No. 23-1128

IN THE

Supreme Court of the United States

McINNIS ELECTRIC COMPANY,

Petitioner,

v.

BRASFIELD & GORRIE, LLC, *et al.*,

Respondents.

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

BRIEF OF ARBITRATION SCHOLARS GEORGE BERMANN AND RISHI BATRA AS *AMICI CURIAE* IN SUPPORT OF GRANTING THE PETITION FOR A WRIT OF CERTIORARI

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INTERESTS OF THE *AMICI CURIAE* IN THIS CASE[1]

Professor Bermann

Amicus curiae George A. Bermann is the Jean Monnet Professor of EU Law, Walter Gellhorn Professor of Law, and director of the Center for International Commercial and Investment Arbitration at Columbia Law School. A faculty member since 1975, Professor Bermann teaches and writes extensively on transnational dispute resolution, European Union law, administrative law, and comparative law. He is a professeur affilié of the School of Law of Sciences Po (Paris) and lecturer in the MIDS Masters Program in International Dispute Settlement (Geneva).

Professor Bermann is also an active international arbitrator in commercial and investment disputes; chief reporter of the ALI's *Restatement of the U.S. Law of International Commercial and Investor-State Arbitration*; co-author of the *UNCITRAL Guide to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*; chair of the Global Advisory Board of the New York International Arbitration Center; co-editor-in-chief of the *American Review of International Arbitration*; and founding member of the ICC International Court of Arbitration's Governing Body. He is the first American to be elected

1. All parties have received timely notice of amici curiae's intent to file this brief. Amici curiae state that no counsel for any party authored this brief in whole or in part, and no entity or person, aside from amici curiae or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

Président of the International Academy of Comparative Law.

Professor Batra

Amicus curiae Rishi Batra is Professor of Law and the Englehardt Research Fellow at St. Mary's University School of Law in San Antonio, Texas. A nationally recognized speaker and scholar in Arbitration, Mediation, and Alternative Dispute Resolution, he frequently conducts training for attorneys across the country in legal negotiation and dispute resolution strategies. Formerly a tenured professor at Texas Tech University School of Law he has visited at Oregon, Ohio State, Whittier, UNLV, and Santa Clara Law. Prior to joining the St. Mary's law faculty, Professor Batra was Director of the *Leadership and Appropriate Dispute Resolution* (LADR) program in the United States Air Force Academy.

Professor Batra's scholarly focus is alternative alternative dispute resolution, in particular the potential for ADR in novel fields such as criminal procedure and election law. His work has appeared in numerous journals, such as the *George Mason Law Review*, and the *Harvard Negotiation Law Review.* Professor Batra served as the co-chair of the ABA Section of Dispute Resolution Law Schools Committee, and co-chairs the national ABA Representation in Mediation Competition. He is active in the ABA Section of Dispute Resolution Council, among other ADR service roles.

Amici are scholars whose teaching, scholarship, and practice involve arbitration. The *amici's* interests in this case are essential to their work, as the Questions

Presented in this Petition address fundamental questions affecting their past and future scholarship:

Will U.S. law persist in removing judicial determinations of arbitrability from the courts and assigning them to an arbitrator, when one of the parties objects to the arbitrator determining arbitrability?

Will U.S. arbitration law become more compatible with international standards for addressing the same issues, or will it diverge even more, either by delegating further issues into state law variation or by making legal standards that are incompatible with international law?

Amici have particular interests in this case because the opinion below calls into question the techniques and practices these master teachers and institutional leaders believe are proper and have long extolled.

If the opinion below is allowed to stand, the *amici* must consider whether the customary requirements for clarity and equity in arbitration agreements, which the amici have taught, will be replaced by judicial enforcement of badly drafted -- in some cases, deceptively drafted -- arbitration agreements? What effects would such an outcome have on their former and future students, or on the institutions or associations they lead?

SUMMARY OF ARGUMENT

The Petition offers the Court an excellent vehicle to address a central but unsettled issue of domestic and international arbitration law: whether incorporation of institutional rules of arbitral procedure in arbitration

clauses constitutes "clear and unmistakable" evidence that the parties intended "to arbitrate arbitrability," within the meaning of *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938 (1995).

