.S. 25 (international). The *First Options* rule also applies to New York Convention award enforcement proceedings filed in the United States to obtain recognition and enforcement of foreign arbitration awards. *See, e.g.*, *China Minmetals Materials Imp. & Exp. Co. v. Chi Mei Corp.*, 334 F.3d 274 (3d Cir. 2003) (Alito, C.J.).

The attractiveness of New York as a place of arbitration and a venue for enforcing arbitration awards is based largely on the expectation that the FAA will be applied in accordance with Supreme Court precedent. The Second Circuit's rejection of the *First Options* rule undermines that expectation. This can only weaken confidence in arbitration in the United States generally and in New York's role as a leading global arbitral center.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari in this case.

Respectfully submitted,

LOUIS B. KIMMELMAN
Counsel of Record
BROOKLYN LAW SCHOOL
250 Joralemon Street
Brooklyn, New York 11201
(917) 254-7869
louis.kimmelman@brooklaw.edu

Counsel for Amicus Curiae

April 29, 2022