No. 22-518

In The
Supreme Court of the United States

PETROBRAS AMERICA INC., *et al.*,

Petitioners,

v.

TRANSCOR ASTRA GROUP S.A., *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Texas

AMICUS CURIAE BRIEF OF ANTHONY MICHAEL SABINO IN SUPPORT OF PETITION FOR 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arbitrator questions of arbitrability, the arbitrator – rather than a court – must decide whether the contract has been superseded by a subsequent contract.

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INTEREST OF *AMICUS CURIAE*

This *amicus curiae* is a law professor with expertise in arbitration generally, securities arbitration, commercial law, and commercial arbitration. Furthermore, this *amicus curiae* has represented parties in arbitration proceedings, frequently chairs arbitrations for the Financial Industry Regulatory Authority and other bodies, and regularly lectures on the precise topics found in the pending controversy. This case addresses the interpretation of the Federal Arbitration Act, and implicates the enforcement of agreements to arbitrate, and, hence, the proper conduct of arbitration proceedings in a wide variety of fora. This *amicus curiae* has a professional and scholarly interest in the proper application and development of the law in these domains.[1]

STATEMENT

This *amicus curiae* respectfully adopts, in relevant part, the Statement set forth in the Petition for *Certiorari* filed by the Petitioners herein, Petrobras America Inc., *et al.* (hereinafter, "Petitioners"). Petition for a Writ of *Certiorari* at 2. This *amicus curiae* furthermore

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. *See* Supreme Court Rule 37.6. Counsel of record received timely notice of the intent to file this brief. *See* Supreme Court Rule 37.2.

joins in Petitioners' Reasons for Granting the Petition. Petition for a Writ of *Certiorari* at 10.

SUMMARY OF ARGUMENT

Review should be granted for reason that the instant case is an excellent vehicle for affirming the text of the Federal Arbitration Act, the strong federal policy favoring arbitration, and the lengthy and consistent line of precedents upholding that ideal. The decision below denying the arbitrator the authority to decide the "gateway" question of determining arbitrability is unsupported by the statutory regime which empowers arbitration, frustrates the strong federal policy favoring arbitration, and cannot be reconciled with the Court's jurisprudence, which for decades now has robustly upheld the enforceability of arbitral accords generally, and the validity of parties' agreements to delegate "gateway" questions of arbitrability to the arbitrator specifically. Given that the ruling below denigrates the parties' choice to assign to the arbitrator, and not a court, the power to decide threshold issues of arbitrability, it is respectfully suggested by this *amicus curiae* that review should be granted.

ARGUMENT

I. REVIEW SHOULD BE GRANTED TO FULFILL THE PROMISE OF THE FEDERAL ARBITRATION ACT.

Since 1925, arbitration has been regulated, and, moreover, encouraged, by the Federal Arbitration Act. 9 U.S.C. § 1, *et seq.* ("FAA"). The FAA explicitly directs the courts to enforce agreements to arbitrate, and empowers them to do so by a variety of means.

Foremost in the statutory scheme is Section 2, the "primary substantive provision of the Act." *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983) ("*Moses H. Cone*"). The statute mandates that a written provision in a contract which calls for the arbitration of controversies "*shall* be valid, irrevocable, and enforceable." 9 U.S.C. § 2 (emphasis supplied). *See Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 474 (1989) ("*Volt*"). It is noteworthy that the proviso is stated in the imperative "shall," and not the permissive "may" or similar.

Subsequent portions of the FAA also unmistakably work towards the goal of enforcing agreements to arbitrate. *See* 9 U.S.C. § 3 (providing for a stay of proceedings for a matter referable to arbitration), § 4 (supplying jurisdiction to compel arbitration), and § 9 (establishing a mechanism for confirming and enforcing an arbitration award). *See also Volt*, *supra*, 489 U.S. at 474 (analyzing Sections 2 and 4). In sum and substance, every aspect of the FAA supports the

enforcement of agreements to arbitrate. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011) ("*Concepcion*").

The Court has repeatedly declared that the aim of the FAA is to ensure private agreements to arbitrate are enforced according to their terms. *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995) ("*Mastrobuono*") (quotation omitted). The Court has frequently held that the FAA places agreements to arbitrate on "an equal footing with other contracts." *Concepcion*, *supra*, 563 U.S. at 339 (quotations omitted), *citing Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006). *See also Volt*, *supra*, 489 U.S. at 474 and 478.