See also *Granite Rock Co. v. Int'l Bhd. of Teamsters,* 561 U.S. 287, 297, n.5 (2010); *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 U.S. 63, 69 (2019).

This Court has recognized that the issue of who has primary responsibility to decide arbitrability – court or arbitrator – "can make a critical difference to a party resisting arbitration" because it can remove a party's right to have a court determine the arbitrability of a dispute. *Id*. at 942. See also *Granite Rock,* 561 U.S. at 300-301.

The Mississippi opinion below relied on recent federal case precedents to adopt an assumption that the incorporation of such arbitration-association rules constitutes "clear and unmistakable" evidence of the parties, or at least the non-demanding party's intent. App. 11-13. Thus, the Mississippi Supreme Court adopted a legal interpretative standard *in lieu* of the factual inquiry this Court has required since, at least, its opinion in *First Options*, nearly two decades ago.

In addition, the Mississippi opinion also addresses an important split among the courts on what party bears the burden of proving the existence or absence of a valid arbitration agreement, and this case presents an ideal vehicle to resolve that split among the States.

ARGUMENT

I. There are Compelling Reasons to Grant Certiorari in this Case

A. The Mississippi Supreme Court Decision Blatantly Conflicts with this Court's Relevant Decisions

This Court's Rule 10(c) indicates one reason this Court finds certiorari appropriate is when "a state court . . . has decided . . . an important federal question in a way that conflicts with relevant decisions of this Court." Such is the case here, because the decision below fails to apply – or it patently misapplies -- the analysis this Court has consistently required since its decision in *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938 (1995).

1. The *First Options* Test

The issue raised here is a well-known subspecies of a more general question that has occupied this Court's attention on numerous occasions: who – court or arbitrator – has primary responsibility for deciding issues of arbitrability.

In some cases, a party initially raises an issue of arbitrability before an arbitral tribunal. In that situation, the tribunal, exercising its competence-competence, makes a jurisdictional determination. If it finds jurisdiction and issues an award, the losing party may seek the award's *vacatur*. The court, upon request, will then make a fully independent determination of arbitrability, without deference to the tribunal's findings.

This was exactly the situation in *First Options*.

There, the district court confirmed an award, finding that a couple that had not signed an arbitration agreement concluded by their wholly-owned company was bound by that agreement. The Court of Appeals reversed, deciding, upon *de novo* review of the record, that the couple was not bound by the agreement. In so doing, it affirmed that courts "should independently decide whether an arbitration panel has jurisdiction over the merits of any particular dispute." *Kaplan v. First Options of Chi., Inc.*, 19 F.3d 1503, 1509 (3d Cir. 1994). In an opinion by Justice Breyer, this Court unanimously affirmed:

Courts should not assume that the parties agreed to arbitrate arbitrability unless there is "clea[r] and unmistakabl[e]" evidence that they did so . . . . .

> [The] "who (primarily) should decide arbitrability" question is rather arcane. A party often might not focus upon that question or upon the significance of having arbitrators decide the scope of their own powers . . . . And, given the principle that a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration, one can understand why courts might hesitate to interpret silence or ambiguity on the "who should decide arbitrability" point as giving the arbitrators that power, for doing 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, 514 U.S. at 944–45. On the merits, the Court agreed with the Court of Appeals that the Kaplans had not clearly and unmistakably conferred on arbitrators exclusive authority to determine arbitrability. Id. at 946.

In sum, the Court took as its uncontroversial point of departure that issues of arbitrability, due to their fundamental importance, call for independent judicial determination. At the same time, the Court left open the possibility that the parties, in an exercise of party autonomy, could agree to forego independent judicial review on issues of arbitrability – provided they do so "clearly and unmistakably."

The Court has reiterated this fundamental proposition that "courts presume that the parties intend courts, not arbitrators, to decide . . . disputes about 'arbitrability'" unless "the parties clearly and unmistakably provide otherwise" See, e.g., *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83-84 (2002); *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 80 (2010); BG *Grp., PLC v. Republic of Arg.*, 572 U.S. 25, 34 (2014); *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 U.S. 63, 72 (2019).

