No.

# In the Supreme Court of the United States

PETROBRAS AMERICA INC., ET AL., PETITIONERS

*v.*

TRANSCOR ASTRA GROUP S.A., ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS*

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTION PRESENTED

Whether, when parties have entered a contract with an arbitration clause that delegates to the arbitrator questions of arbitrability, the arbitrator—rather than a court—must decide whether the contract has been superseded by a subsequent contract.

## PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioners are Petrobras America Inc. and Petróleo Brasileiro S.A.—Petrobras.

Petrobras America Inc. is a wholly owned subsidiary of PIB BV, which is partially owned by petitioner Petróleo Brasileiro S.A.—Petrobras.

Petróleo Brasileiro S.A.—Petrobras has no parent corporation, and no publicly held company holds 10% or more of its stock.

Respondents are Transcor Astra Group S.A.; AOT Bis B.V.; Astra Energy Holdings, Inc.; Astra Oil Trading NV; Astra Oil Company, LLC; Astra GP, Inc.; Astra Tradeco LP, LLC; Pasadena Refinery Holding Partnership; Pasadena Refining System, Inc.; PRSI Real Property Holdings, LLC; PRSI Trading, LLC; Eric Bluth; Kari Burke; Daniel Burla; Charles L. Dunlap; Alberto Feilhaber; John T. Hammer; Ireneusz Kotula; Rolf Mueller; Thomas J. Nimbley; Carlos E. Ortiz; Stephen Wade; and Clifford L. Winget, III.[*]

[*] Pursuant to Rule 12.6, petitioners have notified the Clerk that they believe that Pasadena Refining System, Inc.; PRSI Real Property Holdings, LLC; PRSI Trading LLC; and Alberto Feilhaber have no interest in the outcome of the petition. Petitioners have served a copy of that notice on all parties to the proceedings below.

**RELATED PROCEEDINGS**

District Court of Harris County, Texas:

*Petrobras America, Inc.*, *et al.* v. *Astra Oil Trading NV*, *et al.*, No. 2016-43650 (June 1, 2018)

Fourteenth Court of Appeals of Texas:

*Petrobras America, Inc.*, *et al.* v. *Astra Oil Trading NV*, *et al.*, Nos. 14-18-728-cv, 14-18-793-cv & 14-18-798-cv (Aug. 20, 2020)

Supreme Court of Texas:

*Transcor Astra Group S.A.*, *et al.* v. *Petrobras America Inc.*, *et al.*, No. 20-932 (Apr. 29, 2022)

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## PETITION FOR A WRIT OF CERTIORARI

Petrobras America Inc. and Petróleo Brasileiro S.A.—Petrobras respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Texas in this case.

### OPINIONS BELOW

The opinion of the Supreme Court of Texas (App., *infra*, 1a-33a) is reported at 650 S.W.3d 462. The opinion of the Court of Appeals of Texas (App., *infra*, 34a-92a) is reported at 633 S.W.3d 606. The relevant opinions of the trial court (App., *infra*, 93a-106a) are unreported.

## JURISDICTION

The judgment of the Supreme Court of Texas was entered on April 29, 2022. A petition for rehearing was denied on September 2, 2022 (App., *infra*, 106a). The jurisdiction of this Court is invoked under 28 U.S.C. 1257.

## STATUTORY PROVISION INVOLVED

Section 2 of the Federal Arbitration Act, 9 U.S.C. 2, provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

## STATEMENT

This case presents a vitally important question concerning the Federal Arbitration Act that has divided the federal courts of appeals and state courts of last resort. Under the Arbitration Act, "parties may agree to have an arbitrator decide not only the merits of a particular dispute but also "'gateway' questions of 'arbitrability.'" *Henry Schein, Inc.* v. *Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019). Courts must enforce an agreement delegating questions of arbitrability to the arbitrator, because such an agreement is "simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce." *Rent-A-Center, West, Inc.* v. *Jackson*, 561 U.S. 63, 70 (2010). The question presented here is whether an arbitrator—rather than a court—must

decide whether an arbitration agreement that delegates questions of arbitrability to an arbitrator has been superseded by a subsequent contract.

Petitioners and respondents are international energy companies and former partners in a joint venture. To facilitate that joint venture, the parties entered into an initial agreement that required the arbitration of all relevant disputes, including disputes about the applicability and enforceability of the arbitration agreement itself. When the joint venture fell apart, the parties asserted numerous claims against each other in both arbitration and litigation. The parties ultimately resolved their disputes by entering into a global settlement agreement.

After the settlement agreement was concluded, the Brazilian government began investigating allegations of bribery and kickbacks in connection with the joint-venture agreement. In 2017, the Brazilian government filed formal criminal charges against several individuals, including respondents' vice president for Latin American trading. When those allegations came to light, petitioners proceeded to assert claims related to the joint-venture agreement in arbitration. Petitioners separately asserted claims arising out of the settlement agreement in state court.

