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.

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

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

There is an entrenched conflict among numerous courts of appeals and state courts of last resort on an important question concerning the interpretation of the Federal Arbitration Act: namely, whether an arbitrator must decide whether a contract with an arbitration clause that delegates questions of arbitrability to the arbitrator has been superseded by a subsequent contract. The Texas Supreme Court erred by holding that a court must decide such questions. This case is an excellent vehicle for resolving the conflict.

In the face of compelling arguments for further review, respondents offer only feeble responses. On the conflict: the conflict has only deepened since the petition was filed, with the Ninth Circuit siding with those courts

holding that a court must decide the supersession question. Respondents seek to distinguish the decisions of the Fifth Circuit and the Alabama Supreme Court on the ground that they addressed not "revocation" (which respondents contend is at issue here), but other forms of supersession. But respondents never explain that taxonomy, let alone why it should affect the analysis. Spoiler alert: it should not.

On the merits: respondents suggest that the Texas Supreme Court did not really hold that a court must decide whether a contract with an arbitration clause that delegates questions of arbitrability has been superseded by a subsequent contract. But the Texas Supreme Court unambiguously said as much. And when respondents reluctantly get around to defending that holding, they cannot reconcile it with this Court's precedents.

This case presents the Court with the opportunity to dispel longstanding uncertainty on a legal question of great practical importance and to provide much-needed guidance to the lower courts. The petition for a writ of certiorari should be granted.

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

1. Respondents attempt to distinguish away the decisions of the Fifth Circuit and the Alabama Supreme Court holding that an arbitrator, and not a court, must decide questions of supersession. Specifically, respondents argue (Br. in Opp. 21-24) that supersession challenges based on "revocation" are analytically distinct from other types of supersession challenges.

That is a classic that-was-Monday, this-is-Tuesday distinction. To begin with, respondents never define a "revocation" challenge, much less explain how it differs

from other types of supersession challenges. (The settlement agreement here did not by its terms "revoke" anything.) Nor do respondents explain how and why such a distinction has any relevance to the question of who decides the challenge. Nor do they cite any court that has recognized such a distinction. Quite to the contrary: regardless of the label that respondents choose to affix to any given challenge, the question decided by the Fifth Circuit and the Alabama Supreme Court is substantively identical to the question decided by the court below and the other courts in the conflict.

For example, in *Agere Systems, Inc.* v. *Samsung Electronics Co.*, 560 F.3d 337 (5th Cir. 2009), the parties entered a number of successive licensing agreements, and the dispute centered on whether a 2000 licensing agreement (which contained an arbitration agreement and delegation provision) or a 2006 agreement (which contained neither) controlled. See *id.* at 338-339. The party seeking arbitration argued that the 2000 agreement remained in effect; the party resisting arbitration argued that the 2006 agreement had "super[s]eded" the 2000 agreement. See *id.* at 340. The Fifth Circuit held that the arbitrator had to decide that question. See *ibid.*

Relying on a single sentence in the Fifth Circuit's opinion, respondents argue that the question in that case was whether the earlier agreement had expired *by its own terms*, rather than whether it was superseded by the later agreement. See Br. in Opp. 22 (citing *Agere*, 560 F.3d at 340). But that ignores the rest of the court's opinion, which characterized the question as one of supersession. See *Agere*, 560 F.3d at 339-340. It also ignores the district court's opinion, which similarly characterized the dispute as whether "the [later] [a]greement *superseded* all of the obligations of the [earlier one]." Civ. No. 06-185, 2007 WL 9724759, at *2 (E.D. Tex. Sept. 27, 2007) (emphasis

added); see *Austin Capital Management* v. *Board of Trustees of Texas Iron Workers' Pension Fund*, Civ. No. 09-351, 2009 WL 10699390, at *5 (W.D. Tex. July 30, 2009) (citing the Fifth Circuit's decision in *Agere*).

In any event, respondents have offered no explanation for why a dispute over a container contract's "expir[ation]" should be treated differently from one over supersession. Whatever descriptive noun is attached to the situation, the challenger's submission is that the earlier contract with a delegation provision is no longer in force. And the competing arguments about why the arbitrator should (or should not) decide that question are exactly the same.

