No. 19-1080

IN THE

Supreme Court of the United States

ARCHER AND WHITE SALES, INC.,
Cross-Petitioner,

v.

HENRY SCHEIN, INC.
Respondent.

On Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICUS CURIAE* PROFESSOR GEORGE A. BERMANN IN SUPPORT OF CROSS-PETITIONER

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April 2, 2020

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INTEREST OF *AMICUS CURIAE*[1]

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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 (NYIAC); co-editor-in-chief of the *American Review of International Arbitration*; and founding member of the governing body of the ICC International Court of Arbitration.

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[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus* or its counsel, make a monetary contribution intended to fund the preparation or submission of this brief. This brief is submitted pursuant to the consent provided by cross-petitioner and cross-respondent.

Professor Bermann is interested in this case because it presents a highly important but unsettled issue of domestic and international arbitration law relating to the application of the test in *First Options of Chi., Inc.* v. *Kaplan*, 514 U.S. 938 (1995), for determining whether parties have agreed to delegate to arbitral tribunals primary responsibility for determining arbitrability, *i.e.*, the enforceability of agreements to arbitrate. The specific issue is whether incorporation of rules of arbitral procedure constitutes "clear and unmistakable" evidence, within the meaning of *First Options*, that the parties intended to withdraw from courts' authority to determine the arbitrability of a dispute, on account of the fact that those rules, as in this case, contain a clause authorizing arbitrators to determine their own jurisdiction.

Although a majority of courts have found the incorporation of rules containing such a provision to satisfy *First Options*' "clear and unmistakable" evidence test, the ALI's Restatement of the U.S. Law of International Commercial and Investor-State Arbitration has concluded, after extended debate, that these cases were incorrectly decided because incorporation of such rules cannot be regarded as manifesting the "clear and unmistakable" intention that *First Options* requires. This case presents an opportunity to clarify what constitutes "clear and unmistakable" evidence, within the meaning of *First Options*, and thereby preserve the proper balance under federal law between the roles of courts and arbitral tribunals in determining arbitrability.

SUMMARY OF ARGUMENT

This case involves the classic question of who has primary responsibility for determining arbitrability – a court or an arbitrator. Since this Court's decision in *First Options*, the law has been settled that "[t]he question of whether the parties have submitted a particular dispute to arbitration, *i.e.*, the '*question of arbitrability*' is 'an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise.'" *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) (alteration in original). What remains unsettled, however, is whether the incorporation in a contract of arbitral rules containing a provision empowering a tribunal to determine its own jurisdiction satisfies the "clear and unmistakable" evidence test.

When the present dispute first came before this Court, the question was whether a proper delegation could be avoided when the challenge to arbitrability is "wholly groundless." This Court ruled that no such exception to an otherwise proper delegation exists. *Henry Schein, Inc.* v. *Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019). The Court was not asked to, and did not, address the premise on which the question of the existence of a "wholly groundless" exception rested, namely whether the parties, in their arbitration agreement, had made a delegation to the tribunal of the authority to determine arbitrability in the first place.

Although the Court had no occasion at that time to decide whether incorporation by reference in an arbitration agreement of institutional rules conferring authority on a tribunal to determine its own jurisdiction met *First Options*' "clear and unmistakable" evidence test, it demonstrated considerable interest in

that subject both during oral argument and in its opinion in the case.

At oral argument, several Justices expressed interest in, and questioned, the proposition that incorporation of institutional rules authorizing tribunals to determine their jurisdiction constitute "clear and unmistakable" evidence within the meaning of *First Options*. Significantly, they did so despite the Court not having granted certiorari on that question.

Justice Ginsburg asked counsel to explain why the arbitration agreement in the case should be read to divest courts of authority to determine arbitrability:

> But clear . . . and unmistakable delegation, why can't it be both; that is, that the arbitrator has this authority to decide questions of arbitrability, but it is not exclusive of the court? We have one brief saying that that is indeed the position that the Restatement has taken.

