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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Where a party resisting arbitration contends that an earlier arbitration agreement has been revoked and superseded by a subsequent contract, is it the court's obligation to determine whether that earlier arbitration agreement still exists?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

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

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.

Astra Oil Company, LLC (formerly Astra Oil Company, Inc.) is 100% wholly owned by Worldwide Energy, S.A., a Swiss company, which is in turn 100% wholly owned by Astra Transcor Energy, NV (formerly Astra Oil Trading NV), a Netherlands company, which is in turn 100% wholly owned by TAGAM, S.A., a Swiss company, which is in turn 100% wholly owned by Transcor Astra Group, a Belgian company. No other Respondent has any other parent company and no publicly traded entities own any stock in any of the Respondents or their parent companies.

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SUMMARY

The most fundamental rule of arbitration is that no party can be compelled to arbitrate absent an agreement to do so, and it is the court's responsibility to determine whether an agreement to arbitrate exists. Although parties may initially agree to arbitrate their disputes and to delegate arbitrability issues to arbitrators, parties are also free to later revoke arbitration provisions and subsequently agree that they will no

longer arbitrate any issues. The right to do so is preserved by Section 2 of the Federal Arbitration Act (the "FAA"), which provides that arbitration agreements are "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 (emphasis added).

For this reason, even when a prior delegation of arbitrability exists, it is a court's obligation to determine whether a subsequent contract has revoked the earlier arbitration agreement, such that no agreement to arbitrate any issues still exists. Here, the Texas Supreme Court properly ruled that it was obligated to decide whether an agreement to arbitrate still existed or had been entirely revoked by the parties' subsequent contract. In addition to the Texas Supreme Court, three federal Courts of Appeals (the First, Third and Ninth Circuits) and two other state courts of last resort (Alaska and Wisconsin) have considered the issue of who decides whether earlier arbitration provisions, including delegations of arbitrability, are still in existence or have been revoked. All of these courts have concluded that a court must decide that issue because no party can be compelled to arbitrate unless an agreement to arbitrate currently exists.

Petitioners contend that the Fifth Circuit Court of Appeals and the Alabama Supreme Court have adopted a different rule, namely that, where a delegation of arbitrability exists, arbitrators must always decide if a subsequent agreement revokes the arbitration provisions of the prior agreement. According to Petitioners, the rule recognized by these two courts

supposedly creates an "entrenched conflict" (Pet. 10) with the rule recognized in the six other courts.

There is no real conflict. Neither the Fifth Circuit nor the Alabama Supreme Court cases involved claims that an earlier agreement to arbitrate no longer existed because it had been revoked. Nor did either case purport to adopt a broad rule dictating that if a delegation clause exists all revocation issues are for arbitrators. The outcomes in these cases resulted not from any conflicting view of the governing legal principles, but rather from the different facts and claims presented in those cases. Significantly, neither the Fifth Circuit nor the Alabama Supreme Court decision has, insofar as Respondents are aware, been cited for the broad proposition that when there is a prior delegation agreement, arbitrators must always decide any supersession claim, including a claim based on a revocation theory such as that presented here.

STATEMENT OF THE CASE

In 2006, Petitioners (collectively, "Petrobras") and Respondents (collectively, "Astra") entered into a Stock Purchase and Sale Agreement (the "2006 SPA") and became joint owners of a Texas refinery. The 2006 SPA included an arbitration agreement with a clause

delegating issues regarding the validity of the agreement to arbitrators. (Pet. App. 38a–39a)[1]

In June 2012, after years of litigation, various Petrobras and Astra entities entered into a global settlement agreement (the "Settlement Agreement"). The Settlement Agreement included the following provisions:

(i) a merger clause stating that the Settlement Agreement "represent[s] the entire agreement of the parties and supersede[s] all prior written or oral agreements" (*see* Pet. App. 28a);[2]

(ii) a comprehensive general release of "all claims and causes of action of any kind whatsoever," including "any claim arising out of" the 2006 SPA, and any "covenants" in the 2006 SPA (*see* Pet. App. 29a); and

(iii) a forum-selection clause making the Texas courts the "exclusive" forum for "any dispute arising out of or related to this Settlement Agreement," and stating that "any legal proceeding arising out of or related to such dispute must be filed in one of the Texas Courts." (*See* Pet. App. 28a–29a)

In 2016, Petrobras filed this action in Texas state court seeking to invalidate the Settlement Agreement

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[1] Respondents have used "Pet. App." to refer to the Petitioners' Appendix and "R. App." to refer to Respondents' Appendix.