In other cases, unlike *First Options*, but like the present one, a party resisting arbitration raises its arbitrability objections before a court before arbitration, asking it to stay an action and/or compel arbitration based on a putative arbitration agreement. See 9 U.S.C. §§ 3–4. If the plaintiff contests any aspect of the dispute's arbitrability, the court must independently determine that question.

Such was the situation in *Rent-A-Center*, where this Court reaffirmed that, in order to constitute a

delegation, the language used by the parties must unambiguously establish each parties' "manifestation of intent" to withdraw from the courts the judicial authority to determine the parties' agreement's arbitrability. 561 U.S. at 69 n.1.

Thus, whether a party chooses to contest arbitrability in a court prior to arbitration or before an arbitral tribunal, that party is entitled to an independent judicial determination of arbitrability – an entitlement so strong that it cannot be overcome with anything less than "clear and unmistakable" evidence.

2. *Henry Schein's* Application of *First Options*

In most delegation cases thus far, litigants demanding arbitration have argued that, if an arbitration agreement incorporates by reference institutional rules containing a competence-competence clause, that fact alone renders "clear and unmistakable" the parties' intention to give arbitral tribunals exclusive authority to determine arbitrability.

The language considered by this Court in *Henry Schein*, reviewing the decision of the Fifth Circuit position in this case, is illustrative. The arbitration clause contained no language, much less any "clear and unmistakable" language, suggestive of a delegation:

> Any dispute arising under or related to this Agreement (except for actions seeking injunctive relief and disputes related to . . . intellectual property of Pelton & Crane), shall

> be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association.

Henry Schein, 586 U.S. at 66.

There is nothing in the language of this arbitration agreement that puts a party on notice of a delegation. A party reading that passage would have no idea whatsoever that, by signing the agreement, it was relinquishing its right of access to a court to demonstrate that it never consented to arbitration, *i.e.,* that the agreement was never formed, is invalid or inapplicable to it or to its dispute. Yet, that is a right to which, under this Court's consistent case law, a party is entitled.

This arbitration agreement should be contrasted with the clause in *Rent-A-Center,* the only case before this one presenting this Court with a putative delegation. The *Rent-A-Center* clause provided that:

> [t]he Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this [Arbitration] Agreement including, but not limited to any claim that all or any part of this [Arbitration] Agreement is void or voidable.

561 U.S. at 66 (emphasis added).

This clause expressly conferred on the tribunal exclusive authority to decide upon the arbitration

agreement's formation, interpretation, and applicability. Thus, the parties clearly relinquished their right to an independent judicial determination of those matters. Indeed, the question whether there had been a valid delegation was never even raised.

By contrast, the arbitration agreement in the present case contains nothing approaching the language in *Rent-A-Center*. In order to find a delegation, the Fifth Circuit was reduced to treating incorporation by reference of the AAA Rules containing a standard competence-competence clause as if it met *First Options*' demanding standard.

The procedural history here is instructive. The district court, tasked with considering the facts of the case, found in the competence-competence clause and its reference of the AAA rules, no clear and unmistakable evidence of a delegation.[2] Dutifully following the law of the Circuit, after the district court found there was no express delegation clause, it also applied the circuit's "wholly groundless" test. See *Douglas v. Regions Bank*, 757 F.3d 460, 463-464 (5th Cir. 2014). The district court thus found that the demand to arbitrate the question of arbitrability was wholly groundless. The Fifth Circuit upheld the district court's interpretation of the arbitration agreement and its rejection of the putative delegation clause, also resting its decision on the notion that the party demanding arbitration's demand was wholly groundless. The action, Judge Higginbotham wrote, was not subject

2. Competence-competence is the arbitral tribunal's competence to determine its own power and jurisdiction. *See* George A. Bermann, *Arbitrability Trouble*, 23 Am. Rev. Int'l Arb. 367, 378 (2012), *citing* William H. Park, *Amending the Federal Arbitration Act*, 13 Am. Rev. Int'l Arb. 75 (2002).

to mandatory arbitration. *Archer & White Sales, Inc. v. Henry Schein, Inc.*, 878 F.3d 488, 497 (5th Cir. 2017), vacated and remanded, 586 U.S. 63, (2019).