Oral Argument Transcript at 7, *Henry Schein, Inc.* v. *Archer & White Sales, Inc.*, No. 17-1272 (U.S. Oct. 29, 2018) (hereinafter "Transcript").

> But the district court . . . decided on alternative grounds, and wasn't the district court's first decision that this contract did not have a sufficiently clear and unmistakable delegation? It's nothing like that.

Id. at 10.

> [W]hy do you have the evidence? When the . . . model case is this Court's *Rent-a-Car* [sic] decision, and there the . . . clause said the arbitrator, not the court, has exclusive authority. And, here, . . . we're missing both the arbitrator, to the exclusion of the court, and the arbitrator has exclusive authority.

Id. at 18 (italics added).

Similarly, Justice Kagan inquired:

> [I]f you look at *First Options*, *First Options* is a case where we said we're not going to treat these delegation clauses in exactly the same way as we treat other clauses. And there was an idea that people don't really think about the question of who decides, and so we're going to hold parties to this higher standard, the clear and unmistakable intent standard.

Id. at 17 (italics added).

Justice Breyer as well underscored the importance, before reaching the "wholly groundless" exception, of finding "clear and unmistakable" evidence within the meaning of *First Options*:

> [S]o you say step 1. Is there clear and unmistakable evidence that an arbitrator is to decide whether a particular matter X is arbitrable? Is that right?

Id. at 20.

> Step 1 is we have to decide . . . whether there is a clear and unmistakable commitment to have this kind of matter decided in arbitration.

Id. at 24.

Justice Gorsuch in turn asked:

> [T]here's just maybe a really good argument that clear and unmistakable proof doesn't exist in this case of a desire to go to arbitration and have the arbitrator decide arbitrability? And why doesn't that take care of 90 percent of these kinds of cases?

Id. at 43.

Finally, in remanding the case, the Court, in a unanimous decision authored by Justice Kavanaugh, invited the Court of Appeals to address the question of whether there was a "clear and unmistakable" delegation in the first place:

> We express no view about whether the contract at issue in this case in fact delegated the arbitrability question to an arbitrator. The Court of Appeals did not decide that issue. Under our cases, courts "should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so." *First Options,* 514 U.S., at 944 (alterations omitted). On remand, the Court of Appeals may address that issue in the first instance, as well as other arguments that Archer and White has properly preserved.

Schein, 139 S. Ct. at 531.

It is suggestive of the importance of the question whether a delegation had in fact been made that that several of the Justices brought the question to the surface even though certiorari had not been granted on that question and counsel on neither side had briefed it.

That question, however, is now before the Court, and it warrants the Court's attention. As demonstrated below, the mere presence in the rules that the parties incorporated by reference in their arbitration clause of a simple provision empowering a tribunal to determine its own jurisdiction (known in international arbitration circles as a "competence-competence" clause) falls far short of – and cannot properly be viewed as – establishing by "clear and unmistakable" evidence that the parties intended to withdraw from courts the authority to determine issues on which the

parties' consent to arbitrate depends. These issues include whether an arbitration agreement was formed, whether the arbitration agreement is valid and whether it binds a non-signatory, as well as whether the dispute falls within the scope of that agreement. They also include "whether an arbitration clause in a concededly binding contract applies to a particular type of controversy." *Howsam*, 537 U.S. at 84. This Court on several occasions has held that questions of the arbitrability of a dispute, if raised, are properly decided by the courts.

These are issues that this Court has also termed "gateway" issues owing to their fundamental importance in terms of party consent. They are called "gateway" issues precisely because, presumptively, a court that is asked to resolve them can and must do so before referring the parties to arbitration. Simply put, gateway issues implicate the principle of party consent on which the entire edifice of arbitration is built and on which its legitimacy depends.

This Court accordingly made it clear in *First Options* that access to a court on fundamental issues of consent to arbitrate is so serious a matter that the parties' intent to make a delegation must be nothing less than "clear and unmistakable." This is so because the effect of a valid delegation is to deprive parties of the opportunity to demonstrate to a court that they did not in fact consent to arbitration of the dispute at hand, and thereby also divest courts of the possibility that they would otherwise have of determining that all-important question independently.