The Alabama Supreme Court's decision in *Blanks* v. *TDS Telecommunications LLC*, 294 So. 3d 761 (2019), is to the same effect. There, an internet provider entered into a service agreement with its customers. The initial contract required arbitration of all disputes between the parties, including disputes about arbitrability. See *id.* at 762. In a later contract, however, the provider unilaterally revised the terms of service to prohibit arbitration by particular customers, as it had the power to do under the initial contract. See *id.* at 762-763.

Respondents contend that the provider's reliance on the initial contract in issuing the later contract distinguishes the case, because that reliance indicated the initial contract was still "in existence." Br. in Opp. 23-24. According to respondents, the later contract did not terminate the initial contract entirely, but instead terminated only the arbitration agreement contained within it. See *ibid.* But that is not how the Alabama Supreme Court saw it: like the court below, it considered (and decided) only the question whether "the prior version of the [t]erms of [s]ervice ha[d] been *superseded* by the updated version." *Blanks,* 294 So. 3d at 763 (emphasis added).

To the extent that respondents seek to distinguish between different forms of "supersession," *Blanks* affirmatively rejects any such distinction. The Alabama Supreme Court explained that, "[f]or purposes of who is to decide arbitrability," it "d[id] not see a meaningful difference in the alleged termination of the agreement and the parties' business relationship in [a previous case] and the alleged superseding of the agreement governing the parties' relationship in the present case." 294 So. 3d at 765.

2. Contrary to respondents' contention (Br. in Opp. 15-21), the cases on their side of the conflict do not support a distinction between "revocation" and other forms of supersession challenges either.

For example, in the Ninth Circuit's recent decision in *Suski* v. *Coinbase, Inc.*, 55 F.4th 1227 (9th Cir. 2022), it was undisputed that the previous contract—a Coinbase user agreement—remained in effect with respect to some transactions. See *id.* at 1228-1231. The only dispute was whether a second, more specific contract—the official rules for a Coinbase-operated contest—superseded the user agreement *as to the contest*. And even in a case with materially similar facts to those here—an initial contract governing a business dispute, followed by a settlement purportedly releasing all claims—the First Circuit spoke descriptively in terms of "supersession" and "termination," rather than "revocation." See, *e.g.*, *McKenzie* v. *Brannan*, 19 F.4th 8, 19 (2021).

In short, respondents' attempt to explain away the conflict by distinguishing between "revocation" and other forms of supersession has no support in precedent and makes little sense besides. In light of the substantial conflict on the question presented, the petition for certiorari should be granted.

B. The Decision Below Is Incorrect

On the merits, respondents contend that, whenever a subsequent contract "calls into question" the ongoing effect of a previous contract that contains a delegation provision, that question must be decided by a court. Br. in Opp. 24-27. Although the merits are ultimately a matter for another day, respondents' defense of the decision below lacks merit.

1. To begin by clearing out some underbrush: respondents first argue (Br. in Opp. 7, 25) that the Texas Supreme Court adjudicated, and respondents raised, a challenge solely to the arbitration agreement, rather than to the joint-venture agreement that contained it. That is both incorrect and irrelevant. The Texas Supreme Court concluded that the arbitration agreement was no longer in effect because the settlement agreement "confirms that the parties later agreed to resolve all claims and to supersede *the* [*joint-venture*] *agreement*." Pet. App. 28a (emphasis added). The court likewise understood respondents to be challenging the joint-venture agreement as a whole, explaining that respondents "argue[] * * * that the parties' * * * settlement agreement resolved all claims between the parties and replaced and superseded the [joint-venture] agreement, including the arbitration clause, so the arbitration agreement ceased to exist after the settlement agreement." *Id.* at 27a. And the court proceeded to hold that a court, not the arbitrator, must decide whether an arbitration agreement is unenforceable because the initial contract containing the arbitration agreement has been superseded by a subsequent contract, with the result that the arbitration agreement no longer "presently exists." *Id.* at 30a.