The Supreme Court vacated the decision of the Fifth Circuit, though doing so only as to its determination that the demand for arbitration was wholly groundless. Id. at 68-72. The matter was remanded for a further determination as to whether there was sufficient evidence to meet *First Options'* "clear and unmistakable evidence" standard. Id. at 72, quoting 514 U.S., at 944. Back in the Fifth Circuit, the three-judge panel heard new arguments and found that, though the parties agreed there was an arbitration clause, the vague reference to the AAA rules was insufficient evidence to find a delegation clause. *Archer & White Sales, Inc. v. Henry Schein, Inc.*, 935 F.3d 274 (5th Cir. 2019), cert. granted then dismissed, 592 U.S. 168 (2021).

3. The Mississippi Court Majority Avoids this Court's Opinions

Justice Kavanaugh announced the opinion of a unanimous court in *Henry Schein* on January 8, 2019.

On October 23, 2023, the Mississippi Supreme Court announced its divided opinion, in which a majority found an arbitration clause (one very much like *Henry Schein's*) to be the only required proof that each party "manifested their intent to be bound by such rules," and to be "tantamount to agreeing to delegate scope questions to the arbitrators." *McInnis Electric Company v. Brasfield & Gorrie, LLC*, --- So.3d ----, 2023 WL 6889119, *4-*5 (Miss. 2023), App. 12-13.

The Mississippi majority was aware that its reliance on older Fifth Circuit precedent, and its recent own state precedent, was a challenging interpretation of the Federal Arbitration Act. The citation to the Fifth Circuit's opinion in *Arnold v. Homeaway Inc.*, 890 F.3d 546, 552 (5th Cir. 2018), can hardly explain away the Fifth Circuit's later opinions in *Henry Schein.* App. 11-12.

The state court's reliance on its precedents and on a Delaware case are similarly insufficient. App. 11-12, citing *Nethery v. CapitalSouth Partners Fund II, L.P.*, 257 So. 3d 270, 273 (Miss. 2018), citing *James & Jackson, LLC v. Willie Gary, LLC*, 906 A.2d 76 (Del. 2006)).

The majority's analysis makes no reference to this Court's instructions in *First Options*, *Henry Schein*, or the case pronounced only months before, *Morgan v. Sundance, Inc.*, 596 U.S. 411 (2022), in which Justice Kagan announced, for a unanimous court, the courts are barred from using "custom-made rules, to tilt the playing field in favor of (or against) arbitration." Id. at 419.

Any doubt of that the lessons of *First Options* were timely heard by the Mississippi court dissolves before the dissenting opinion of the state's two presiding justices. Presiding Justice Kitchen's first argument questions why the case had not been analyzed under their court's precedent in *Greater Canton Ford Mercury, Inc. v. Ables*, 948 So. 2d 417 (Miss. 2007), which applied the tests originating with *First Options*:

> [w]hether a party is bound by an arbitration agreement is generally considered an issue for the courts, not the arbitrator, '[u]nless

> the parties clearly and unmistakably provide otherwise.' " [948 So. 2d.] at 422, quoting *AT & T Techs. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986).

McInnis, App. 14-15.

Thus, the Mississippi Supreme Court in this case has decided an important federal question in a way that conflicts with relevant decisions of this Court.

B. The Mississippi Opinion Illustrates Splits among Other State and Circuit Courts on an Important Issue of Burden of Proof

This Court's Rule 10(c) indicates one reason this Court finds certiorari appropriate is "a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court . . . ." Such is the case here, as the decision below illustrates a split among other states and the federal circuits that have not yet been settled by this court. Namely, courts are split as to which party bears the burden of proof regarding the presumption of arbitrability.