The question whether an arbitration agreement actually meets the standard established by *First Options* standard has been raised in several lower federal court decisions. In virtually all cases in which a court has found "clear and unmistakable" evidence of

an intent to delegate arbitrability, it has based that finding on nothing more than the simple presence in institutional rules that the parties incorporated by reference in their arbitration agreement of a standard competence-competence clause.

The earlier judgment of the Fifth Circuit in this case is illustrative. The arbitration agreement did not itself contain any language whatsoever to support the notion that the parties delegated questions of arbitrability to a tribunal, much less any language suggesting that they did so clearly and unmistakably. The clause should be compared to the clause in *Rent-A-Center, West, Inc.* v. *Jackson*, 561 U.S. 63 (2010), the one and only case in which this Court was ever presented 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 Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable.

Id. at 66.

By contrast, there is in this case nothing approaching the language in the *Rent-A-Center* arbitration agreement. In order to find a delegation, the Fifth Circuit was reduced to treating the incorporation by reference of the rules of the American Arbitration Association ("AAA") containing a competence-competence clause as if it clearly and manifestly evidenced an intention to delegate.

In this case, the Magistrate Judge found incorporation of the AAA Rules in the parties' arbitration agreement to constitute a "clear and unmistakable"

delegation. The district court disagreed, finding that "there is no reason to believe that incorporation of the AAA rules . . . should indicate a clear and unmistakable intention that the parties agreed to arbitrate the question of arbitrability in these circumstances." Petition Appendix at 32a, *Henry Schein, Inc.* v. *Archer & White Sales, Inc.*, No. 19-963 (U.S. Jan. 31, 2020). In reversing the district court, the Court of Appeals relied upon its earlier decision in *Petrofac, Inc.* v. *DynMcDermott Petroleum Operations Co.*, 687 F.3d 671, 675 (5th Cir. 2012), citing it for the proposition that "the express adoption of [the AAA Rules] presents clear and unmistakable evidence that the parties agreed to arbitrate arbitrability." *Id.* The court then went on to invoke the "wholly groundless" doctrine that this Court eventually rejected.

The view that incorporation of institutional rules containing a competence-competence clause meets the *First Options* test for delegation has won favor among the courts of appeals.[2] However, none of these

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[2] *See, e.g.*, *Oracle Am., Inc.* v. *Myriad Grp., A.G.*, 724 F.3d 1069, 1074–75 (9th Cir. 2013) (noting that the "prevailing view" is that incorporation of the UNCITRAL rules "is clear and unmistakable evidence that the parties agreed the arbitrator would decide arbitrability"); *Green* v. *SuperShuttle Int'l, Inc.*, 653 F.3d 766, 769 (8th Cir. 2011) ("By incorporating the AAA Rules, the parties agreed to allow the arbitrator to determine threshold questions of arbitrability."); *Awuah* v. *Coverall N. Am., Inc.*, 554 F.3d 7, 11 (1st Cir. 2009) (incorporation of AAA rules provides "clear and unmistakable" evidence that parties meant to arbitrate arbitrability).

By contrast, the Tenth Circuit, in *Riley Mfg. Co.* v. *Anchor Glass Container Corp.*, 157 F.3d 775, 777 n.1, 780 (10th Cir. 1998), took the position that an arbitration agreement incorporating AAA rules did not indicate "a specific intent to submit to an arbitrator" the question of arbitrability." In a later case, *Belnap* v. *Iasis Healthcare*, 844 F.3d 1272, 1284 (10th Cir. 2017),

decisions provides any reasoning whatsoever as to how or why incorporation of such arbitral rules meets the "clear and unmistakable" evidence test. They simply assume, without analysis, that if arbitrators have authority to determine arbitral jurisdiction, the courts necessarily have no such authority. As shown below, that is not the case.