To be sure, as respondents note (Br. in Opp. 8-9), in the course of adjudicating respondents' general supersession argument, the Texas Supreme Court considered

whether the merger clause of the settlement agreement "could somehow be interpreted to except or preserve" the arbitration agreement. Pet. App. 28a; see *id.* at 28a-29a (similarly discussing the forum-selection clause). But the court ultimately concluded that it could not—and the court's failed search for an "excep[tion]" from the wholesale supersession of the joint-venture agreement simply reinforces the general nature of respondents' challenge.

2. Even if respondents were correct that they solely challenged the arbitration agreement, their challenge still should have been heard by the arbitrator because of the provision delegating arbitrability questions to an arbitrator. A delegation provision is both binding, see *Henry Schein, Inc.* v. *Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019), and severable from the surrounding arbitration agreement, see *Rent-A-Center, West, Inc.* v. *Jackson*, 561 U.S. 63, 74-75 (2010). And it is only specific challenges *to the delegation provision*—not general challenges to the surrounding arbitration agreement—that can be adjudicated by a court. See *ibid.* The absence of a specific provision in the settlement agreement nullifying the delegation provision is thus determinative.

Tacitly acknowledging that principle, respondents next insist that they "did separately challenge the delegation provision." Br. in Opp. 26; see *id.* at 7. But even now, respondents have not proposed a theory that applies specifically to the delegation provision, rather than the arbitration agreement (and indeed the joint-venture agreement) as a whole. In fact, respondents concede that any challenge they made to the delegation provision "rested on" the purported revocation of "the arbitration provisions" more broadly. *Id.* at 7-8; see Br. in Opp. App. 123-127. And again, respondents can point to no provision in

the settlement agreement that specifically nullifies the delegation provision.[1]

Respondents suggest (Br. in Opp. 14-15) that there is something problematic about petitioners' acknowledgment that a court can hear a challenge to a delegation provision based on a provision in a subsequent contract that specifically nullifies that provision. Not so. The question presented concerns disputes over supersession by one contract of another. When a party attempts to rely solely on the supersession of the entire contract, that constitutes a classic—and impermissible—general challenge. That is true because of the familiar principle that delegation provisions are severable from the arbitration agreements and container contracts in which they are embedded; as a result, the supersession of a container contract is presumptively insufficient to supersede a delegation provision. See *Rent-A-Center*, 561 U.S. at 74-75; *Prima Paint Corp.* v. *Flood & Conklin Manufacturing Co.*, 388 U.S. 395, 402-404 (1967).

By contrast, where parties act specifically to nullify a delegation clause, either through an independent nullification agreement or through a specific nullification provision in a broader contract, there is nothing to sever. If the challenge is successful, the delegation clause is nullified. Such a challenge, however, would be predicated not on the

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[1] Respondents assert that petitioners "did not argue that [respondents] also had to explicitly attack the delegation provision." Br. in Opp. 25-26, 28. But petitioners repeatedly argued below that respondents' challenge was insufficiently specific, see, *e.g.*, Br. in Opp. App. 53-54, 167, and that respondents' authorities were inapposite because they "d[id] not even address the delegation of arbitrability," *id.* at 49 n.9, 165 n.12. And dispositively, this point is at most a "new argument to support what has been [petitioners'] consistent claim"—*i.e.*, that arbitrators must decide supersession questions—not a "new claim" that is subject to forfeiture. *Lebron* v. *National Railroad Passenger Corp.*, 513 U.S. 374, 379 (1995).

supersession of the broader contract, but on a specific nullification agreement or provision. None of the cases in the conflict on the question presented presents this scenario. It is hardly an "inconsistent" "concession" (Br. in Opp. 14-15) to acknowledge that this scenario would yield a different outcome; rather, it is simply dictated by this Court's precedents treating delegation clauses as severable. See p. 7, *supra*.