Respondents asked the state court to stop the arbitration, arguing that the settlement agreement had superseded the joint-venture agreement, including its arbitration provision. The court agreed and further concluded that petitioners had released the claims asserted in the arbitration. The court declined to compel arbitration of the question whether the settlement agreement superseded the arbitration provision in the joint-venture agreement. The Texas Supreme Court affirmed in relevant part, holding that the settlement agreement negated the parties' clear and unmistakable manifestation of intent in

the joint-venture agreement to delegate to the arbitrator any questions about the arbitrability of the claims.

The Texas Supreme Court's decision was erroneous, and it deepens a conflict among federal courts of appeals and state courts of last resort on the question whether an arbitrator must decide whether an arbitration agreement delegating questions of arbitrability to an arbitrator has been superseded by a subsequent contract. One federal court of appeals and one state supreme court have held that the arbitrator must decide that question. But two federal courts of appeals and three state supreme courts, including the court below, have reached the opposite conclusion. Because this case is an ideal vehicle for resolving the conflict on an important question of federal law, the petition for a writ of certiorari should be granted.

**A. Background**

1. In 1925, Congress enacted the Arbitration Act to "reverse the longstanding judicial hostility to arbitration agreements." *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). As this Court has repeatedly recognized, the Arbitration Act reflects "both a liberal federal policy favoring arbitration and the fundamental principle that arbitration is a matter of contract." *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 339 (2011) (internal quotation marks and citations omitted).

Section 2 of the Arbitration Act—the Act's "primary substantive provision," *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1, 24 (1983)—provides that "[a] written provision in * * * a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract * * * shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. 2. Consistent

with that express mandate and the broader policy underlying the Arbitration Act, courts must "place[] arbitration agreements on an equal footing with other contracts and * * * enforce them according to their terms." *Rent-A-Center*, 561 U.S. at 67 (citations omitted).

The requirement that courts rigorously enforce arbitration agreements applies to "gateway" disputes over arbitrability. See *Rent-A-Center*, 561 U.S. at 68-70. The question of arbitrability concerns "whether the parties have submitted a particular dispute to arbitration." *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002). It encompasses issues such as "whether the parties are bound by a given arbitration clause" and "whether an arbitration clause in a concededly binding contract applies to a particular type of controversy." *BG Group plc* v. *Republic of Argentina*, 572 U.S. 25, 34 (2014) (citation omitted).

2. Although a court presumptively resolves disputes over arbitrability, there are some circumstances under which the court must refer such disputes to the arbitrator. Two are of particular relevance here.

*First*, parties are permitted to agree to arbitrate questions of arbitrability, and a court will enforce such an agreement as long as there is "clear and unmistakable" evidence of the agreement. *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 943-944 (1995) (citation and alterations omitted). One way for parties to accomplish that result is by including in their arbitration agreement a provision delegating questions of arbitrability to an arbitrator. As this Court has explained, a delegation provision is "simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce," and the Arbitration Act "operates on this additional arbitration agreement just as it does on any other." *Henry Schein*, 139 S. Ct. at 529 (citation omitted). When parties

include such a provision, the delegation of authority to the arbitrator applies to virtually all gateway disputes over arbitrability. See *ibid.* (citation omitted).

*Second*, this Court has held that, as a "matter of federal law," arbitration agreements are "'separable' from the contracts in which they are embedded." *Prima Paint Corp.* v. *Flood & Conklin Manufacturing Co.*, 388 U.S. 395, 402-405 (1967). Under that federal rule of severability, a challenge to "the contract as a whole, either on a ground that directly affects the entire agreement" or "on the ground that the illegality of one of the contract's provisions renders the whole contract invalid," must be decided by the arbitrator rather than the court. *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440, 444-445 (2006). Accordingly, when a party argues that an arbitration agreement is unenforceable because the broader contract in which it is embedded is invalid for some reason, a court must send that issue to the arbitrator. See *ibid.*

This Court has made clear that the same severability rule governs the relationship between a delegation provision and the arbitration agreement in which it is situated. See *Rent-A-Center*, 561 U.S. at 74-75. A party resisting arbitration thus cannot avoid a delegation provision by arguing that the arbitration agreement in which it is embedded is unenforceable. Instead, the party resisting arbitration must "challenge[] the delegation provision specifically." *Id.* at 72.

**B. Facts And Procedural History**

1. Petitioners are Petróleo Brasileiro S.A.—Petrobras, the Brazilian state-owned energy company, and its American subsidiary, Petrobras America Inc. Respondents are Astra Oil Company LLC, a multinational energy company; several of Astra Oil's subsidiaries, affiliates, and

officers or employees; and certain other business entities related to an oil refinery in Pasadena, Texas.

