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

REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REPLY IN SUPPORT OF PETITION FOR CERTIORARI 1

ARGUMENT 3

I. The Decision Below Clashes With *First Options* And Its Progeny 3

II. There Are No Vehicle Problems 9

III. The Question Presented Is Important 10

CONCLUSION 13

TABLE OF AUTHORITIES

Cases

BG Grp., PLC v. *Republic of Argentina*,
572 U.S. 25 (2014) .... *passim*

First Options of Chicago, Inc. v. *Kaplan*,
514 U.S. 938 (1995) .... *passim*

Hart Surgical, Inc. v. *Ultracision, Inc.*,
244 F.3d 231 (1st Cir. 2001) 8

Michaels v. *Mariforum Shipping, S. A.*,
624 F.2d 411 (2d Cir. 1980) 8

Scherk v. *Alberto-Culver Co.*,
417 U.S. 506 (1974) 11

State v. *United States*,
986 F.3d 618 (6th Cir. 2021) 12

Other Authorities

Brief for the Securities Industry Association as Amicus Curiae Supporting Respondents, *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 1995 U.S. S. Ct. Briefs LEXIS 134 .... 11, 12

Restatement (Third) U.S. Law of Int'l Comm. Arb. § 1.1 (Am. Law Inst. 2019) 8

REPLY IN SUPPORT OF PETITION FOR CERTIORARI

Although Respondent's brief in opposition purports to do otherwise, it effectively concedes that the Second Circuit's holding undoes *First Options*—a fact that none of its red herrings, irrelevancies, and mischaracterizations could obscure.

Thus, Respondent says the decision below has "clarif[ied] for future litigants how U.S. courts will interpret *utter silence* on the question of who should decide arbitrability[.]" Opp. 24 (emphasis added). Following the Second Circuit's decision, as Respondent explains, parties must "signal in *some* way that they want this question reserved for a court." *Id.*, at 24–25.

Therein lies the rub. *First Options* held precisely the opposite: "[T]he law treats silence or ambiguity about the question '*who* (primarily) should decide arbitrability' differently from the way it treats silence or ambiguity about the question '*whether* a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement'—for in respect to this latter question the law reverses the presumption." *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 944–45 (1995). As this Court explained, "[i]f the contract *is silent* on the matter of who primarily is to decide 'threshold' questions about arbitration," then "courts presume that the parties intend *courts*, not arbitrators, to decide what we have called disputes about 'arbitrability.'" *BG Grp., PLC* v. *Republic of Argentina*, 572 U.S. 25, 34 (2014) (emphases added).

Respondent not only ignores the *First Options* presumption governing the who-primarily-decides question but, even more importantly, the strength of that presumption. That presumption cannot be overcome with anything less than "clear and unmistakable" evidence. And Respondent wholly disregards the critical distinction this Court drew in *First Options* between (a) the right to argue arbitrability to a tribunal, and (b) the right of the party objecting to the tribunal's arbitrability determination to *de novo* judicial review.

Respondent has no cogent response to the Second Circuit's fundamental conflict with this Court's clear instructions. So it resorts to irrelevancies and distractions. It argues *First Options* involved an arbitration respondent rather than a claimant, and that the 'arbitrability' question here is unusual in that it concerns the right to obtain relief under a treaty. None of this is relevant. Indeed, Respondent's attempt to marshal a parade of distinguishing facts is detached from the Second Circuit's actual, broad reasoning.

Moreover, the question presented is critically important. The decision below undermines the foundation of arbitration—mutual agreement to arbitrate only those disputes to which the parties agreed. It also places the Second Circuit out of step with other international-arbitration centers, contravening the federal interest in uniformity reflected in the New York Convention. This is particularly troubling for the Circuit that is home to the premier international center of arbitration in the United States—New York. The Court should grant the petition, and summarily reverse.

ARGUMENT

I. The Decision Below Clashes With *First Options* And Its Progeny

The rule announced in *First Options* is well-established and long-settled: Unless there is "clear and unmistakable" evidence otherwise, "courts presume that the parties intend courts, not arbitrators, to decide what we have called disputes about 'arbitrability,'" including questions about a tribunal's jurisdiction. *BG Grp.*, 572 U.S., at 34. In line with that presumption, *First Options* held that arguing arbitrability to arbitrators is insufficient to forego *de novo* judicial review of their arbitrability rulings. 514 U.S., at 946.