[2] The Petition makes no mention whatsoever of the merger clause.

on the ground that it was fraudulently obtained.[3] Petrobras also sought a declaration of the parties' rights and obligations under the Settlement Agreement. Separately, Petrobras began an arbitration against Astra asserting claims relating to the 2006 SPA that indisputably are covered by the release in the Settlement Agreement.

In the state court, Astra sought a declaratory judgment that the Settlement Agreement was valid and enforceable and that it barred all claims relating to the 2006 SPA, including those claims Petrobras asserted in the arbitration.[4] In June 2018, the trial court issued a judgment declaring the Settlement Agreement valid and enforceable and confirming that the release barred all claims relating to the 2006 SPA, including those claims Petrobras had asserted in the arbitration. The Texas Court of Appeals affirmed the declaratory relief granted in the trial court, but reversed and remanded on other grounds. On April 29, 2022, the Texas Supreme Court reinstated the trial court's original judgment in full.

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[3] Astra has consistently denied Petrobras' allegations in the state court (repeated at Pet. 7) that Astra paid a bribe to certain Petrobras officials in connection with the 2006 SPA. Petrobras has never asserted, however, that any bribes were paid in connection with the Settlement Agreement.

[4] The Petition states that the trial court "declined to compel arbitration of the question whether the settlement agreement superseded the arbitration provision in the joint-venture agreement." (Pet. 3) That statement is incorrect. Petrobras never made a motion to compel arbitration.

With respect to "who" decides whether the prior arbitration provisions were revoked, the Texas Supreme Court identified the issue as "whether, in light of the 2012 settlement agreement, the parties' agreement to arbitrate as set forth within the [2006 SPA] still exists at all." (Pet. App. 27a) Relying on *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019), and *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002), the court noted that courts, not arbitrators, decide whether an agreement to arbitrate "exists," and "[b]ecause the parties here dispute whether their arbitration agreement continued to exist after the 2012 settlement agreement, . . . courts must decide that issue." (Pet. App. 27a-28a) The court then concluded that, under Texas law, the Settlement Agreement had revoked the 2006 SPA's arbitration provisions, including the delegation clause, and no agreement to arbitrate any issues still existed. (Pet. App. 28a)

Petitioners repeatedly misrepresent the basis for the Texas Supreme Court's conclusion that the arbitration provisions, including the delegation clause, had been revoked and no longer existed. Petitioners incorrectly state that:

- the "only basis" for the decision was that "the settlement agreement had 'superseded,' as a whole, the joint-venture agreement in which the arbitration agreement was contained" (Pet. 21);
- the court erred by basing its decision "solely on a supersession argument that applies

generally to the arbitration agreement as a whole" (Pet. 22);

- the court's view was that no arbitration agreement exists "because the settlement agreement purported to 'supersede' the entire joint-venture agreement" (Pet. 9); and
- the arbitration provisions were unenforceable "because the broader contract containing the arbitration agreement has been superseded by a subsequent contract." (Pet. 18)

Contrary to these representations, Astra's challenge was directed to the arbitration provisions and the delegation provision specifically, and the Texas Supreme Court's decision rested on the finding that these arbitration provisions had been revoked by the Settlement Agreement.

Astra's Brief in the Texas Supreme Court made clear that Astra was directly attacking the continued existence of the arbitration provisions, including the delegation provision. The Brief included a separate section entitled: "The Settlement Agreement revoked the arbitration provisions of the 2006 SPA," which argued that "[o]nce this revocation occurred, there was no longer any agreement to arbitrate any issues. . . ." (R. App. 120) Astra spent over four pages discussing cases holding that a later agreement revoked earlier arbitration provisions, including delegation clauses, and demonstrating why those cases supported Astra's challenge to the arbitration provision and its delegation provision here. (R. App. 123–27)

Astra also argued that the forum-selection provision, standing alone, was sufficient to revoke the earlier arbitration provisions, including the delegation agreement. Astra explained that the exclusive jurisdiction granted to the Texas courts "necessarily include[d] deciding what impact the Settlement Agreement had on the arbitrability provisions of the 2006 SPA" and "no issue having any possible relationship to the Settlement Agreement is to be decided by any arbitrators." (R. App. 126) Obviously, the issue whether the Settlement Agreement revoked the earlier arbitration provisions would be within the scope of the delegation of exclusive jurisdiction to the Texas courts, and the later agreement thus revoked any prior delegation of authority to arbitrators to determine this issue.