The dispute in this case arose from the failure of a joint venture between petitioners and respondents. In 2006, the parties agreed to do business together. In addition to setting forth the terms of the joint venture, their agreement included dispute-resolution procedures that required the arbitration of "[a]ny controversy or claim * * * arising out of or related to" the agreement if the dispute cannot be resolved through mediation. App., *infra*, 38a-39a.

The business relationship between the parties deteriorated, and the parties asserted numerous claims against each other in litigation and arbitration. In 2012, the parties agreed to resolve the outstanding claims by entering into a global settlement agreement, pursuant to which petitioners agreed to pay over $800 million. The parties agreed to release any and all claims related to the joint-venture agreement, and the settlement agreement designated the federal and state courts in Harris County, Texas, as the "exclusive forums for any dispute arising out of or related to" the settlement agreement or the transactions contemplated in it. App., *infra*, 3a, 28a-29a.

Petitioners eventually learned that respondents' officials had acted corruptly to convince them to accept both the initial joint-venture agreement and the subsequent settlement agreement. Specifically, petitioners learned that representatives of respondents had paid $15 million to bribe certain officials of petitioners to agree to the joint-venture agreement. Petitioners further believed that respondents offered those officials additional bribes totaling between $80 million and $100 million during the subsequent settlement negotiations. App., *infra*, 3a.

2. In 2016, petitioners commenced actions against respondents in two separate forums. Pursuant to the arbitration provisions in the joint-venture agreement, petitioners filed a demand for arbitration with the International Centre for Dispute Resolution of the claims related to the joint-venture agreement. App., *infra*, 4a. Petitioners "expressly disavowed" that those claims had anything to do with the settlement agreement and noted that "any claims that arise out of or relate to the [s]ettlement [a]greement" would be asserted in a separate lawsuit. *Id.* at 75a.

Petitioners also pursued their settlement-related claims in state court in Harris County, Texas, in accordance with the forum-selection clause in the settlement agreement. App., *infra*, 3a, 28a, 37a. Petitioners asserted claims for fraud, breach of fiduciary duty, and negligent misrepresentation and sought a declaration that the settlement agreement was invalid. *Id.* at 3a-4a. Respondents raised several counterclaims and sought declaratory relief of their own. *Id.* at 4a-5a. As is relevant here, respondents also asked for a declaration that the settlement agreement barred petitioners' claims both in court and in arbitration. *Ibid.*

The state trial court granted summary judgment to respondents on all of petitioners' claims. App., *infra*, 94a-95a. At summary judgment, petitioners argued that the court had no power to issue a declaration concerning the effect of the release on the arbitration, because doing so would improperly infringe on the arbitrator's jurisdiction. Rejecting that argument, the trial court also entered a declaratory judgment in favor of respondents. *Id.* at 102a-105a. As is relevant here, the declaratory judgment stated that the settlement agreement is "valid, binding, and enforceable in all respects" and that it released all

"claims sought to be asserted by" petitioners in arbitration "and other claims arising out of or related to" the joint-venture agreement. *Id.* at 95a.

3. The Fourteenth Court of Appeals of Texas affirmed in relevant part, App., *infra*, 72a-77a, as did the Texas Supreme Court, *id.* at 26a-30a.

In its decision, the Texas Supreme Court focused its analysis on petitioners' argument concerning the delegation provision in the joint-venture agreement. The court acknowledged that the joint-venture agreement "indisputably includes a clear and unmistakable agreement that the arbitrator will decide any question regarding the 'validity' of the parties' arbitration agreement." App., *infra*, 28a. But the court concluded that the subsequent settlement agreement eliminated the necessary clear and unmistakable evidence of a delegation. In the court's view, it could not conclude that "a presently enforceable arbitration agreement clearly and unmistakably exists," because the settlement agreement purported to "supersede" the entire joint-venture agreement. *Id.* at 29a-30a.

Having decided that the joint-venture agreement—including its arbitration and delegation provisions—was no longer enforceable, the Texas Supreme Court concluded that a court must determine whether the settlement agreement barred petitioners' claims in arbitration. App., *infra*, 29a-30a. The court proceeded to determine that, because the parties included the "broadest type of general release" in the settlement agreement, the arbitration could not go forward. *Id.* at 30a.

5. A petition for rehearing was denied. App., *infra*, 106a.

## REASONS FOR GRANTING THE PETITION

This case presents the question whether an arbitrator must decide whether an arbitration agreement that delegates questions of arbitrability to the arbitrator has been superseded by another contract. That question is the subject of an entrenched conflict among both the federal courts of appeals and state courts of last resort. In holding that a court must decide the question of supersession despite the presence of a valid delegation, the Texas Supreme Court improperly overrode the intent of the contracting parties and violated black-letter principles of federal arbitration law. Only this Court can resolve the conflict and correct those departures from its precedents, and this case is an excellent vehicle in which to do so. The petition for a writ of certiorari should be granted.