In the decision below, however, the Second Circuit tossed those principles out; it held that Petitioners forewent *de novo* judicial review merely by agreeing to a schedule for the submission of jurisdictional and other issues, and by then making jurisdictional arguments to the arbitrators. Pet. 9; Pet. App. 16a. Faced with this obvious conflict warranting the Court's intervention, Respondent tries to recharacterize both *First Options* and the decision below. Those efforts fail—indeed, they only highlight why the petition should be granted.

A. To begin, Respondent says *First Options* involved a respondent resisting arbitration, whereas the decision below involves arbitration claimants. Opp. 2–3, 20–21, 24. As with Respondent's other arguments, that is a distinction without a difference.

First Options draws no distinction based upon party status, and nothing in *First Options* turned on the fact that the Kaplans were arbitration respondents rather than claimants. The question was solely whether there was clear evidence of *an agreement by all parties* "to be effectively bound" by arbitrators' rulings on arbitrability—rather than merely permitting arbitrators to make "an initial (but independently reviewable) arbitrability determination." 514 U.S., at 946–47. It was not a question of waiver, forfeiture, or preservation. It was about what both parties had agreed as to who would decide arbitrability questions. And the Court specifically held that "merely arguing" arbitrability was not enough to show *an agreement* to be bound by a ruling on arbitrability. *Ibid.*

Nor is the premise of Respondent's argument sound. Respondent asserts "the party that initiated the arbitration" is the one that must be considered to have "submitted both the merits question *and* the question of arbitrability to the arbitrators." Opp. 2. But the opposite is true. As amicus Professor Bermann explains, it is the *respondent* who triggers a tribunal's exercise of its power to determine its own jurisdiction by *objecting*. Bermann Amicus Br. 14 ("Not only is Claimant not the party that invited the tribunal's inquiry into arbitral jurisdiction, but it could do nothing to prevent it.").

B. Respondent misses the mark again when it next urges that this case supposedly involves an atypical arbitrability issue that is intertwined with the merits

of a treaty arbitration. Opp. 3–5, 17–18, 21–22. The simple answer here is that the Circuit held that "the issue of whether Article 8(3) of the Treaty reaches Petitioners-Appellants' claims for expropriation does in fact constitute a dispute about 'arbitrability'" within the meaning of *First Options*. Pet. App. 18a. Whether that ruling is correct or not—and it is correct, see *BG Group*, 572 U.S., at 32—is not at issue here. The sole legal problem raised by this petition is that the Circuit went on from this ruling to fundamentally depart from the *First Options* framework for resolving the who-primarily-decides-arbitrability question.[1]

By the same token, Respondent gets nowhere arguing that "the Treaty had obviously delegated to the tribunal the authority to determine *everything* about the arbitration and the substantive claims it would reach." Opp. 19 (emphasis in original). Respondent never raised the argument before the Second Circuit and, regardless, the Circuit reached the opposite conclusion: "the Treaty in this case does not supply 'clear and unmistakable' evidence that the Parties intended to submit arbitrability issues to arbitration." Pet. App. 16a. This ruling (which was correct) is not presented here; the issue is whether the bifurcation of proceedings was, as the court below held, sufficient.

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[1] Respondent also lengthily argues that *First Options* should not apply to investment treaties, wherein parties could not have sued in the United States. Opp. 4–5, 16–18, 20. This is not just irrelevant, but also incorrect, *BG Group*, 572 U.S., at 28–29, 33.

C. Respondent clearly misstates the law when it next tries resisting the notion that the Circuit reversed the *First Options* presumption. Opp. 22–23. Consider again what *First Options* said: "[T]he law treats silence or ambiguity about the question '*who* (primarily) should decide arbitrability' differently from the way it treats silence or ambiguity about the question '*whether* a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement[.]'" 514 U.S., at 944–45. Seeking to justify the Circuit's decision, Respondent quotes a portion of *First Options* addressing that "latter question"—i.e., the "*whether*" question—writing that "'one can understand why the law would insist upon clarity before concluding that the parties did not want to arbitrate a related matter.'" Opp. 23 (quoting 514 U.S., at 945). The core point—apparently lost on Respondent—is that *First Options* "reverses th[is] presumption" when it comes to "the 'who (primarily) should decide arbitrability' question." 514 U.S., at 945.