Although Astra also argued that the Settlement Agreement could be viewed as revoking the entire 2006 SPA, Astra made clear that to succeed on its challenge it need not demonstrate that the entire 2006 SPA had been revoked. All Astra needed to establish was that the arbitration provisions had been revoked:

- "[f]or purposes of this case the important inquiry is whether the arbitration provisions . . . were revoked" (R. App. 128);
- the exclusive forum-selection clause was "clearly sufficient to at least revoke the earlier arbitration agreement" (R. App. 128);
- the Settlement Agreement "revoked the earlier agreement to arbitrate, if not the entire 2006 SPA" (R. App. 132); and

- the provisions in the Settlement Agreement had been found in prior cases to support a finding that a later agreement revoked "a prior agreement or, at the very least, an earlier agreement to arbitrate." (R. App. 132)

Even though the Texas Supreme Court suggested, in passing, that the Settlement Agreement might also have revoked the entire 2006 SPA (Pet. App. 28a), that was not the basis for the court's ruling. Instead, the Texas Supreme Court made a detailed and focused comparison of the terms of the Settlement Agreement and the terms of the arbitration provisions to see whether, under well-recognized principles of Texas state contract interpretation law, the provisions of the Settlement Agreement revoked the arbitration provisions.

First, the court noted that the merger clause expressly superseded "all prior written or oral agreements," and contained "no language that could somehow be interpreted to except or preserve the parties' 'prior written . . . *agreement' to arbitrate disputes* over the 2006 stock-purchase agreement." (Pet. App. 28a) (emphasis added)

Next, the court found that the exclusive forum selection provision "indicate[d] the parties' intent to supersede *the arbitration clause* in the 2006 stock-purchase agreement." (Pet. App. 29a) (emphasis added)

Third, the court stated that the release of all claims related to the 2006 SPA, including "without limitation, any claims relating to [any] covenants" in

the 2006 SPA, contained "no language that could be interpreted to preserve any claims regarding the stock-purchase agreement or *its arbitration clause*. In fact, although the settlement agreement describes at length how and where any disputes over the settlement agreement should be resolved, it never mentions arbitration." (Pet. App. 29a) (emphasis added)

Applying the "clear and unmistakable" test outlined by the Court in *Henry Schein*, and comparing the "arbitration agreement" with the terms of the Settlement Agreement, the Texas Supreme Court held:

> At a minimum, reading the arbitration agreement and the subsequent settlement agreement together, we cannot conclude that a presently enforceable arbitration agreement clearly and unmistakably exists. We thus conclude that courts rather than the arbitrator must decide whether an agreement to arbitrate claims regarding the [2006 SPA] presently exists. (Pet. App. 29a–30a)

REASONS FOR DENYING THE PETITION

The Court should deny the Petition because there is no true conflict over whether courts or arbitrators must decide if a subsequent contract has revoked and superseded an earlier agreement delegating arbitrability to arbitrators. The Texas Supreme Court's decision is in line with the view of three federal Courts of Appeals and two other state courts of last resort that have considered this specific issue. The Fifth Circuit

and Alabama cases cited by Petitioners as creating a conflict do not actually do so. Those decisions did not involve revocation arguments or purport to announce a general rule governing who decides revocation-based supersession claims.

Nor was the decision below incorrect in any way. The Texas Supreme Court applied well-settled arbitration principles requiring the courts to determine whether an arbitration agreement exists before compelling parties to arbitrate. The court did so by applying settled state law contract interpretation principles to determine whether, based on the terms of the Settlement Agreement, the parties still had the "clear and unmistakable intention" to arbitrate any disputes.

This case would also be a poor vehicle to consider a number of the issues Petitioners seek to raise, not only because of a failure to preserve issues and arguments, but also because of the fact-bound nature of much of the inquiry.

A. Background

Several fundamental principles of arbitration law are relevant here.

The most fundamental principle is that arbitration is a "matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Howsam*, 537 U.S. at 83; *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 67 (2010) (recognizing the "fundamental principle that

arbitration is a matter of contract."); *Granite Rock Co. v. Teamsters*, 561 U.S. 287, 299 (2010) ("Arbitration is strictly a matter of consent.") (citations and internal quotations omitted)

The FAA "embodies the national policy favoring arbitration and places arbitration agreements on equal footing with all other contracts." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006). The FAA was not, however, intended to "elevate" arbitration agreements over other forms of contracts. *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395, 404 fn.12 (1967). "A court may not devise novel rules to favor arbitration over litigation." *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1713 (2022).