### A. The Decision Below Deepens A Conflict Among The Federal And State Appellate Courts

The Texas Supreme Court's decision deepens an existing conflict on the question presented among the federal courts of appeals and state courts of last resort. One federal court of appeals and one state supreme court have correctly held that, where parties have agreed to delegate to an arbitrator questions of arbitrability, the arbitrator must resolve any dispute over whether a subsequent contract has superseded the arbitration agreement. By contrast, two federal courts of appeals and two additional state supreme courts have held, like the Texas Supreme Court in the decision below, that the presence of an allegedly superseding contract negates an otherwise clear and unmistakable delegation, even when the supersession argument applies generally to the arbitration agreement as a whole. The resulting conflict warrants the Court's review.

1. The Fifth Circuit and the Alabama Supreme Court have both held that an arbitrator must decide whether an arbitration agreement that delegates questions of arbitrability to the arbitrator has been superseded by a subsequent contract.

a. The Fifth Circuit was the first court to address the question presented in *Agere Systems, Inc.* v. *Samsung Electronics Co.*, 560 F.3d 337 (2009). In that case, the parties entered into a series of patent licensing agreements, one of which included an arbitration agreement that unmistakably delegated questions of arbitrability to the arbitrator. See *id.* at 338. But a subsequent licensing agreement did not contain any provisions requiring the arbitration of disputes. See *id.* at 339. When a dispute later arose between the contracting parties concerning the subsequent agreement, the district court denied a motion to compel arbitration, holding that the later agreement superseded the arbitration provisions in the earlier agreement. See *ibid.*

The Fifth Circuit reversed. It held that resolution of the question whether the later agreement superseded the earlier agreement had been "left for the arbitrator," because the earlier agreement "explicitly confer[ed] upon an arbitrator the power of determining what 'arises out of or relates to' the [earlier] agreement." 560 F.3d at 340. The Fifth Circuit added that "the federal policy in favor of arbitration applies to resolving doubts concerning the coverage of a broadly worded arbitration clause." *Ibid.*

b. The Alabama Supreme Court reached a similar conclusion in *Blanks* v. *TDS Telecommunications LLC*, 294 So. 3d 761 (2019). There, the defendant internet providers had entered into successive service agreements with the plaintiff customers. See *id.* at 762-763. The initial version of the agreements required arbitration of all

disputes between the parties, including disputes about arbitrability. See *id.* at 762. A later version of the agreements, however, expressly prohibited the arbitration of disputes with customers who receive service in Alabama and Georgia. See *id.* at 763. The plaintiff customers—all recipients of service in Alabama or Georgia—filed demands for arbitration against the service providers, arguing that the subsequent version of the agreement did not apply retroactively. See *ibid.* The providers disagreed, arguing that the later version rendered the arbitration provision in the earlier agreements inoperative. See *ibid.* The trial court declined to compel arbitration. See *ibid.*

The Alabama Supreme Court reversed. The court began by explaining that "[a]n agreement to arbitrate a gateway issue [of arbitrability] is simply an additional, antecedent agreement the party seeking arbitration asks the * * * court to enforce." 294 So. 3d at 766 (citation omitted). The court then noted that there was "no real dispute" that the parties were at one point bound by the initial version of the agreements and that the initial version "evidenced an agreement to delegate issues of arbitrability to an arbitrator." *Ibid.* Because the initial version of the agreements contained a delegation provision and the question of supersession presented "an issue of arbitrability," the court concluded that the arbitrator must resolve the issue. *Ibid.*

2. Like the Texas Supreme Court in the decision below, two federal courts of appeals have held that a court must decide whether an arbitration agreement that delegates questions of arbitrability to the arbitrator has been superseded by a subsequent contract.

a. The First Circuit addressed the issue in *McKenzie* v. *Brannan*, 19 F.4th 8 (2021). There, an artist and an art publisher entered into a contract that included an arbitration agreement that delegated questions of arbitrability

to the arbitrator. See *id.* at 11, 14. When a dispute arose, the parties commenced arbitration but later agreed to a term sheet under which the previous agreement would be terminated and the arbitration dismissed. See *id.* at 11-12. The parties were unable to formalize their settlement, however, and one of the parties sought to resume the arbitration. See *id.* at 12-13. The other party, which believed that the term sheet constituted a binding contract, filed suit in federal court to stop the arbitration. See *id.* at 13. The district court declined to do so. See *id.* at 15. It concluded that, because the initial agreement delegated questions of arbitrability to the arbitrator, the supersession question was for the arbitrator to decide. See *id.* at 14-15.