Whether the demanding party or the non-demanding party bears the burden of proving a valid arbitration agreement has been resolved in opposite ways by the various states and circuits. In many jurisdictions, the party seeking to compel arbitration must demonstrate the existence and validity of the arbitration agreement. *See Nelson v. Dual Diagnosis Treatment Ctr., Inc.*, 77 Cal. App. 5th 643, 653–54, 292 Cal. Rptr. 3d 740, 748 (2022). ("The party seeking to compel arbitration "bears

the burden of proving the existence of an arbitration agreement ..."); *Ford Motor Credit Co., LLC v. Miller*, 248 W. Va. 231, 235–36, 888 S.E.2d 257, 261–62 (2023) ("A party who seeks to enforce an arbitration agreement must make an initial, prima facie showing that the agreement exists between the parties."); *Rogers v. Royal Caribbean Cruise Line*, 547 F.3d 1148, 1151 (9th Cir. 2008) ("As the party opposing arbitration, plaintiffs bear the burden of establishing that the exemption applies.").

Conversely, in other jurisdictions, "the burden of proof is on the party seeking to avoid arbitration." to prove that the agreement is invalid or inapplicable. *Steven Burnett v. Pagliacci Pizza, Inc.*, 9 Wash. App. 2d 192, 199, 442 P.3d 1267, 1270 (2019) ("The burden of proof is on the party seeking to avoid arbitration."); See also *Bielski v. Coinbase, Inc.*, 87 F.4th 1003, 1009–10 (9th Cir. 2023)

This divergence in legal standards can lead to varying outcomes in similar cases, underscoring the importance of this court resolving the dispute to ensure nationwide standards in this area.

II. The Competence-Competence Language in Arbitration Rules Does Not Constitute "Clear and Unmistakable" Evidence Under *First Options*

Courts in the United States have been fundamentally mistaken in inferring from a grant of authority to the arbitrators a withdrawal of all such authority from the courts, for four principal reasons.

First, the language of the competence-competence provision in this case, as in others, fails to support any such inference.

Second, it is well established that competence-competence in U.S. law

signifies only that tribunals may determine their authority; it does not make that authority exclusive.

Third, treating a standard competence-competence clause as sufficient to establish "clear and unmistakable" evidence would effectively reverse *First Options*' strong presumption that parties are entitled to an independent judicial determination of arbitrability.

Fourth, to be truly "clear and unmistakable," a delegation clause belongs in an arbitration agreement itself, not buried in referenced rules of arbitral procedure.

A. The Language of the Putative Delegation Clause

Agreements that refer to the "AAA Rules" in an arbitration clause refer, we must presume to the AAA's "jurisdiction rule" in the industry appropriate rule set. The AAA Construction Industry Arbitration Rules contain in Rule R-9(a) a standard competence-competence clause:

> The arbitrator tribunal shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement(s).

AAA Construction Industry Arbitration Rules & Mediation Procedures, R. 7 (2024). https://www.adr.org/sites/default/files/ ConstructionRules.pdf (Last visited May 1, 2024).

Rule R-9(a) confers on arbitrators the authority to determine their jurisdiction, but that is all it does. It gives no indication of also divesting courts of their presumptive authority to make that determination if so requested. In order to reach that result, one must read into Rule 9(a) the word "exclusive."

That is a big and very serious leap, and one that parties could easily accomplish without the misdirection of reference to other rules. The would do so instead by (a) placing a clause that addresses who decides arbitrability in the arbitration agreement itself, rather than in incorporated rules and (b) expressly stating in that clause that the tribunal's competence is "exclusive."

Taking those two simple steps in drafting the arbitration agreement is all one needs to do, if one truly wants to render an intention to delegate arbitrability "clear and unmistakable." (And, if one believes that the other contracting party would in fact share a similar intention.) Regardless, failing to take these simple steps fails to render that intention apparent at all, much less rendering it "clear" or "unmistakable.'