Section 2 of the FAA expressly recognizes that arbitration agreements, including delegation agreements, can be revoked just like any other contract, stating that any "provision in . . . a contract . . . to settle by arbitration a controversy . . . 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 (emphasis added).

"[C]ourts presume that the parties intend courts, not arbitrators, to decide . . . disputes about 'arbitrability.'" *Howsam*, 537 U.S. at 84. Parties may agree to delegate issues of arbitrability to arbitrators, but they must do so by "clear and unmistakable" evidence. *Henry Schein*, 139 S. Ct. at 529. The issue whether the parties have demonstrated a clear and unmistakable intention to delegate arbitrability issues to

arbitrators is decided by the courts. *Id.* "[B]efore referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement *exists*." *Id.* at 530 (citing 9 U.S.C. § 2) (emphasis added).

B. There is no true conflict

In addition to the decision below, the First, Third, and Ninth Circuits, and the highest courts in Wisconsin and Alaska, have all expressed the same view in similar factual circumstances. When a subsequent contract contains terms indicating that the parties intended to revoke a prior agreement to arbitrate, including an earlier delegation provision, it is the court's obligation to decide whether the later agreement did so, and thus, if there is no longer any agreement to arbitrate any issues, including arbitrability. *See Field Intelligence Inc. v. Xylem Dewatering Solutions Inc.*, 49 F.4th 351, 354–55 (3d Cir. 2022); *McKenzie v. Brannan*, 19 F.4th 8 (1st Cir. 2021); *Suski v. Coinbase, Inc.*, 55 F.4th 1227, 1230 (9th Cir. 2022); *Midwest Neurosciences Associates, LLC v. Great Lakes Neurosurgical Associates, LLC*, 920 N.W.2d 767, 784 (Wis. 2018); and *SMJ General Construction, Inc. v. Jet Commercial Construction, LLC*, 440 P.3d 210, 214 (Alaska 2019).

Petitioners contend that the rules adopted by the courts in *Agere Systems, Inc. v. Samsung Electronics, Co. Ltd.*, 560 F.3d 337 (5th Cir. 2009), and *Blanks v. TDS Telecommunications LLC*, 294 So.3d 761 (Ala.

2019) conflict with the rule adopted in the six above-cited cases, warranting the attention of the Court. According to Petitioners, these two cases hold that, once the parties have agreed on a delegation of arbitrability, all future revocation challenges are for the arbitrators. (Pet. 10 ("the arbitrator must resolve any dispute over whether a subsequent contract has superseded the arbitration agreement"); Pet. 11 ("an arbitrator must decide whether [a delegation agreement] has been superseded by a subsequent contract"); and Pet. 18 (an "arbitrator must resolve the question of supersession in such a situation")). Petitioners state this as an absolute rule without exceptions.

Yet, Petitioners also concede that sometimes courts, not arbitrators, could determine a supersession challenge. Petitioners volunteered this concession in response to the concern voiced by several courts that if arbitrators always determined whether a delegation of authority was revoked, then the delegation would be effectively irrevocable. Petitioners volunteered that this irrevocability concern was overblown because, if the subsequent contract was sufficiently explicit as to the parties' intentions, then the issue could be for the courts:

> Contrary to the concerns expressed by some lower courts [about a delegation being effectively irrevocable if arbitrators always decide a revocation claim] . . . the foregoing approach [of having arbitrators decide supersession issues] 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*. (Pet. 22) (emphasis added)

Petitioners never explain why in this example the issue of revocation is for the courts, versus the arbitrators, or why this example is not inconsistent with Petitioners' contention that *Agere* and *Blanks* stand for the proposition that arbitrators must *always* determine the revocation issue. Presumably, Petitioners will offer some explanation in a Reply Brief. Whatever the explanation, however, it cannot establish what does not exist—a conflict in the cases.

As detailed below, those cases considering a supersession challenge based on a subsequent agreement revoking an earlier agreement to arbitrate, including its delegation provision, have all ruled that the issue whether any arbitration agreement still exists is for the courts.