Those courts that have found a delegation have done so without the benefit of any clarification of the *First Options* standard by this Court. Because the effect of a delegation is so consequential to the issue of arbitrability, it calls for renewed attention by this Court, which alone can provide an authoritative understanding of what the *First Options* test means and how it should be applied. For this reason, the case for granting the petition is especially strong.

The question raised here was squarely before the American Law Institute in the context of the recently

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that court found that adoption of a set of rules containing a competence-competence clause did constitute "clear and unmistakable" evidence of a delegation on the ground that the rules in the two cases were worded differently. It found that the rules in *Riley* did not include a provision "concerning the arbitration of arbitrability." *Id.*

The fact remains that the Fifth, Eighth and Ninth Circuit Courts of Appeals all read *Riley* as rejecting the idea that competence-competence clauses in institutional rules manifest the necessary "clear and unmistakable" evidence, thereby creating a circuit split on the issue. *See Petrofac, Inc.*, 687 F.3d at 675; *Fallo* v. *High-Tech Inst.,* 559 F.3d 874, 878 (8th Cir. 2009); *Oracle Am., Inc.*, 724 F.3d at 1074.

Also, in *Duthie* v. *Matria Healthcare, Inc.*, 535 F. Supp. 2d 909, 916 (N.D. Ill.), *aff'd*, 540 F.3d 544 (7th Cir. 2008), the district court ruled that incorporation of AAA rules is not "clear and unmistakable evidence" of agreement to arbitrate arbitrability when the arbitration clause does not provide for arbitration of all disputes.

approved and now official Restatement of the U.S. Law of International Commercial and Investor-State Arbitration ("Restatement"), and received there extremely close and careful attention. Upon full consideration, the Restatement concluded that the incorporation of arbitral rules like the AAA rules does not in fact constitute "clear and unmistakable" evidence of an intention to arbitrate arbitrability as required by *First Options*.

ARGUMENT

I. THE INCORPORATION OF ARBITRATION RULES CONTAINING "COMPETENCE-COMPETENCE" LANGUAGE DOES NOT CONSTITUTE THE "CLEAR AND UNMISTAKABLE" EVIDENCE OF AN INTENT TO ARBITRATE ARBITRABILITY REQUIRED BY *FIRST OPTIONS*

A. The *First Options* Test.

This case involves the threshold issue of who – court or arbitrator – has primary responsibility for deciding issues of arbitrability, notably whether an arbitration agreement was formed, is valid, encompasses the claim sought to be arbitrated, and may possibly be binding on a non-signatory.

In some cases, such as the present one, the issue of arbitrability is first raised in a judicial proceeding to enforce an arbitration clause, the proponent of the arbitration agreement asking the court to compel arbitration or stay the lawsuit in favor of arbitration. See 9 U.S.C. §§ 3–4. In these cases, in order to grant that relief, the court must satisfy itself that the claim is arbitrable in all respects, and it makes that determination independently.

In other cases, the issue of arbitrability is initially raised before the arbitral tribunal in a challenge to the arbitrator's exercise of jurisdiction, rather than before a court. In that situation, the tribunal, exercising its competence-competence will make that determination, proceeding with the case if it finds the claim arbitrable, and dismissing the case if it does not. However, a finding by the tribunal that the claim is arbitrable may be challenged at a later point, either in a proceeding to vacate the award or deny its enforcement. There, too, the court will make its determination de novo and without deference to the tribunal's finding as to arbitrability. See*, e.g.*, *First Options*, 514 U.S. at 941, 947.

The crucial point is that, in either situation, a court will at some point exercise its responsibility to determine independently whether the claim is or is not arbitrable. It does so precisely because the principle of consent, fundamental to arbitration, is at stake.

In *First Options*, this Court ruled that, while issues of arbitrability, because of their importance, call for independent judicial determination, the parties may, in an exercise of party autonomy, agree that such issues shall be primarily for a tribunal to decide. However, the Court explicitly held that "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." *Id.* at 944 (alteration in original) (quoting *AT&T Techs.*, 475 U.S. at 649 (1986)). The Court has since on several occasions reiterated that "courts presume that the parties intend courts, not arbitrators, to decide . . . disputes about 'arbitrability'" unless "the parties clearly and unmistakably provide otherwise.'" *BG Grp. PLC* v. *Republic of Argentina*, 572 U.S. 25, 34 (2014); *Howsam*, 537 U.S. at 83.