That is unfortunate, as it should not be supposed that authorizing a tribunal to determine its own competence is not without value. In its absence, a tribunal whose jurisdiction is challenged on arbitrability grounds might be stopped in its tracks because the party challenging arbitrability could have recourse to a court for a determination of the matter. The tribunal would likely suspend proceedings pending that determination. The resulting delay and expense would compromise two of arbitration's strongest selling points: speed and economy.

Even so, the lower courts rarely offer serious support for the proposition that an incorporated competence-competence provision meets *First Options*' "clear and unmistakable" evidence test. They arrive at that result perfunctorily.

In one of the earliest such decisions, *FSC Sec. Corp. v. Freel*, 14 F.3d 1310 (8th Cir. 1994), the Court of Appeals said only this:

> [T]he parties expressly agreed to have their dispute governed by the NASD Code of Arbitration Procedure . . . . [W]e hold that the parties' adoption of this provision is a "clear and unmistakable" expression of their intent to leave the question of arbitrability to the arbitrators.

Id. at 1312–13. Worse yet, the great majority of decisions to come later do not even purport to address the issue. All they do is rely on a decision from another circuit. This pattern was merely repeated in the case below, which cited case upon case that likewise repeated the pattern, as if any of it justifies the result. See, e.g., Petrofac, 687 F.3d at 675 ("We agree with most of our sister circuits that the express adoption of these rules presents clear and unmistakable evidence that the parties agreed to arbitrate arbitrability.")

None of these courts explained or excused their assumption that, if arbitrators have authority to determine arbitral jurisdiction, then the courts necessarily do not.

B. The Meaning of Competence-Competence in U.S. Law

Especially problematic for the proposition advanced by the Respondent is the fact that competence-competence simply does not have the meaning in U.S. arbitration law that the Respondent has ascribed to it. Competence-competence has been consistently understood in the U.S., and worldwide, to authorize an arbitral tribunal to determine its jurisdiction if challenged in that tribunal, and nothing more.

The point of arbitral competence-competence in America is that arbitrators are entitled to determine their own jurisdiction, yet "not for the purpose of reaching any conclusion which will be binding upon the parties--because that they cannot do -- but for the [merely practical] purpose of satisfying themselves as a preliminary matter whether they ought to go on with the arbitration or not." Jan Kleinheisterkamp, *The Myth of Transnational Public Policy in International Arbitration*, 71 Am. J. Comp. L. 98, 138 (2023), quoting *Christopher Brown Ltd. v. Genossenschaft Osterreichischer* [1954] 1 QB 8, 12-13 (Eng.) (emphasis added); Accord with current English, French, and U.S. law, *Dallah Real Estate & Tourism Holding Co. v. Ministry of Religious Affs., Gov't Pak.* [2010] UKSC 46 (per Lord Mance).

The fact that competence-competence does not preclude access to a court on arbitrability issues is built into the key instruments of domestic and international arbitration law. The FAA, 9 U.S.C. § 4, specifically calls upon courts to compel arbitration only if they are "satisfied that the making of the agreement for arbitration . . . [was]

not in issue." (Emphasis added). Similarly, under Article II of the New York Convention, courts do not refer parties to arbitration if they find the arbitration agreement to be "null and void, inoperative or incapable of being performed." 9 U.S.C. § 201 (emphasis added). Courts could not possibly perform their obligations under the FAA or the New York Convention if competence-competence operated to negate judicial authority to make arbitrability determinations.

In sum, the principle of competence-competence in U.S. law has never entailed the corollary that, if arbitrators may decide arbitrability, courts may not. There is no warrant for altogether redefining it merely because it is inserted into a set of procedural rules.

C. The Mississippi Court's Use of Competence-Competence is Associated More with the Law of France than of the United States

The understanding of competence-competence provisions as applied in the Mississippi case below and in its predecessor lower courts is a deviation from U.S. law that contrasts sharply with the understanding of competence-competence that prevails in most countries.

The Mississippi approach is, however, similar to the law of France and certain other countries, which view competence-competence as both vesting tribunals with authority to determine arbitrability and divesting courts of that authority.