In *Field Intelligence*, the parties entered into a 2013 purchase agreement with an arbitration provision incorporating the AAA rules.[5] 49 F.4th at 354. In 2017, the parties signed a new agreement that

[5] The Court has not yet weighed in on whether the incorporation of the AAA rules without more is sufficient indicia of the parties' "unmistakable" intention to delegate arbitrability and expressly declined to reach this issue in *Henry Schein*. This case does not present that issue.

included a merger clause superseding all prior agreements and a forum-selection clause selecting New Jersey courts for future disputes. *Id.* at 354–55. One party resisted arbitration under the earlier agreement on the ground that the "parties agreed, by their 2017 contract, not to submit the dispute before us to an arbitrator." 49 F.4th at 358. The Third Circuit held: "Because the substance of the parties' supersession dispute is 'whether there is an agreement to arbitrate,' . . . the District Court rightly declined to send it to an arbitrator." *Id.* at 356 (citations omitted).

The Third Circuit rejected the argument that once the earlier delegation agreement was proven it satisfied this Court's "clear and unmistakable" intention test because the issue was whether, in light of the later agreement, the parties still had the intention to arbitrate:

> Were this fight simply about whether the 2013 agreement had terminated or was invalid, we might agree [that arbitrators should decide]. But the question here is whether, by the later contract, the parties intended to extinguish their prior agreement and litigate any disputes between them moving forward. Put another way, if Field Intelligence is correct that the 2017 contract superseded the 2013 agreement, then there is no arbitration agreement for us to enforce. And "it can hardly be said that contracting parties clearly and unmistakably agreed to have an arbitrator decide the existence of an arbitration agreement when one of the parties has put the

> existence of that very agreement in dispute." *Field Intelligence*, 49 F.4th at 356 (citations omitted).

The *Field Intelligence* court also explained that if arbitrators always determined whether a delegation agreement had been revoked, then the delegation agreement would effectively be irrevocable. *Id.* at 358. Such a result would conflict with the mandate of Section 2 of the FAA, requiring that arbitration agreements are to be revocable to the same extent as any other contract under governing state law. Creating a special irrevocability rule for delegation agreements would also violate this Court's instruction that courts not create "novel rules to favor arbitration over litigation." *Morgan*, 142 S. Ct. at 1713.

The *Field Intelligence* court emphasized that permitting delegation provisions to be irrevocable would produce "passing strange results" and an "odd outcome:"

> To hold [that arbitrators decided whether an arbitration and delegation provision was revoked] would foster *passing strange results*. . . . Were we to do so, parties would never be able to execute a superseding agreement to rid themselves of a prior agreement to arbitrate arbitrability. They would forever be bound by that agreement even if their later dealings show an intent to avoid it. . . . We decline to reach such an *odd outcome*. *Id.* at 358 (emphasis added).

The First Circuit reached a similar conclusion in *McKenzie*. 19 F.4th 8. There, the issue was whether arbitrators or the court must decide whether a 2019 Term Sheet superseded a 2008 Agreement containing an arbitration agreement with a delegation provision. 19 F.4th at 10–12. The 2019 Term Sheet resolved pending disputes, terminated the prior 2008 Agreement, dismissed an arbitration brought pursuant to the earlier agreement, and provided for full releases to be executed. *Id.* One party claimed that the parties intended the 2019 Term Sheet to supersede and revoke both the 2008 Agreement and its arbitration clause. *Id.* at 19.

The party seeking arbitration argued that the court should look solely to the earlier agreement and its delegation clause. *Id.* at 18. The court rejected this argument, observing that "we can't look at the 2008 Agreement in isolation, ignoring the potential impact of the 2019 Term Sheet on the parties' intent to be bound by an earlier agreement to send a dispute like this to arbitration." *Id.* at 19. While the earlier agreement could conceivably cover the present dispute, "that's true only if the 2008 Agreement and its arbitration provision are still in effect." *McKenzie*, 19 F.4th at 18.

Relying on existing First Circuit precedent and "helpful guidance from our sister circuits," the court concluded:

> "[A] claim . . . that two parties later agreed to extinguish their arbitration pledge (specifically) is for the courts to decide." *Biller [v. S-H*

> *OpCo Greenwich Bay Manor, LLC]*, 961 F.3d [502,] 514 [(1st Cir. 2020)] . . . *Jaludi v. Citigroup*, 933 F.3d 246, 255 (3d Cir. 2019) (explaining that "the question of whether a later agreement supersedes a prior arbitration agreement is tantamount to whether there is [still] an agreement to arbitrate" in the first place). That's exactly what we have here. *McKenzie*, 19 F.4th at 19.