The First Circuit reversed. The court began by noting that gateway issues of arbitrability are presumptively for a court to decide unless there is "clear and unmistakable evidence" that the parties agreed to arbitrate those issues. 19 F.4th at 17 (internal quotation marks and citations omitted). The court acknowledged that the parties' initial agreement had a "'broad' arbitration clause delegating the decision making power to an arbitrator to resolve the dispute at hand," but it reasoned that the existence of the later term sheet negated the "clear and unmistakable evidence" in the first agreement. *Id.* at 18-19. The court thus concluded that "it is the court, not the arbitrators, who must resolve" whether the parties were still bound by the original arbitration agreement. *Id.* at 19-20 (internal quotation marks and citation omitted). In so holding, the court acknowledged that general challenges to a contract do not invalidate an arbitration agreement (or a delegation) within the contract. See *id.* at 20-21. But it concluded that the district court should consider the question whether the plaintiff's challenge was directed to the arbitration agreement specifically or the

container contract generally as part of its arbitrability analysis on remand. See *id.* at 21.

b. In *Field Intelligence, Inc.* v. *Xylem Dewatering Solutions Inc.*, 49 F.4th 351 (2022), the Third Circuit reached a conclusion similar to the one reached by the First Circuit in *McKenzie* and the Texas Supreme Court in the decision below. In *Field Intelligence*, a water-pump manufacturer entered into successive business contracts with a technology company to develop a system for monitoring and controlling pumps. See *id.* at 353-354. The parties' initial contract contained an arbitration agreement that delegated questions of arbitrability to the arbitrator. See *id.* at 354, 356. A subsequent contract, however, required litigation of disputes in federal or state court in New Jersey, and it contained an "integration clause" stating that the contract "supersede[d] any and all prior or contemporaneous understandings or agreements." *Id.* at 354. When the relationship between the two companies broke down, one party filed a demand for arbitration and the other filed suit in federal district court. See *id.* at 354-355. The district court enjoined the arbitration, determining that the subsequent contract had superseded the arbitration agreement in the first contract. See *id.* at 355.

The Third Circuit affirmed. The court acknowledged that neither party "dispute[d] that the [earlier] agreement was valid when executed." 49 F.4th at 358. But it reasoned that a "supersession challenge places the parties' mutual assent directly at issue." *Ibid.* Because the parties came to dispute whether they "agreed, by their [later] contract, not to submit the dispute" to arbitration, the Third Circuit reasoned that a court must resolve the supersession issue before referring the matter to arbitration. *Ibid.* In so holding, the Third Circuit considered this Court's precedents requiring the severability of arbitra-

tion agreements from their container contracts, but it concluded that those precedents did not apply because "the existence of the parties' arbitration agreement ha[d] been challenged." *Id.* at 357.

3. Two state courts of last resort have also held that a court, rather than an arbitrator, must decide whether an arbitration agreement with a delegation provision has been superseded by a subsequent contract. While those courts invoked state arbitration acts in reaching their decisions, they relied heavily on federal case law in the process.

a. In *Midwest Neurosciences Associates, LLC* v. *Great Lakes Neurosurgical Associates, LLC*, 920 N.W.2d 767 (2018), the Wisconsin Supreme Court considered the relationship between two successive contracts between the parties: an earlier one that required the arbitration of disputes, including disputes over questions of arbitrability, and a later one that lacked any arbitration agreement and that purported to supersede "all prior contracts." *Id.* at 770-771, 784.

On appeal from the denial of a motion to compel arbitration under the earlier agreement, a divided Wisconsin Supreme Court held that a court must decide the question of supersession. The majority reasoned that, in light of the subsequent agreement, there was no "clear and unmistakable" evidence of a delegation. 920 N.W.2d at 782-784. And it therefore held that a court had "initially [to] determine whether the parties contracted to arbitrate," including "ascertain[ing] which contract controls." *Id.* at 790; see also *id.* at 779-780 (relying on *Granite Rock Co.* v. *Teamsters*, 561 U.S. 287 (2010), and *Kindred Nursing Centers Limited Partnership* v. *Clark*, 137 S. Ct. 1421 (2017)).

In reaching that conclusion, the majority rejected the argument that the federal rule of severability required a

different result. See 920 N.W.2d at 786-787. The majority acknowledged that, under this Court's precedents, only challenges to "the arbitration clause itself," rather than challenges to "the contract generally," are suitable for judicial resolution. *Ibid.* (discussing *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440 (2006), and *Prima Paint Corp.* v. *Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967)). But the majority concluded that this Court's precedents were "distinguishable" because they did not specifically address an argument that an arbitration agreement is invalid because the contract in which it is located has been superseded by a subsequent contract. See *id.* at 787.