Under settled French law, competence-competence has both a "positive" and a "negative" dimension. The

positive dimension affirmatively confers on arbitral tribunals authority to determine their jurisdiction. The negative dimension deprives courts, prior to arbitration, of that authority. See generally Emmanuel Gaillard & Yas Banifatemi, *Negative Effect of Competence-Competence: The Rule of Priority in Favor of the Arbitrators, in Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* 257 (Emmanuel Gaillard & Domenico Di Pietro eds., 2008).

Significantly, however, even under French law, negative competence-competence is not entirely unreviewable. The Civil Procedure Code expressly authorizes courts to decline to enforce an arbitration agreement if they find it "manifestly void or manifestly not applicable." Code De Procédure Civile [C.P.C.] art. 1448 (Fr.).

This difference between the U.S. version of competence-competence ("positive" only) and the French version (both "positive" and "negative") pervades the international arbitration literature. The fact that competence-competence in U.S. law has a positive dimension is simply uncontested. See, e.g., Jack M. Graves & Yelena Davydan, "Competence-Competence and Separability-American Style," in *Int'l Arb. and Int'l Commercial Law: Synergy, Convergence and Evolution* (2011).

In short, whether incorporated in institutional rules or not, clauses that bring competence-competence into an arbitration agreement have been indisputably understood in U.S. law not to deprive courts of the authority, when asked, to determine the arbitrability of a dispute prior to arbitration – much less deprive them of that authority "clearly and unmistakably."

D. Competence-Competence in Context

The Court in *First Options* deliberately restored the rule of judicial authority to determine arbitrability the rule, and consigned any deprivation of that authority to be the exception. This restoration reflects the Court's commitment to the principle of party consent lying at the heart of U.S. arbitration law.

Parties must decidedly "go out of their way" to withdraw from courts the authority to decide issues of arbitrability that they ordinarily enjoy. The "clear and unmistakable" standard cannot be understood any other way. The Court's purpose would be frustrated if the mere inclusion of a competence-competence clause in procedural rules referenced in an arbitration agreement were treated as "clear and unmistakable" evidence of a delegation under First Options.

Today, competence- competence provisions are ubiquitous. They are found in virtually every modern set of institutional rules; the AAA Rules are by no means exceptional. They are also found in virtually every modern arbitration law that Countries and States enact to regulate international arbitral activity conducted on their territory. Under the leading model law of international arbitration, widely adopted around the world and even by a good number of U.S.:

> [t]he arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.

UNCITRAL Model Law, art. 16(1).

As a result, it is the rare international arbitration indeed that is conducted in the absence of a competence-competence provision. Such provisions have become, for all practical purposes, "boiler-plate." Parties do not need to "go out of their way" to subject their arbitrations to competence-competence. All modern arbitration laws and rules do that for them.

Treating competence-competence provisions as "clear and mistakable" evidence does nothing short of destroying the strong presumption in favor of judicial determination of arbitrability that *First Options* created. That simply cannot be the result that this Court had in mind in establishing the *First Options* framework and describing it as a "heightened standard." *Rent-A-Cente*r, 561 U.S. at 69 n.1.

The entire delegation question received sustained attention when the recently-adopted *ALI Restatement of the U.S. Law of International Commercial and Investment Arbitration* was prepared. The Reporters, the ALI Council and the ALI membership at large faced directly the question whether the incorporation of competence-competence language from a set of arbitral rules constituted "clear and unmistakable" evidence of an intention to withdraw from courts their authority to determine arbitrability.

In its lengthy deliberations, the ALI closely examined the proposition that the presence of competence-competence provisions in incorporated institutional rules satisfies the *First Options* test. It looked at the proposition from every angle, carefully weighing both the strengths and weaknesses of the proposition. The

Reporters concluded with confidence that the proposition was unsustainable, and their position was unanimously adopted by both the ALI Council and the ALI membership when the entire Restatement was approved in May 2019. See *Restatement of the U.S. Law of Int'l Commercial and Inves-tor-State Arb.* § 2.8, art. b, Reporter's n. b (iii), (Am. L. Inst. 2019). As Chief Reporter of the Restatement, George Bermann, as *amicus curiae* here affirms that this *amicus* brief accurately reports the ALI's position.