In *Suski*, decided several weeks after the Petition was filed, the Ninth Circuit considered the issue whether courts or arbitrators should decide if an arbitration agreement with a delegation clause was revoked by a forum-selection provision in a later agreement. 55 F.4th at 1229. The party seeking arbitration argued that the issue concerned the scope of the arbitration clause, and therefore it was for the arbitrators to decide pursuant to the earlier delegation clause. *Id.* The Ninth Circuit disagreed because the question presented went to the current "existence" of an arbitration agreement:

> We find well-taken plaintiffs' argument that under *Goldman, Sachs & Co. v. City of Reno*, 747 F.3d 733 (9th Cir. 2014), the existence rather than the scope of an arbitration agreement is at issue here. . . . The "scope" of an arbitration clause concerns how widely it applies, not whether it has been superseded by a subsequent agreement. . . . The District Court therefore correctly ruled that the issue of whether the forum selection clause in the [later agreement] superseded the arbitration clause in the [original agreement] was not

> delegated to the arbitrator, but rather was for the court to decide. *Suski*, 55 F.4th at 1230.

In *Midwest Neurosciences*, 920 N.W.2d at 784, the parties had initially executed an agreement that contained an arbitration agreement with a delegation provision. They later entered into another agreement that contained a merger clause superseding prior agreements, released certain obligations under the earlier agreement, and did not include an arbitration provision. *Id.* at 770.

The Wisconsin Supreme Court noted that the party seeking to arbitrate was essentially arguing that the earlier delegation agreement was irrevocable, and the issue before it was "whether the parties [in their earlier agreement] have always and forever agreed to arbitrate arbitrability. . . ." *Id.* at 782. The court rejected the "notion that no parties can ever contract out of arbitration," and the idea of a "limitless . . . contractual obligation to arbitrate." *Id.* at 787–88. Such a notion, the court explained, would be inconsistent with the principle that agreements to arbitrate are revocable where "'grounds exist at law or in equity for the revocation of any contract.'" *Id.* at 787 (citing Wis. Stat. § 788.01 (2012), which is identical to Section 2 of the FAA). Because the issue was whether any agreement to arbitrate still existed, the inquiry was for the court, not the arbitrators.

In *SMJ General Construction*, the Alaska Supreme Court also concluded that the revocation issue was for the courts, not arbitrators. 440 P.3d at 214–15.

There, the issue was whether a later settlement agreement that released "any and all . . . obligations" under the prior contract was intended to release the prior dispute resolution obligations and any delegation of arbitrability. *Id.* at 215. The court held that "[i]t is the task of the courts to decide whether the parties' two successive contracts—the subcontract and the settlement agreement—require SMJ to arbitrate its claims." *Id.* at 214.

Petitioners contend that the holdings in these cases (and the Texas Supreme Court below) are directly contrary to the rules announced in *Agere* and *Blanks*. However, neither *Agere* nor *Blanks* dealt with a revocation claim challenging the continued existence of a prior arbitration agreement delegating arbitrability issues to the arbitrators.

Agere involved a dispute over the payment schedule for a 1990 patent cross-licensing agreement. 560 F.3d at 339. In addition to the patent agreement, the parties entered into five successive separate agreements between 1990 and 2006 that set the amounts payable under the patent agreement. The 2000 agreement had an arbitration provision with a delegation clause, and a "good faith" requirement to agree upon a new pricing schedule. *Id.* The 2006 agreement had a "best efforts" requirement, but "did not reference an alternative dispute procedure or any of the prior agreements, except for the initial 1990 patent cross-licensing agreement." *Id.* at 339.

Samsung argued that the "good faith" standard in the 2000 agreement applied and also required arbitration of their current dispute. *Id.* at 340. Agere did not contend that the 2000 agreement or its arbitration provision had been revoked or that the arbitration obligation in the 2000 agreement no longer existed. Rather, Agere countered that "the [earlier] 2000 agreement, by its terms, expired on December 31, 2004." *Id.* The court framed the issue before it as "whether the arbitration clause is still in effect," an apparent reference to Agere's argument that the earlier agreement had expired "by its terms." *Agere*, 560 F.3d at 340.