3. When they finally get around to the merits, respondents have no answer to the fundamental problem with the Texas Supreme Court's holding that a court must decide the supersession question despite the presence of a valid delegation: it cannot be reconciled with this Court's decisions in *Prima Paint* and *Rent-A-Center*. Respondents contend only that a court must decide the supersession question because it relates to "the parties' current 'intention' rather than whether a prior agreement was enforceable." Br. in Opp. 26-27.

That contention is severely flawed. This Court has drawn a clear distinction between questions concerning a contract's *formation* and those concerning a contract's *validity*; it is only with respect to the former that a court must make a threshold determination. But in a supersession dispute, all parties agree that they did form an agreement to arbitrate *at some point*; the only question is whether the agreement is still in effect and enforceable. As this Court has made clear, the question of formation is not what the parties "current[ly] inten[d]," Br. in Opp. 26 (internal quotation marks omitted), but rather whether an agreement to arbitrate was "*ever* concluded," *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440, 444 n.1 (2006) (emphasis added); see *Rent-A-Center*, 561 U.S. at 70 n.2.

More fundamentally, respondents ignore the logic behind the rule distinguishing questions of formation from

questions of validity. As this Court has explained, a court requires "clear and unmistakable" evidence of at least *some* agreement to arbitrate before compelling arbitration because failing to so "might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide." *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 945 (1995) (alterations omitted). By contrast, when "parties concede that they have agreed to arbitrate some matters pursuant to an arbitration clause," "the law's permissive policies in respect to arbitration" require clarity before *removing* matters from arbitration. *Granite Rock Co.* v. *Teamsters*, 561 U.S. 287, 298 (2010).

The rule requiring judicial determination of formation questions is thus best understood as an "exception" to the general policy favoring arbitrability—an exception that must be applied only in "narrow circumstance[s]." *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002). A supersession challenge does not fall within that narrow exception. The Texas Supreme Court's decision disrespects the parties' delegation of arbitrability questions and the Arbitration Act's policy favoring arbitration.[2]

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

Respondents do not dispute that the question presented here is frequently recurring or that questions involving commercial arbitration are of substantial legal and practical importance. Nor do they dispute that, in light of the acute need for uniformity, this Court routinely

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[2] Beyond the question presented, respondents also deny the existence of the bribery scheme. See Br. in Opp. 5 n.3. But undisputed evidence confirmed the existence of that scheme. See Br. in Opp. App. 39-40, 155.

grants certiorari on Arbitration Act questions even where the conflict in the lower courts is shallow. Instead, respondents contend only that there is no need to grant certiorari here because the decision below "properly takes into account the mandate of the [Arbitration Act] and th[is] Court's precedent." Br. in Opp. 27-29. As discussed above, see pp. 9-10, the decision below did neither. And as underscored by the Ninth Circuit's recent decision in *Suski*, the question remains a recurring one of vital practical importance.

Respondents assert that any concerns about "protracted mini-trials" on supersession questions are "specula[ive]." Br. in Opp. 27. But such consequences are already apparent. For example, after the First Circuit remanded in *McKenzie*, the district court held a three-day bench trial on the supersession question, and it took more than six months to issue a decision allowing the arbitration to proceed. See *McKenzie* v. *Brannan*, Civ. No. 20-262, 2023 WL 1433107, at *1, *16 (D. Me. Feb. 1, 2023).

Finally, respondents object that this case is a poor vehicle in which to decide the question presented because it is not a "pure question of law." Br. in Opp. 28-29. But petitioners have presented, and the lower courts have passed upon, a legal question: if there is a delegation provision and no subsequent specific negation of that provision, must the arbitrator decide whether the contract containing the provision has been superseded by a subsequent contract? The particular facts in any given case are irrelevant. It is respondents who seek to muddy the waters by proposing different treatment for different types of supersession challenges—a distinction no court has drawn. See pp. 5-6, *supra*.

In short, this case is an excellent vehicle in which to resolve an exceedingly important question that has vexed

the lower courts. The Texas Supreme Court's decision violated fundamental principles of federal arbitration law. The Court should grant review and reverse the judgment below.

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The petition for a writ of certiorari should be granted.

Respectfully submitted.

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