Justice Rebecca Grassl Bradley dissented. See 920 N.W.2d at 796-802. She began from the premise that the parties had entered into a contract that "confer[red] exclusive authority on the arbitrator to decide issues of arbitrability," including "the existence and validity" of the contract containing the arbitration clause. *Id.* at 798. Although she agreed with the majority that there were "serious questions" as to which agreement controlled, she believed that the parties had agreed to arbitrate those questions. *Ibid.* In her view, the majority's contrary conclusion "nullif[ied] the parties' arbitration agreement by creating a new rule bestowing on the judiciary the power to decide arbitrability even though the parties agreed an arbitrator would resolve th[e] issue." *Id.* at 796.

b. The Alaska Supreme Court addressed the question in *SMJ General Construction, Inc.* v. *Jet Commercial Construction, LLC,* 440 P.3d 210 (2019). There, the parties initially entered into a construction subcontract with a "broad dispute resolution provision" requiring arbitration of all disputes pursuant to the rules of the American Arbitration Association (AAA), which delegate questions of arbitrability to the arbitrator. *Id.* at 211, 214. A

series of disputes then arose, and the parties resolved them through a settlement agreement that was silent on the use of arbitration to resolve future disputes. See *id.* at 212, 215. When a further dispute arose, the state trial court declined to compel arbitration under the initial subcontract. See *id.* at 212-213.

The Alaska Supreme Court also declined to compel arbitration, holding that "[i]t is the task of the courts to decide whether the parties' two successive contracts—the subcontract and the settlement agreement—require [the plaintiff] to arbitrate its claims." 440 P.3d at 214. Citing both federal and state law, the court explained that courts must decide arbitrability issues unless "the parties have clearly and unmistakably provided otherwise." *Ibid.* (internal quotation marks, citations, and alteration omitted). The court acknowledged that the subcontract's reference to the AAA rules could be read as "intending that questions of arbitrability are for the arbitrator, not the courts." *Ibid.* (citing federal case law). But the court concluded that it "need not decide" that issue, because "whatever obligations the parties had under the subcontract have been explicitly released." *Ibid.* Because of the release provision in the subsequent settlement agreement, the court reasoned, the original contract was "to be regarded as history" and, as a result, "the parties had no obligation to arbitrate their claims." *Id.* at 216 (citation omitted).

4. In each of the foregoing cases, the parties had initially entered into an arbitration agreement that clearly and unmistakably evidenced an intent to delegate questions of arbitrability to the arbitrator. Under this Court's precedents, the arbitrator, rather than the court, must decide questions of arbitrability pursuant to such an agreement. The federal courts of appeals and state courts of last resort have sharply divided, however, on how those

precedents apply when a party resists arbitration on the ground that a subsequent contract supersedes the original arbitration agreement. The Fifth Circuit and the Alabama Supreme Court have concluded that the arbitrator must resolve the question of supersession in such a situation. Two other federal courts of appeals and three state supreme courts, including the Texas Supreme Court in the decision below, have reached the opposite conclusion.

The conflict on the question presented is substantial, and there is no realistic prospect that it will resolve itself without this Court's intervention. Further review is therefore warranted.

**B. The Decision Below Is Incorrect**

In this case, the Texas Supreme Court held that, despite a clear and unmistakable agreement to delegate questions of arbitrability to the arbitrator, a court may decide that an arbitration agreement is unenforceable because the broader contract containing the arbitration agreement has been superseded by a subsequent contract. That holding is incorrect.

1. As this Court has often reiterated, "arbitration is simply a matter of contract between the parties." *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 943 (1995). Consistent with that principle, the Arbitration Act permits parties to "agree to arbitrate 'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." *Rent-A-Center, West, Inc.* v. *Jackson*, 561 U.S. 63, 69-70 (2010). As long as there is "clear and unmistakable evidence" that the parties agreed to delegate questions of arbitrability to the arbitrator, "the courts must respect the parties' decision as embodied in the contract." *Henry Schein, Inc.* v. *Archer & White*

*Sales, Inc.*, 139 S. Ct. 524, 530-531 (2019) (internal quotation marks and citation omitted).

A court, in turn, "possesses no power to decide" questions of arbitrability if the parties have agreed to arbitrate those questions. *Henry Schein*, 139 S. Ct. at 529. "Just as a court may not decide a merits question that the parties have delegated to an arbitrator, a court may not decide an arbitrability question that the parties have delegated to an arbitrator." *Id.* at 530. Once the court determines that the parties entered into a valid delegation agreement, the court's only task is to enforce that agreement as written. See *ibid.*

Here, the Texas Supreme Court accepted that the parties' arbitration agreement in the broader joint-venture agreement clearly and unmistakably delegated questions of arbitrability to the arbitrator. App., *infra*, 28a. At that point, it should have ordered arbitration of the question whether the settlement agreement superseded the joint-venture agreement (and thus the arbitration agreement embedded in that agreement). By reserving that question for itself, the Texas Supreme Court decided one of the very questions of arbitrability that the parties agreed to delegate to the arbitrators—and, in so doing, failed to "respect the parties' decision as embodied" in the joint-venture agreement. *Henry Schein*, 139 S. Ct. at 528.