As to the who-primarily-decides question, this Court instructs, silence is *not* enough to forgo *de novo* review: "If the contract is silent on the matter of who primarily is to decide 'threshold' questions about arbitration," then "courts presume that the parties intend courts, not arbitrators, to decide what we have called disputes about 'arbitrability.'" *BG Grp.*, 572 U.S., at 34. *Compare* Opp. 22–23, *with First Options*, 514 U.S., at 945 ("[G]iven the principle that a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration, one can understand

why courts might hesitate to interpret silence or ambiguity on the 'who should decide arbitrability' point as giving the arbitrators that power[.]").

The Second Circuit plainly reversed *that* presumption. Respondent gives up the game there when it announces, as if it were a virtue, that the Circuit has "clarif[ied] for future litigants" that "utter silence on the question of who should decide arbitrability" will not be enough to obtain *de novo* review, and that litigants must "signal in *some* way that they want this question reserved for a court," Opp. 24–25. This is precisely the *opposite* of what *First Options* held.

D. Finally, arguing the merits and contending the decision below is supposedly "factbound"—despite elsewhere acknowledging it "clarif[ies]" the law for "future litigants," Opp. 24—Respondent adduces a grab-bag of facts that, in its view, shows the Circuit got it right. Respondent recites facts on which the Circuit relied (for example, the parties agreed to bifurcated proceedings, Opp. 9, 18) and many facts on which the Circuit did not (for example, Petitioners proposed proceeding under the UNCITRAL Rules, Opp. 9–10, 18). Not one of Respondent's factoids salvages the decision below, because not one of them shows that the parties reached an agreement "to be effectively bound" by the arbitrators' arbitrability ruling, rather than simply "allowing the arbitrator[s] to make an initial (but independently reviewable) arbitrability determination." *First Options*, 514 U.S., at 946–47.

Consider, for example, the core point on which the Circuit relied, but which Respondent relegates to a secondary role—the bifurcation of proceedings into a jurisdiction-and-liability phase and a damages phase. Respondent does not dispute this occurs routinely in arbitrations (a point made in the petition, at 16 & n.3). Nor does it dispute that an order of bifurcation does not clearly show the parties agreed "to be effectively bound" by the arbitral ruling on arbitrability rather than to have an "independently reviewable[] arbitrability determination." *First Options*, 514 U.S., at 946–47. As such, it is plainly insufficient.

The same is true of Respondent's mention of the Petitioners' request that the arbitrators issue a "final and binding" award. Opp. 5, 10, 11. As amicus Professor Bermann explains, this merely signifies that the arbitrators will have completed their work on the point, Bermann Br. 16–17, such that the award would be subject to confirmation or similar judicial proceedings. Restatement (Third) U.S. Law of Int'l Comm. Arb. § 1.1 Cmt. *o*. ("Final award") (Am. Law Inst. 2019).[2] But the fact that judicial review becomes available under the FAA does not speak to the *standard* used in that review—i.e., deferential or *de novo*.

As to that, there can be no question that the Second Circuit contradicted *First Options*' core holding, and not one of Respondent's remaining arguments

[2] *E.g.*, *Hart Surgical, Inc.* v. *Ultracision, Inc.*, 244 F.3d 231, 234 (1st Cir. 2001); *Michaels* v. *Mariforum Shipping, S. A.*, 624 F.2d 411 414–15 (2d Cir. 1980).

shows otherwise. In fact, Respondent remarkably cites a portion of the Circuit's decision that *expressly* "rejected" 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*." Pet. App. 24a–25a (cited at Opp. 22). That distinction is at the very core of *First Options*.

II. There Are No Vehicle Problems

Respondent also claims there are "vehicle" problems with this case, but its arguments are difficult to understand—and in any event wrong.

Respondent first argues that the petition is an "esoteric vehicle" as "[t]here can be no precedential effect attached to this decision." Opp. 5–6. It is unclear what that means, or why Respondent thinks the decision will lack "precedential effect." The Circuit issued a published decision. And, to again borrow Respondent's words, it "clarif[ied] for future litigants" that the law in the Circuit is the opposite of what *First Options* held: "utter silence" will mean the converse of what it meant before. Opp. 24. That makes it a solid, not an "esoteric," vehicle to address the question presented.