The Court has declared that the FAA safeguards arbitral accords from "judicial interference." *Epic Systems Corp. v. Lewis*, 584 U.S. ___, ___, *slip op.* at 3 (No. 16-285) (May 21, 2018) ("*Epic*"). *See also Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967) (the plain language of the Act evinces a clear legislative intent to prohibit judicial obstructionism to arbitration). *See also Morgan v. Sundance, Inc.*, 596 U.S. ___, ___, *slip op.* at 6 (No. 21-328) (May 23, 2022) (quotation and citation omitted) (the strong federal policy favoring arbitration acknowledges the FAA's commitment to overrule the judiciary's longstanding refusal to enforce arbitral accords, and to place such agreements on the same footing as other contracts).

As a more recent addition to the pantheon of the Court's arbitration jurisprudence, *Epic* confirms that

the statutory components of the FAA constitute a cohesive scheme which "require[s] courts to respect and enforce agreements to arbitrate." *Epic*, *supra*, *slip op.* at 5. Quite telling is the closing paragraph of *Epic*, wherein the Court characterizes the statutory regime as a solemn command from Congress "that arbitration agreements . . . must be enforced as written." *Id.*, *slip op.* at 25.

Regrettably, the decision below, as well as certain of the conflicting cases which swirl about it, may threaten all or most of the precepts stated above. By aggrandizing to itself the power to decide the vital "gateway" question of what is arbitrable, a matter which the parties specifically reserved to the arbitrator, and not a court, the lower court usurped a key element of the parties' original bargain.

When a court refuses to permit the arbitrator to exercise a power explicitly bestowed by the parties' arbitral accord, that court denies the parties the benefit of their bargain, fails to enforce the parties' agreement as written, places the arbitral accord on a footing different from – indeed, inferior to – other contracts, and evinces, at least implicitly, a form of judicial hostility to arbitration, an animosity which the FAA was expressly intended to extinguish.

Granting review of the decision below will afford an opportunity to reinforce the inexorable statutory edict that agreements to arbitrate *shall* be valid, irrevocable, and enforceable, an overriding legislative command upheld time and again by the Court. Moreover,

review of the case at hand will assure that arbitral accords are enforced according to their terms, are on an equal footing with other contracts, and are safeguarded from judicial interference.

It is respectfully submitted by this *amicus curiae* that review should be granted for reason that the case at bar represents an excellent vehicle for fulfilling the promise of the FAA.

II. REVIEW SHOULD BE GRANTED TO ENSURE THAT COURTS DO NOT NULLIFY CONTRACTUAL TERMS, NOR DEPRIVE PARTIES OF THE BENEFIT OF THEIR BARGAIN.

It is a "fundamental principle that arbitration is a matter of contract." *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 67 (2010) ("*Rent-A-Center*"). *See also American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, 233 (2013) ("*American Express*"). In relation thereto, it has long been a bedrock principle of this Court's jurisprudence that arbitration is a matter of consent, not coercion. *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662, 681 (2010) ("*Stolt-Nielsen*"), *quoting Volt*, *supra*, 489 U.S. at 479 (quotations omitted). Precisely for these reasons, the Court's arbitration landmarks have long affirmed that "the FAA requires courts to honor parties' expectations." *Concepcion*, *supra*, 563 U.S. at 351.

Agreements to arbitrate must therefore be rigorously enforced. *Dean Witter Reynolds Inc. v. Byrd*, 470

U.S. 213, 221 (1985). *See also Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 U.S. ___, ___-___, *slip op.* at 4-5 (No. 17-1272) (January 8, 2019) ("*Henry Schein*") (citation omitted) (courts must enforce arbitration contracts according to their terms, and may not override the parties' agreement). As with any other contract, the parties' intentions control. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) ("*Mitsubishi*"). The proper role of the courts is to "give effect to the contractual rights and expectations of the parties," as gleamed from the arbitral accord. *Volt*, *supra*, 489 U.S. at 479.

Reflecting that arbitral pacts are just like ordinary contracts, it has long been acknowledged that parties are generally free to shape their agreements to arbitrate as they see fit. *Mastrobuono*, *supra*, 514 U.S. at 57. *See also Concepcion*, *supra*, 563 U.S. at 344 ("The point of affording parties discretion in designing arbitration processes" is that it empowers them to adopt the rules and procedures they deem best suited to their particular needs.). Thus, in yet another hallmark of the Court's arbitration jurisprudence, it is well known that parties may categorize the controversies they wish to submit to the arbitrator for resolution. *See generally Mitsubishi*, *supra*, 473 U.S. at 628 (parties may choose to include or exclude statutory claims from arbitration, but are bound to that choice, once made).