2. In reaching that conclusion, the Texas Supreme Court erred in two principal respects.

a. The Texas Supreme Court first misunderstood the nature of the "clear and unmistakable" requirement. The court concluded that it had to decide the question of supersession because the answer to that question affected whether the parties clearly and unmistakably agreed to delegate questions of arbitrability to the arbitrator. App., *infra*, 29a-30a. But the "clear and unmistakable" requirement "pertains to the parties' *manifestation of intent*, not

the agreement's *validity*." *Rent-A-Center*, 561 U.S. at 69 n.1. Those two issues are analytically distinct, see *Buckeye*, 546 U.S. at 444 n.1, and clear evidence is required only to show that the delegation of arbitrability "was in fact agreed to," not that the agreement is "legally binding" and enforceable. *Rent-A-Center*, 561 U.S. at 69 n.1. Where the parties have agreed to delegate questions of arbitrability to the arbitrator, the requisite "clear and unmistakable" evidence is present, and the question of validity or enforceability is for the arbitrator. See *ibid.*

It is undisputed that the arbitration agreement contained in the broader joint-venture agreement clearly and unmistakably delegates questions of arbitrability to the arbitrators. App., *infra*, 28a. The only remaining question is whether that delegation is now *unenforceable* because (as respondents have argued) the settlement agreement superseded the joint-venture agreement. Even if it did, it would not follow that the agreement to delegate was never formed in the first instance; the defense of supersession concerns the *enforceability* of the delegation, not its *formation*. The Texas Supreme Court thus erred when it considered the issue of supersession as bearing on the presence or absence of the necessary evidence to show a delegation. The requisite "clear and unmistakable" evidence is present because the arbitration agreement in the joint-venture agreement unquestionably delegated questions of arbitrability to the arbitrator.

b. The Texas Supreme Court also erred by ignoring this Court's clear instructions regarding the relationship between an arbitration agreement and the broader contract in which the agreement is embedded. Under this Court's precedents, a challenge to the enforceability of a contract as a whole does not suffice to challenge an arbitration agreement contained within that contract. See, *e.g.*, *Buckeye*, 546 U.S. at 444-447; *Prima Paint*, 388 U.S.

at 402-404. As a "matter of federal law," arbitration agreements are "'separable' from the contracts in which they are embedded." *Prima Paint*, 388 U.S. at 402. The challenge must thus be directed specifically at the arbitration provision, rather than at the contract as a whole. See *id.* at 402-404.

In addition, the Court has made clear that the same severability rule governs the relationship between a delegation provision and the arbitration agreement in which it is located. See *Rent-A-Center*, 561 U.S. at 71-72. A party resisting arbitration thus cannot avoid a delegation provision by arguing that the arbitration agreement in which it is embedded is unenforceable; instead, the party resisting arbitration must "challenge[] the delegation provision specifically." *Id.* at 72.

The Texas Supreme Court failed to adhere to those principles. The only basis on which it declined to enforce the delegation in the arbitration agreement here was that the settlement agreement had "superseded," as a whole, the joint-venture agreement in which the arbitration agreement was contained. App., *infra*, 28a-30a. Notably, the Texas Supreme Court relied on the very same ground when invalidating the broader joint-venture agreement (and the arbitration agreement with it). *Ibid.* The decision below itself thus demonstrates that respondents' supersession argument constituted a challenge to "the contract as a whole." *Rent-A-Center*, 561 U.S. at 70. Because the supersession argument was not specific to the delegation provision, the Texas Supreme Court erred by relying on it to invalidate the delegation. The court should instead have directed that argument to the arbitrator.

3. Contrary to the concerns expressed by some lower courts, see, *e.g.*, *Field Intelligence*, 49 F.4th at 358, the foregoing approach will not prevent parties from terminating preexisting arbitration agreements that delegate

questions of arbitrability to the arbitrator. Parties are free to include in a subsequent contract a provision specifically nullifying the delegation provision, and such a provision could form the basis of a court challenge to the delegation provision specifically. And of course, nothing prevents a party from raising a broader supersession argument before the arbitrator; if the argument is successful, the case would simply return to court.