As a result, delegation is not lightly to be found. In *Rent-A-Center*, 561 U.S. at 69 n. 1, the Court reaffirmed that, in order for a delegation to be found, the language used by the parties must unambiguously establish the "parties' *manifestation of intent*" to withdraw from courts authority to resolve issues of arbitrability.

In the intervening years, this Court has not had occasion to decide what language is necessary to constitute the "clear and unmistakable" evidence required by *First Options*, so as to overcome the strong presumption that arbitrability is primarily for the courts. In *Rent-A-Center*, the question did not arise because the existence of a delegation was not contested. It was not contested because the parties had agreed in the arbitration clause itself that the "'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." *Id*. at 66 (emphasis added).

B. The Competence-Competence Language in Arbitration Rules Does Not Reflect "Clear and Unmistakable" Evidence.

The language relied upon in this case to establish a delegation under *First Options* is dramatically different from the language in *Rent-A-Center*. In the first place, the parties did not, as in *Rent-A-Center*, express their intentions in this regard in the arbitration agreement itself. The only basis asserted for finding "clear and unmistakable" evidence of an intention to delegate was a provision in the arbitration clause according to which disputes between the parties were to be submitted to arbitration "in accordance with the arbitration rules of the American Arbitration Association," *i.e.*, incorporating those rules by reference.

Rule 7 of the Commercial Arbitration Rules of the American Arbitration Association like all modern arbitral rules,[3] contains a competence-competence clause stating that the "arbitrator shall have power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." In other words, the parties agreed to the incorporation by reference of arbitral rules that confer power on arbitrators to decide their own jurisdiction.

However, there is no indication in Rule 7 that the conferral on arbitrators of authority to determine arbitrability divests courts of all authority to make that determination. Nevertheless, courts have summarily concluded, as has the Fifth Circuit, that "the express adoption of these [arbitration] rules presents clear and unmistakable evidence that the parties agreed to arbitrate arbitrability." *Petrofac, Inc.*, 687 F.3d at 675.[4]

For several reasons, the courts drawing this inference are mistaken in doing so.

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[3] *See, e.g.*, Rules of Arbitration of the Int'l Chamber of Commerce, art. 6(3) (Mar. 1, 2017) ("[A]ny question of jurisdiction . . . shall be decided directly by the arbitral tribunal . . ."); ICDR Int'l Dispute Resolution Procedures, art. 19(1) (June 1, 2014) ("The arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement(s) . . ."); U.N. Comm'n on Int'l Trade Law Arbitration Rules, art. 23(1), G.A. Res. 65/22, U.N. Doc. A/RES/65/22 (Jan. 10, 2011) ("The arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to existence or validity of the arbitration agreement.").

[4] *See, e.g.*, *Oracle Am., Inc.*, 724 F.3d at 1074–75 (incorporation of UNCITRAL rules is "clear and unmistakable evidence" of intent to arbitrate arbitrability); *Awuah*, 554 F.3d at 11 (same with respect to AAA rules).

First, the principle of competence-competence simply does not have the meaning attributed to it. All that the principle does is authorize an arbitral tribunal, during the arbitral proceedings themselves, to resolve challenges to its jurisdiction. A tribunal's authority to do so was not to be taken for granted. Absent competence-competence, a tribunal whose jurisdiction is challenged arguably would have to suspend proceedings and await a court determination of arbitral jurisdiction before proceeding. Disallowing tribunals from opining on their own jurisdiction would be a recipe for delay and expense. The competence-competence principle thus makes a real contribution to the efficacy of arbitration as a means of dispute resolution.