Consistent therewith, the Court has quite recently expressed intolerance for rules or judicial decisions which unduly circumscribe the freedom of parties to determine the issues subject to arbitration, and the

rules by which the parties shall arbitrate. *Viking River Cruises, Inc. v. Moriana*, 596 U.S. ___, ___, *slip op.* at 18 (No. 20-1573) (June 15, 2022), *quoting Lamps Plus, Inc. v. Varela*, 587 U.S. ___, ___, *slip op.* at 7 (No. 17-988) (April 24, 2019), and, in particular, mechanisms which violate the fundamental principle that arbitration is a matter of consent. *Viking*, *supra*, *slip op.* at 18, *citing Stolt-Nielsen*, *supra*, 559 U.S. at 684. *See also* Anthony M. Sabino, "Supreme Court Illuminates Enforceability of Arbitration Agreements," 262 *New York Law Journal* at p. 4, cl. 4 (July 3, 2019) (analyzing *Lamps Plus*).

The decision below is difficult, if not impossible, to reconcile with the foregoing axioms. The lower court seemingly disregarded the fundamental precept that, like any other contract, an agreement to arbitrate is to be rigorously enforced according to its terms. In the instant case, this would include the parties' original agreement to refer all questions of arbitrability to the arbitrator, and not a court. By claiming the power to resolve "gateway" questions of arbitrability for itself, the court below acted contrary to the Court's precedents, as set forth herein above, choosing instead to substitute judicial intervention for contractual stipulations, consent, and the expectations of the parties.

In all likelihood, certain aspects of the arbitral accord at issue herein should be beyond question. The first is that the agreement to arbitrate was arrived at by consent; it was not imposed by coercion. Second, the signatories contracted to arbitrate all controversies, with the arbitrator, and not a court, resolving "gateway" questions of arbitrability. Third and last, no doubt

the parties expected a court to honor the terms of their arbitral accord.

The decision below confounds both the terms of that arbitral pact and the parties' expectations. The lower court set aside the words agreed to, and imposed new terms, hitherto unknown to or at least unexpected by the parties. The court below invested itself with the authority to adjudicate "gateway" questions of arbitrability, contrary to the more limited role for a court apparently contracted for and presumed by the parties. The decision below irrevocably alters the means by which the parties agreed to resolve their differences.

It is respectfully submitted by this *amicus curiae* that the decision below is antithetical to the arbitration jurisprudence of the Court, including, but not limited to, the maxims that arbitration is a matter of contract, contracts to arbitrate must be enforced according to their terms, and the expectations of the contracting parties are to be honored. As such, the case at bar is an excellent vehicle for the Court to ensure that courts do not nullify contractual terms, nor deprive parties of the benefit of their bargain.

III. REVIEW SHOULD BE GRANTED FOR REASON THAT THE DECISION BELOW IS CONTRARY TO THE STRONG FEDERAL POLICY FAVORING ARBITRATION.

A long and unbroken line of this Court's arbitration landmarks informs us that, well into the opening decades of the Twentieth Century, there was

widespread judicial hostility towards arbitration as an alternative to traditional litigation. Not long ago, the Court reminded that, once upon a time, "courts routinely refused to enforce agreements to arbitrate" or found other means to undermine their effectiveness. *Epic*, *supra*, *slip op.* at 5.

The strong federal policy validating arbitration closed that unfortunate chapter in American law. *Moses H. Cone*, *supra*, 460 U.S. at 24. *See also* Anthony Michael Sabino, "Awarding Punitive Damages in Securities Industry Arbitration: Working For A Just Result," 27 *U. of Richmond L. Rev.* 33, 34-39 (1992) (summarizing the then-extant landmarks announcing the strong federal policy favoring arbitration). Consonant with that mandate, for many decades now the Court has repeatedly and consistently put aside obstacles to the fulfillment of the robust policy favoring arbitration. *See generally Epic*, *supra*, *slip op.* at 16 ("In many cases over many years, this Court has heard and rejected efforts to conjure conflicts between the Arbitration Act and other federal statutes.").