Respondent also argues that the "ultimate vehicle problem" is that, in Respondent's view, the decision below is supposedly factbound. Opp. 29. This is wrong for the reasons discussed (pp. 7–9), and in any event it would not be a "vehicle problem." More to the point,

the only issue raised in this petition is the legal question of whether participation in an arbitration—including a party's agreement to a scheduling order as to the timing of jurisdictional objections and arguments to the arbitrators—is sufficient to show "clear and unmistakable" evidence of an agreement to arbitrate arbitrability and forgo the default standard of *de novo* review that presumptively applies to judicial challenges to arbitrability determinations. That question is squarely presented.

III. The Question Presented Is Important

The question presented is of great importance. Bifurcations of arbitral proceedings are commonplace, and the decision below undermines the fundamental principle underlying arbitration—consent; the *First Options* holding indeed flows from the fact that parties may be required to arbitrate only what they have agreed to arbitrate, and from the presumption that parties intend courts, not arbitrators, to finally decide arbitrability questions. The Circuit's decision will also harm the recognized U.S. interest in having uniform standards govern arbitrations and create a host of practical problems at the premier seat of international arbitration in the United States, including by encouraging needless pre-arbitration litigation. Pet. 14–24; NYCBA Br. 8; Scholars' Br. 17–19; Bermann Br. 17–18.

Respondent completely ignores these points. For example, Respondent does not dispute that the deci-

sion below will multiply U.S. lawsuits related to arbitration. Respondent does not dispute that there is an imperative federal interest in "unify[ing] the standards by which agreements to arbitrate are observed and arbitral awards are enforced," as reflected in the New York Convention, an important treaty to which the United States is a party. *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974). Nor does Respondent dispute that, on the facts presented, *de novo* judicial review would have been available in all other arbitration centers—as it should be under *First Options*. See Scholars' Br. 4–17 (describing practice in England and Wales, Singapore, France, Switzerland, and Sweden). Any of these factors is plainly sufficient to justify review. See Pet. 15 (citing *BG Grp.*, 572 U.S., at 32).

And the few arguments that Respondent does muster fail. *First*, Respondent effectively urges that the Second Circuit's reversal of *First Options* is no big deal because in the future a litigant would know not to remain silent, but rather would "signal in *some* way" its intentions. Opp. 23-25. Putting aside that it is obviously important to ensure that the Second Circuit abides by this Court's directives, the Circuit's decision to undo *First Options* is important, as it fundamentally "undermines [the] basic principles of arbitration that are essential to [arbitration's] legitimacy." NYCBA Br. 7; see also Bermann Br. 3.[3]

[3] The Securities Industry Association made the same point as amici in *First Options*. See Amicus Curiae in Support of Respond-

Second, Respondent says "[a]d hoc treaty-based arbitrations are exceedingly rare nowadays," and treaties tend to "involve ICSID" or UNCITRAL. Opp. 26–29. Ad hoc arbitrations are not as rare as Respondent would have it, and the United States and state governments are sometimes a party.[4] But the more important point is that Respondent misses the forest for the trees: the Second Circuit's ruling applies to judicial review of *all* arbitrability questions in *all* arbitrations in the Second Circuit—and not just ad hoc treaty-based ones: commercial cases, labor disputes, employment contests, securities and antitrust cases, and everything else.

* * *

In sum, this case does not just implicate a direct conflict with the settled law of this Court, it also plainly raises critically important questions going to the legitimacy of the arbitration process.

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ents, No. 94-560, 1995 U.S. S. Ct. Briefs LEXIS 134, p. 14 ("A decision concerning the arbitrator's authority to resolve a particular dispute is altogether different. As with questions about whether a specific issue is within the scope of the arbitration agreement or whether the arbitrator has authority to utilize a particular remedy, the question of arbitrability goes to the legitimacy of the dispute resolution process. That legitimacy stems from the contract between the parties.").

[4] See, e.g., *State* v. *United States*, 986 F.3d 618 (6th Cir. 2021).

CONCLUSION

The petition should be granted, and the judgment of the court of appeals should be summarily reversed, or else the case should be heard on the merits.

Respectfully submitted,

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