But it is another thing altogether to read competence-competence as making the tribunal's authority to determine its jurisdiction exclusive of a court's authority to do so, if so requested. Competence-competence has simply never been understood in United States law to render arbitral authority to determine arbitrability exclusive. Section 4 of the Federal Arbitration Act authorizes a court to compel arbitration "upon being satisfied that the making of the agreement for arbitration . . . is not in issue." 9 U.S.C. § 4. Similarly, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") calls upon courts to enforce an agreement to arbitrate unless they find it to be "*null and void*, inoperative or incapable of being performed." Art. II, June 10, 1958, 330 U.N.T.S. 3 (emphasis added). Thus, the presumption is that courts have the authority to determine arbitrability—an authority that, under *First Options*, cannot in fact be withdrawn with anything less than "clear and unmistakable" evidence of an intention to that effect.

This well-settled understanding of competence-competence in United States law differs markedly from the law of certain other countries, which have a distinctly different conception of competence-competence – one that is viewed as *both* vesting tribunals with authority to determine arbitrability *and* divesting courts of that authority.[5] A sharp distinction is drawn in the international arbitration literature between "positive" competence-competence, which affirmatively confers on tribunals' authority to determine their jurisdiction, on the one hand, and "negative" competence-competence, which deprives courts of that authority prior to arbitration. The contrast between positive competence-competence, as practiced in the United States, and negative competence-competence, which is championed in French law, pervades the international arbitration literature.[6] The fact that competence-competence in the

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[5] *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).

[6] John J. Barceló III, *Who Decides the Arbitrators' Jurisdiction? Separability and Competence-Competence in Transnational Perspective*, 36 Vand. J. Transnat'l L. 1115, 1124 (2003):

> Most discussions of competence-competence, especially in U.S. literature, treat only the positive aspect of the doctrine, which is a simple and uncontroversial notion. It means that, . . . arbitrators are empowered to rule on their own jurisdiction; they are not required to stay the proceeding to seek judicial guidance. The doctrine has another, much more consequential aspect, known as the negative effect of competence-competence. It originated in French law, which is well known for its pro-arbitration character. The negative effect doctrine holds that in order to allow arbitrators to rule on

United States has a positive dimension only has never been contested. Thus, the presence of a competence-competence provision in institutional rules merely reaffirms the uncontroversial proposition that tribunals are not required to suspend proceedings if their jurisdiction is challenged.

The meaning of competence-competence in United States law should not now be radically changed merely because it has been inserted into the AAA Rules. If competence-competence, while conferring on tribunals the authority to determine their jurisdiction, does not divest courts of their authority to determine the arbitrability of claims, a mere reference to it in a set of institutional rules cannot possibly be construed as "clear and mistakable" evidence of an intention to deprive courts of that authority. Defined in the way it has always been defined in United States law, a reference to competence-competence not only falls short of clearly and unmistakably evidencing an intention to delegate; it fails to evidence any such intention at all.

Second, the decision in *First Options* makes it altogether clear that judicial authority to determine arbitrability is *the rule*, and that its elimination is *the exception*. The "clear and unmistakable" standard cannot be understood any other way. If the mere inclusion of a competence-competence clause in the rules adopted by the parties is treated as "clear and unmistakable" evidence, within the meaning of *First Options*, that rule and exception are plainly reversed, and the presumption that *First Options* established would altogether cease to exist. That simply cannot

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their own jurisdiction . . . as an initial matter, court jurisdiction . . . should be constrained.

be the result that this Court had in mind in rendering that decision.

In reality, competence-competence provisions are ubiquitous. They are found in virtually every modern set of institutional rules and every modern arbitration law. As a result, it is the rare international arbitration that is conducted in the absence of a competence-competence provision. Such provisions have become, for all practical purposes, "boiler-plate." Treating them all as "clear and mistakable" evidence does nothing short of destroying the strong presumption in favor of judicial authority to determine arbitrability that *First Options* squarely established.