The decision below is untethered from the strong federal policy favoring arbitration. In contravention of that policy, and the legislative mandate which codified it nearly one hundred years ago, the court below waylaid the instant controversy from the parties' chosen path of arbitration, redirecting them to litigation, an option which they had eschewed in their original pact. The actions of the lower court thwarted contractual terms stipulating arbitration for the resolution of all controversies, precisely, questions of arbitrability, and

thereby frustrated the expectations of the parties as signatories to that arbitral accord. All this is inapposite to the strong federal policy favoring arbitration.

It is respectfully submitted by this *amicus curiae* that the decision below is at odds with the strong federal policy favoring arbitration. As such, the case at bar is an excellent vehicle for the Court to uphold that very policy.

IV. REVIEW SHOULD BE GRANTED FOR REASON THAT THE DECISION BELOW IS A JUDICIAL INTERPRETATION WHICH IMPERMISSIBLY FRUSTRATES ARBITRATION.

Consistently, and without hesitation, the Court has, time and again, set aside judge-made law which frustrates agreements to arbitrate. *See Concepcion*, *supra*, 563 U.S. at 340-41. In dismantling one such obstacle to arbitration, that one emanating from a state tribunal, the Court warned that judicial hostility towards arbitration "manifest[s] itself in a great variety of devices and formulas." *Id.* at 342 (quotations and citations omitted). Given that *Concepcion*'s most powerful lessons have already been well illustrated in the arguments preceding this one, there is no need to regurgitate them here.

The salient point to be made at this juncture is that the axiom announced in *Concepcion* held no ambiguity. It pronounced that whenever judicial interpretations from whatever source prohibit or impede

arbitration, "the analysis is straightforward: The conflicting rule is displaced by the FAA." *Id.* at 341. *Concepcion* provides the rule for decision in the case at bar, as it has in other, recent arbitration landmarks. *See American Express*, *supra*, 570 U.S. at 238 ("Truth to tell," *Concepcion* "all but resolves" the question.).

The decision below is little different from the state court construct disavowed in *Concepcion*. The former suffers from the same flaws as the latter: it is antithetical to the strong federal policy favoring arbitration; it usurps the contractual terms of the parties' arbitral accord; and it defeats the parties' expectations.

Refuting the lower court's ruling in the case at bar is required, not merely for the present, but with a view towards the future. Even as the FAA approaches its centennial, "remnants of [a] 'litigation only' ideology occasionally crop up" in the form of judicially crafted obstacles to arbitration. Anthony M. Sabino & Michael A. Sabino, "Law of the Land: U.S. Supreme Court Upholds Arbitration Agreements, Despite State Court Resistance," 61 *Nassau Lawyer* at p. 3 cl. 2 (December 2011).

Small wonder then, that, not long ago, the Court reaffirmed its obligation to guard against "new devices" intended to confound agreements to arbitrate. *Epic*, *supra*, *slip op.* at 9, *quoted by* Michael A. Sabino & Anthony M. Sabino, "'Epic' Decision by Supreme Court Orders Arbitration, Prohibits Class Action," 259 *New York Law Journal* at p. 4, cl. 4 (June 6, 2018).

The instant matter is the latest test of the Court's commitment to the ideals exemplified in its arbitration

jurisprudence. Negating or, at the least, reviewing the decision below is imperative, not merely for the sake of today, but to assure that judicial manifestations hostile to arbitration, but yet to be conceived, shall not survive the Court's scrutiny.

It is respectfully submitted by this *amicus curiae* that the holding of the court below is yet another judicial construct irremediably opposed to the text of the FAA, and the strong federal policy favoring arbitration. As such, the case at bar is an excellent vehicle for the Court to ensure that judicial interpretations which impermissibly frustrate arbitration are not allowed.

V. REVIEW SHOULD BE GRANTED TO ENSURE THAT COURTS DO NOT DEPRIVE PARTIES OF THEIR PREROGATIVE TO DELEGATE "QUESTIONS OF ARBITRABILITY" TO THE ARBITRATOR.

It is a basic tenet of the Court's arbitration jurisprudence that "questions of arbitrability" are ordinarily for a court to decide. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) ("*Howsam*"). Yet the Court issued a contemporaneous warning that this postulation is to be applied narrowly, and then solely to prevent the injustice of forcing arbitration upon a party that had never consented to same. *Id.* at 83-84 (cautioning that not every threshold or "gateway" controversy amounts to a "question of arbitrability").