To be sure, under the foregoing approach, a court may temporarily "enforce an arbitration agreement in a contract that the arbitrator later finds to be void" or otherwise unenforceable. *Buckeye*, 546 U.S. at 448. But this Court has already acknowledged and accepted that result as the necessary cost of the Arbitration Act's policy in favor of arbitrability. See *id.* at 449. Indeed, as the Court has explained, adopting a contrary rule would produce an equally harmful result: it would "permit[] a court to deny effect to an arbitration provision in a contract that the court later finds to be perfectly enforceable." *Id.* at 448-449. The Court acknowledged that challenges to a broader contract containing an arbitration agreement thus present an inevitable "conundrum." *Id.* at 449. But it concluded that, at least for challenges that do not go to the enforceability of the arbitration provision specifically, the Arbitration Act resolves that conundrum "in favor of the separate enforceability of arbitration provisions." *Ibid.*

The Texas Supreme Court erred by deciding the question of arbitrability in the face of a clear and unmistakable delegation of that question to the arbitrator, based solely on a supersession argument that applies generally to the arbitration agreement as a whole. This Court should grant the petition for a writ of certiorari and reverse the judgment below.

### C. The Question Presented Is An Important And Recurring One That Warrants The Court's Review In This Case

The question presented in this case is a frequently recurring one of substantial legal and practical importance. The Court's intervention is necessary to safeguard the Arbitration Act's commitment to the enforceability of commercial arbitration agreements and to provide clarity and uniformity in the law. This case, which cleanly presents the question, is an optimal vehicle for the Court's review.

1. As demonstrated by this Court's frequent grants of certiorari in cases involving the Arbitration Act, commercial arbitration is a critical part of our Nation's legal system. Among other valuable benefits, arbitration agreements allow private parties to resolve a broad range of disputes while avoiding the costs associated with traditional litigation. Parties frequently seek to maximize those efficiencies by delegating questions of arbitrability to the arbitrator as well.

The Texas Supreme Court's approach, which permits a court rather than an arbitrator to decide the effect of an allegedly superseding contract, disserves the interest in efficiency that leads parties to select arbitration in the first place. If it is allowed to stand, the Texas Supreme Court's approach will have the predictable result of unleashing a wave of potentially protracted mini-trials to determine the appropriate relationship between an arbitration agreement and successor agreements. That would "unnecessarily complicat[e] the law and breed[] litigation from a statute that seeks to avoid it." *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 275 (1995). As the Court previously cautioned, court proceedings on arbitrability can be a "time-consuming sideshow" in comparison to simply compelling arbitration of the question of arbitrability in the first instance. *Henry Schein*, 139 S. Ct. at

531. Indeed, in the context of arbitration agreements that delegate questions of arbitrability to the arbitrator, litigation of the question of arbitrability defeats the very purpose of the delegation.

The Texas Supreme Court's approach will also often result in a court effectively deciding the merits of a claim as part of the inquiry into whether the claim is arbitrable. Deciding the question of supersession often requires assessing the validity of the very contract at the heart of the merits of the parties' dispute. Cf. App., *infra*, 29a-30a. Allowing a court to make that decision despite the parties' agreement to arbitrate would be in direct tension with the Court's repeated caution that "a court has no business weighing the merits of the grievance because the agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious." *Henry Schein,* 138 S. Ct. at 529 (internal quotation marks and citation omitted).

In addition, the conflict among federal courts of appeals and state courts of last resort on the question presented will "encourage and reward forum shopping." *Southland Corp.* v. *Keating*, 465 U.S. 1, 15 (1984). The divergent approaches to addressing supersession disputes will result in some courts wresting power from arbitrators in contravention of the parties' original agreement, while other courts send materially identical disputes to arbitrators. Plaintiffs seeking to capitalize on "judicial hostility to arbitration agreements" will naturally opt for the former courts. *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991).

Disuniformity of that sort is intolerable under the Arbitration Act, which was intended to establish nationwide standards for the enforcement of arbitration agreements. It is thus unsurprising that this Court routinely grants certiorari on questions concerning the interpretation of

the Arbitration Act, even where a circuit conflict is shallow. See *American Express Co.* v. *Italian Colors Restaurant*, 570 U.S. 228 (2013); *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333 (2011); *Stolt-Nielsen S.A.* v. *AnimalFeeds International Corp.*, 559 U.S. 662 (2010). This case, which presents a clear and important conflict involving multiple federal and state appellate courts, warrants the Court's review.

2. This case is an excellent vehicle in which to decide the question presented. That question is a pure question of law, and it was pressed and passed upon in the proceedings below. The question is ripe for this Court's review because numerous courts have analyzed the arguments on both sides of the question presented, and those courts have reached differing conclusions after substantial analyses of the question.

This case provides the Court with an ideal opportunity to consider and resolve an exceedingly important question concerning the Arbitration Act that has divided the federal courts of appeals and state courts of last resort. The Court should grant review and, on the merits, reverse the judgment below.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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