III. THE EFFECT OF A DELEGATION IS TO FULLY DISABLE COURTS FROM ENSURING THE ARBITRABILITY OF A DISPUTE

It would be a great mistake to assume that, if courts lose their authority to ensure the arbitrability of a dispute prior to arbitration, they will recover it at the end of the process. Under U.S. law, once a proper delegation is made, courts are sidelined, not only pre-arbitration but also in post-award review. The case law holds that, under a proper delegation, courts also cannot, in a *vacatur* or confirmation action, meaningfully ensure that the award debtor consented to arbitration. They owe extreme deference to a tribunal's determination whether an arbitration agreement exists, is valid, is applicable to a non-signatory and encompasses the dispute at hand. See, e.g., *Schneider v. Kingdom of Thailand*, 688 F.3d 68, 74 (2d Cir. 2012) ("Because Walter Bau and Thailand clearly and unmistakably agreed to arbitrate issues of arbitrability—including whether the tollway project involved 'approved investments'—Thailand is not entitled to an independent judicial redetermination of that same question.") That deference has numerous analytical components.

> [A] court has the authority to enjoin a party to an international arbitration agreement from initiating or maintaining litigation before another court only if the arbitration agreement is enforceable, the party being enjoined is bound by the arbitration agreement, the claims to be enjoined are within the scope of the arbitration agreement, and issuance of the injunction is appropriate upon consideration of a number of factors, including which court has the greater interest in ruling on the enforceability of the arbitration agreement.

Eletson Holdings, Inc. & Eletson Corporation, V. Levona Holdings Ltd., Respondent., No. 23-CV-7331 (LJL), 2024 WL 1724592, at *41 (S.D.N.Y. Apr. 19, 2024), quoting *Restatement (Third) of the U.S. Law of Int'l Com. Arb.* § 2.29 (Am. L. Inst., Tentative Draft No. 2, 2012).

In sum, according to the *Restatement*, Section 4.12, Reporters' note d; in order to be overturned, a tribunal's finding of arbitrability must be "baseless." The Reporters rested this conclusion on this Court's ruling in *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 569 (2013).

Accordingly, under a delegation, at no point in the arbitration life-cycle will parties have the benefit of an independent judicial determination whether they indeed consented to arbitrate. That is too drastic a result to follow from the mere presence of a standard competence-competence provision only found in the rules of procedure referenced in an agreement to arbitrate. It is, instead, the French approach. See Ina C. Popova, Patrick Taylor & Romain Zamour, *France*, in European Arbitration Review 2020, p. 29.

IV. The Presumptive Authority of Courts to Determine the Arbitrability of a Dispute is Central to Arbitration's Legitimacy as A Means Of International Dispute Resolution

Depriving parties of a right of access to a court on matters of arbitrability is inimical to the fundamental principles that (a) parties are not required to submit their claims to arbitration without their consent and that (b) they are entitled, upon request, to an independent judicial determination of that matter.

But there is more. Preserving that right, absent "clear and unmistakable" evidence that a party has abandoned it, is essential to the legitimacy of arbitration itself. George A. Bermann, *The "Gateway Problem" in International Commercial Arbitration*, 37 Yale J. Int'l L. 1 (2012).

Issues of arbitrability, such as the question whether the parties actually and validly agreed to arbitrate a particular dispute, go to the heart of that legitimacy. The fewer opportunities there are for genuine issues of legitimacy, perhaps the less likely that false issues will undermine these institutions.

It is not news that international arbitration -- one of the most effective and ancient means of avoiding war and managing crises -- is increasingly under attack. See generally, the essays in *Practising Virtue: Inside International Arbitration* (David D. Caron, Stephan W. Schill, Abby Cohen Smutny & Epaminontas E. Triantafilou, eds., 2015).

The crises of our times make essential that, to the fullest extent possible, nothing is done to place that legitimacy at risk.

CONCLUSION

Therefore, *Amici Curiae* respectfully suggest that this Court grant the Petition for Certiorari presently before it in this matter.

Respectfully submitted,

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