The foregoing is offset by a rule of equal efficacy; parties to an arbitral accord "may choose *who* will

resolve specific disputes." *Stolt-Nielsen*, *supra*, 559 U.S. at 683 (emphasis supplied). *See also Henry Schein*, *supra*, *slip op.* at 4 (citation and internal quotations omitted) ("[P]arties may agree to have an arbitrator decide not only the merits of a particular dispute but also 'gateway' questions of arbitrability."). Accordingly, parties to an arbitral pact enjoy the liberty of delegating questions of arbitrability to the arbitrator, provided they do so in clear and unmistakable terms. *Howsam*, *supra*, 537 U.S. at 83, *quoting AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 649 (1986) ("*AT&T Technologies*") (quotation omitted). *See also Rent-A-Center*, *supra*, 561 U.S. at 68-69 ("We have recognized that parties can agree to arbitrate 'gateway' questions of 'arbitrability.' ").

It is not surprising that precedent allows parties to diverge from the ostensible norm, and delegate questions of arbitrability to the arbitrator. For decades now, the Court has looked on with approval as parties have entrusted arbitrators with the power to decide issues arising under solemn and complex statutory schemes, such as the federal securities laws, *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 238 (1987), the Racketeer Influenced and Corrupt Organizations Act, *id.* at 242, and the federal antitrust laws. *American Express*, *supra*, 570 U.S. at 233-34. *See also Epic*, *supra*, *slip op.* at 16 (summarizing the above and additional precedents "reject[ing] efforts to conjure conflicts" between the FAA and other federal statutes). Provided it is clearly and unmistakably stated, the parties' delegation of questions of arbitrability to

the arbitrator is indistinguishable from these other, far reaching assignments of adjudicative authority to arbitrators.

Who determines questions of arbitrability turns upon "what the parties agreed to about *that* matter." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) ("*First Options*") (emphasis in the original). *See also AT&T Technologies*, *supra*, 475 U.S. at 649-50 (parties may agree to submit questions of arbitrability to the arbitrator, and not a court). The primacy accorded to the choice of the parties is firmly grounded in "the fact that arbitration is simply a matter of contract," *First Options*, *supra*, 514 U.S. at 943, and arbitral pacts, "like other contracts, are enforced according to their terms." *Id.* at 947 (quotations and citations omitted). *See also Henry Schein*, *supra*, *slip op.* at 5 ("[A] court may not decide an arbitrability question that the parties have delegated to an arbitrator.").

In sum, the Court's arbitration jurisprudence makes the first priority determining what the parties agreed to with regard to who decides questions of arbitrability. If it appears that the parties have delegated questions of arbitrability to the arbitrator, the next step is to confirm that such a delegation was expressed in clear and unmistakable terms.

Unfortunately, the decision below cannot be easily squared with the precepts set forth herein above. For one, it appears that the lower court unjustifiably disregarded the parties' original agreement to refer all questions of arbitrability to the arbitrator, and not a

court. In setting aside that fundamental component of the seminal accord, the court below irreparably harmed the parties' freedom to craft the arbitral process to their liking. Furthermore, this unwarranted judicial intervention provoked an outcome clearly at odds with the parties' original agreement, by expropriating from the arbitrator the authority to resolve a pivotal threshold issue, and instead bestowing same upon a judicial officer. Lastly, the axioms discussed herein above sit in counterpoise; yet, the lower court upset that fine balance, by abruptly tipping the scales toward a court, contrary to the parties' evident choice that the arbitrator should determine "gateway" questions of arbitrability.

It is respectfully submitted by this *amicus curiae* that the decision below misapprehends the Court's arbitration jurisprudence regarding who decides questions of arbitrability, fails to recognize the ability of parties to contractually delegate the determination of such issues to the arbitrator, and unjustifiably amplifies judges' discretion to decide questions of arbitrability. As such, the case at bar is an excellent vehicle for the Court to augment its existing jurisprudence, and thereby ensure that courts do not deprive parties of their prerogatives to delegate "gateway" questions of arbitrability to the arbitrator.

CONCLUSION

Respectfully, for all the reasons set forth herein above, it is suggested by this *amicus curiae* that the Petition for a Writ of *Certiorari* should be granted.

Respectfully submitted,

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