Emphasizing that it was "adopt[ing] no new standards of Fifth Circuit analysis of arbitration provisions,"[6] the court held that "we simply conclude that there is a legitimate argument that this arbitration clause covers the present dispute" and, thus, the dispute must go to arbitration. *Id.* The *Agere* court did not address any claim that the prior agreement to arbitrate had been revoked by the subsequent agreement, and no party argued that it had been. Nor did *Agere*

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[6] Prior to *Agere*, the Fifth Circuit recognized that courts, not arbitrators, must decide whether an arbitration agreement exists. *See, e.g.*, *Will-Drill Resources, Inc. v. Samson Resources Co.*, 352 F.3d 211, 218 (5th Cir. 2003). Following *Agere*, the Fifth Circuit has reiterated that "parties cannot delegate disputes over 'the very *existence* of an[ ] [arbitration] agreement.' " *Newman v. Plains All American Pipeline, L.P.*, 23 F.4th 393, 398 (5th Cir. 2022) (citations omitted) (emphasis in original). These rulings before and after *Agere* further undercut Petitioners' assertion that *Agere* intended to implicitly adopt a contrary rule giving arbitrators the authority to decide if an arbitration agreement still existed.

analyze, discuss, or pronounce a general rule for dealing with all supersession or revocation challenges, instead limiting its decision to the facts before it and applying the "wholly groundless" analysis that was later abrogated by this Court in *Henry Schein*.

In *Blanks*, Alabama customers of an internet service provider sought to arbitrate claims based on an arbitration agreement and delegation provision contained in their existing Terms of Service. 294 So.3d at 762–63. Upon learning of the customers' claims, the service provider unilaterally revised the existing Terms of Service, excluding Alabama residents from arbitration. *Id.* The service provider relied on the existing Terms of Service as the authority for making the unilateral change, thereby confirming the ongoing validity of the original Terms of Service. *Id.*

When the customers sought to arbitrate their pre-revision claims under the original Terms of Service, the service providers resisted, arguing that the revised Terms of Service retroactively terminated the prior arbitration provision with respect to these pre-revision claims. *Id*. at 763. The court ruled that the issue whether the updated Terms of Service "validly terminated the arbitration clause" was an issue of arbitrability delegated to an arbitrator, adding that "[i]t is also worth pointing out that the arbitration provision in the prior Terms of Service states that it 'survives the termination of this service agreement.'" *Blanks*, 294 So.3d at 766, fn.6.

The service provider in *Blanks* did not argue that the original Terms of Service had been revoked or that the original arbitration agreement was no longer in existence. Indeed, the service provider was relying on the terms of the earlier agreement to authorize the retroactive application of the new arbitration provision. As in *Agere*, the court did not offer, discuss, or analyze any general rule that should apply to all types of supersession or revocation claims.

In summary, *Agere* and *Blanks* do not create any conflict with the decision of the six other courts. Neither *Agere* nor *Blanks* considered a revocation claim, and neither announced any general rule governing revocation claims. Not surprisingly, neither *Agere* nor *Blanks* has been cited by any court for the proposition that when there is a delegation provision, any supersession challenge, even one based on a revocation theory, is always for the arbitrators. In fact, in their briefs in the Texas Supreme Court, Petitioners never cited *Blanks* and relegated their citation of *Agere* to a string cite. (R. App. 46) Moreover, Petitioners' concession that courts can decide a revocation challenge to a delegation provision is evidence that not even Petitioners believe that *Agere* and *Blanks* establish a broad, general rule that revocation issues are always for the arbitrators if an earlier delegation clause exists.

C. The decision below was correct

The Texas Supreme Court's decision in this case was correct. Under Section 2 of the FAA, the 2006

SPA's arbitration provisions were subject to revocation on the same basis that any other agreement could be revoked under Texas law. Because the terms of the Settlement Agreement called into question the continued existence of the 2006 SPA's arbitration provisions, including the delegation agreement, it was the court's obligation to determine whether, under Texas law, the Settlement Agreement revoked the earlier arbitration provisions, such that the earlier arbitration agreements no longer existed.

Petitioners advance three principal arguments why the Texas Supreme Court supposedly erred.