Third, divesting parties of a meaningful right of access to a court on matters of arbitrability, on the basis of boiler-plate in institutional rules that are only incorporated by reference in an arbitration agreement, is simply unfair and contrary to the reasonable expectations of a party. In *First Options* itself, the Court pointedly remarked:

> [The] . . . question . . . "who (primarily) should decide arbitrability" 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.

514 U.S. at 945 (internal citations omitted).

The Restatement considered carefully the question whether the incorporation of competence-competence language from a set of arbitral rules should be taken as "clear and unmistakable" evidence of an intention to withdraw from courts their authority to determine whether a party ever agreed to arbitrate, whether such an agreement is valid under the law of contract, or whether the dispute at hand is even covered by the asserted agreement to arbitrate. The Restatement found that none of the court decisions addressing this issue provides any meaningful reasoning as to how or why a competence-competence provision not only confers power on an arbitrator to determine arbitrability, but withdraws that power from the courts. Restatement of the U.S. Law of International Commercial and Investor-State Arbitration § 2.8, cmt. *b*, Reporters' n. *b (iii)*, (Am. L. Inst. 2019). That position was unanimously adopted by the ALI when the entire Restatement was approved in May 2019.

Importantly, when a valid delegation is made, parties lose their right to a judicial determination of their consent to arbitration, not only at the outset of a dispute (as in the court of appeals cases cited above), but also in any post-award proceeding to vacate or enforce the arbitral award. This is exactly the situation that was presented to this Court in *First Options,* which involved a proceeding to vacate an award, not an action to enforce an arbitration agreement. Thus, if a delegation is found to be valid under *First Options*, it bars recourse to a court on the question of consent both *before* and *after* the arbitration. The resulting loss of access to a court to determine arbitrability is therefore total. This fact makes it all the more imperative that the requirement under *First Options* of "clear and unmistakable" evidence of a delegation be strictly and narrowly applied.

Fourth, depriving parties of a right of access to a court on matters of arbitrability is not only inimical to the fundamental principle that parties are not required to submit their claims to arbitration without their consent, and are entitled to a judicial determination of that matter, but also inevitably inimical to the legitimacy of arbitration itself.[7]

It is worth recalling here the concern voiced by Justice Kagan when this case was last before the Court

> [I]f you look at *First Options*, *First Options* is a case where we said we're not going to treat these delegation clauses in exactly the same way as we treat other clauses. And there was an idea that people don't really think about the question of who decides, and so we're going to hold parties to this higher standard, the clear and unmistakable intent standard.

Transcript at 17.

If only for this reason, this Court should not allow courts to find "clear and unmistakable" evidence on as weak and unconvincing a basis as the presence of perfectly ordinary competence-competence language in the institutional rules to which an arbitration clause may make reference. Such standard language in virtually all institutional rules of arbitral procedure cannot bear the weight that is being assigned to it by those who treat it as "clear and unmistakable" evidence required by *First Options*.

The *First Options* framework is meant to protect the legitimacy of arbitral proceedings by enabling courts, if asked to do so, to determine independently whether parties agreed to arbitrate. Issues of arbi-

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[7] George A. Bermann, *The "Gateway" Problem in International Commercial Arbitration*, 37 Yale J. Int'l L. 1 (2012).

trability, such as the question of whether the parties actually and validly agreed to arbitrate a particular dispute, go to the heart of arbitration, which is party consent. This Court accordingly has stated time and again that "'arbitration is a matter of contract . . . 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 (quoting *Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960)).

In *First Options*, this Court allowed parties, by way of exception, to delegate to an arbitral tribunal primary authority to determine the arbitrability of a dispute. But, precisely to ensure the consensual nature of arbitration, the Court required a "clear and unmistakable" demonstration of that intention. To treat the incorporation by reference of competence-competence language found in the altogether standard procedural rules of arbitral institutions as meeting that test is to turn *First Options* on its head, rendering it practically meaningless.

CONCLUSION

For the foregoing reasons, the Court should grant the cross-petition and hold that the issue of arbitrability was primarily for the court, although for reasons different than those relied on by the Fifth Circuit.

Respectfully submitted,

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April 2, 2020

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