First, Petitioners repeat their misrepresentation that the court held that the delegation agreement was "unenforceable because the broader contract containing this arbitration agreement [the 2006 SPA] has been superseded." (Pet. 18; *see also* Pet. 21) As previously demonstrated, this was not the basis of the Texas Supreme Court holding. As detailed above, the ruling that no arbitration agreement existed was based on the court's comparison of the terms of the Settlement Agreement with just the arbitration provisions, not with the overall 2006 SPA. (Pet. App. 28a–30a)

Second, Petitioners argue that "[b]ecause the supersession argument was not specific to the delegation provision, the Texas Supreme Court erred by relying on it to invalidate the delegation." (Pet. 21) As a threshold matter, Petrobras did not make this argument or raise this issue before the Texas Supreme Court, and it was not preserved. Petrobras' only argument was

that "to avoid an arbitration agreement . . . a party's attack must relate specifically to the arbitration agreement itself, rather than the contract as a whole." (R. App. 53) Petrobras did not argue that Astra also had to explicitly attack the delegation provision, and the opinion of the Texas Supreme Court below does not address any such argument. In any event, this argument also fails because Astra did separately challenge the delegation provision, as detailed above.

Petitioners' third argument is that the Texas Supreme Court misunderstood the "clear and unmistakable" test. (Pet. 19–20) Petitioners contend that, once the delegation agreement in the 2006 SPA was proven, that satisfied the "clear and unmistakable" test, and it was no longer relevant to any inquiry. According to Petitioners, the "only remaining question is whether that delegation is now *unenforceable* because . . . the settlement agreement superseded the joint-venture agreement . . . [and] supersession concerns the *enforceability* of the delegation, not its formation." (Pet. 20) (emphasis in original).

This contention misconceives the nature of the proper inquiry here. The issue before the Texas Supreme Court was whether, at the time arbitration was being sought, the parties still had any agreement to arbitrate arbitrability. The court was considering whether the evidence demonstrated a "clear and unmistakable" intention to have arbitrators decide if the Settlement Agreement had revoked the arbitration provisions of the 2006 SPA. Thus, the issue was one of the parties' current "intention," rather than whether a

prior agreement was enforceable. Enforceability is not an issue unless an agreement exists, which is a threshold issue.

D. There are no other reasons to grant certiorari

Petitioners contend that the Court's intervention is necessary to safeguard the FAA's "commitment to the enforceability of commercial arbitration agreements and to provide clarity and uniformity in the law." (Pet. 23) The Texas Supreme Court decision, like those of the five other courts discussed above, properly takes into account the mandate of the FAA and the Court's precedent that any arbitration agreement, including a delegation agreement, be treated the same as—and not more favorably than—any other contract. Per the FAA and applicable precedent, courts have a duty to determine whether an arbitration agreement has been revoked, such that no agreement or consent to arbitrate exists. That is what the Texas Supreme Court did here.

Petitioners speculate that there will be a "wave of potentially protracted mini-trials" to determine the revocation or supersession issue. (Pet. 23) Apart from there being no such evidence, a risk of litigation in which parties seek to enforce their rights under the FAA is no reason to refuse to enforce those rights.

Finally, this case would not be a good vehicle to clarify any legal principles. Although the Petition states that the questions it raises were "pressed and

passed upon in the proceedings below," that is not the case. (Pet. 25)

Below, Petrobras did not raise or preserve any issue or argument based on Astra's alleged failure to separately attack the delegation provision, and the Texas Supreme Court's decision does not refer to any such argument. Petrobras' only argument was that Astra had not attacked the "arbitration agreement itself." (R. App. 53) In any event, Astra did separately attack the delegation provision. (R. App. 123–27)

Petitioners also contend that the claimed conflict issue presents a "pure question of law." (Pet. 25) That is incorrect. The decision whether the courts or arbitrators decide a supersession challenge depends, in part, on the facts alleged. In the case of a revocation-based supersession claim, the court must first determine whether the terms of the subsequent contract raise an issue as to whether the prior arbitration provisions have been revoked. If so, it is the court's obligation to determine whether the subsequent contract has actually revoked the prior arbitration agreements. That is done by applying the governing state law contract interpretation principles, which determine such revocation issues.[7]

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[7] Petitioners do not seek certiorari to determine whether the Texas Supreme Court correctly applied Texas law in finding that the Settlement Agreement's provisions directly conflicted with the arbitration provisions, including the delegation provision, and thus revoked the earlier arbitration agreements.

Petitioners' contention that this is a pure question of law is further undercut by their concession (Pet. 22) that, depending upon the terms of the subsequent contract, some revocation claims are for courts, not arbitrators, even though a prior delegation agreement exists.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

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