No. 19-672

IN THE

Supreme Court of the United States

THE RAMS FOOTBALL COMPANY, LLC
AND E. STANLEY KROENKE,

Petitioners,

v.

ST. LOUIS REGIONAL CONVENTION AND SPORTS
COMPLEX AUTHORITY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MISSOURI, EASTERN DISTRICT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBERT D. BLITZ
CHRISTOPHER O. BAUMAN
KELLEY F. FARRELL
BLITZ, BARDGETT
& DEUTSCH, L.C.
120 South Central Avenue,
Suite 1500
St. Louis, Missouri 63105
(314) 863-1500

JAMES F. BENNETT
Counsel of Record
EDWARD L. DOWD, JR.
MICHELLE NASSER
DOWD BENNETT LLP
7733 Forsyth Boulevard,
Suite 1900
St. Louis, Missouri 63105
(314) 889-7300
jbennett@dowdbennett.com

Counsel for Respondents

292941

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether the Missouri Court of Appeals correctly interpreted state law regarding contract formation in holding there was no agreement to arbitrate questions of arbitrability where the contract contained no delegation clause, the purportedly incorporated rules did not authorize delegation at the time of contracting, and there was no other evidence the parties intended at the time of contracting to submit such gateway questions to an arbitrator.

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STATUTES AND OTHER AUTHORITIES

Petitioners, the Rams Football Co. and Stanley Kroenke, have filed a petition for a writ of certiorari to the Missouri Court of Appeals challenging that court's interpretation and application of Missouri law. Specifically, Petitioners challenge the intermediate state appellate court's holding that there was no antecedent agreement to delegate questions of arbitrability to an arbitrator because there was no evidence of contractual intent to do so at the time the parties signed the underlying agreement.[1] Petitioners' attempt to create a federal question in this state-law case by arguing that the Missouri Court of Appeals improperly rejected the Federal Arbitration Act's ("FAA"), 9 U.S.C. §§ 1, *et seq.*, equal-footing principle and applied an arbitration-specific standard instead of traditional contract principles. This argument fails, however, for two reasons: It misrepresents the holding of the Missouri Court of Appeals, and it relies on irrelevant legal principles.

First, the intermediate state court did not reject the equal-footing doctrine either expressly or by implication, and it did not impose any extraneous or heightened arbitration-only requirements. In *State ex rel. Pinkerton v. Fahnestock*, 531 S.W.3d 36, 43 (Mo. banc 2017), the Missouri Supreme Court definitively held that the equal-footing doctrine applies to antecedent

1. At times, Petitioners also take issue with the Missouri Court of Appeals' holding that an arbitration provision in a 24 year-old lease did not apply to the parties' current dispute because the lease was not related to the resolution of Respondents' claims. The petition's Question Presented, however, is limited to the threshold question of whether the parties entered an agreement to arbitrate questions of arbitrability. This Brief In Opposition will focus entirely on that issue.

agreements to delegate arbitrability questions and directed Missouri courts to apply traditional contract principles in interpreting and enforcing those agreements. The court below relied on *Pinkerton* throughout its opinion in considering whether the parties entered such an agreement here. Not surprisingly, the court never purported to reject or limit the Missouri Supreme Court's binding authority. Given this, Petitioners' assumption that the Missouri Court of Appeals rejected the equal-footing doctrine would require that the court have done so not only *sub silentio* but also in direct contravention of the very decision which provided the express legal framework for its analysis. That position defies logic and, more fundamentally, rests, at its core, on a dispute over the Missouri Court of Appeals' interpretation and application of Missouri law.

Second, Petitioners focus on largely irrelevant legal principles under both Missouri contract law and the FAA. This case is not about the interpretation of a contract term or the incorporation of evolving standards or procedures or the FAA's equal-footing doctrine. Rather, it is about whether the parties entered a valid agreement to arbitrate gateway arbitrability questions and the fundamental principle that a party cannot be forced to arbitrate a dispute it has not agreed to submit to arbitration. Delegation is not a mere contract term or procedural rule. It is a separate contract, distinct from the underlying arbitration agreement, and it must be validly formed under state law. The Missouri Court of Appeals held no such agreement was formed here because there was no contractual intent to delegate at the time the parties signed the documents containing the arbitration provisions. Petitioners do not, and cannot, dispute that

fact. They cite no principle of Missouri contract law which would allow a contract to be *created* by a rule change years after the parties signed the relevant documents when there was no agreement as to the essential term at the time of contracting.

In short, this case presents no significant unresolved or controverted federal question. There is no dispute over an interpretation of a federal statute or the proper federal standard. There is no established relevant conflict among United States Courts of Appeals or state courts of last resort, or even a *decision* of a United States Court of Appeals or a state court of last resort to be reviewed. There is no disregard for this Court's precedents. A state intermediate appellate court applied the standard established by the state's highest court on a matter of state contract law and interpreted a contract according to that law. The Missouri Supreme Court—after asking the Court of Appeals to ensure they considered recent precedents—saw no need to correct that court's application and interpretation of Missouri law and declined review in this closely-watched case. There is nothing warranting this Court's review, and the issue presented has little to no significance for anyone outside these parties. The petition should be denied.

STATEMENT OF THE CASE

Petitioners would like this case to be about a clear agreement to arbitrate and a state court's hostility towards that agreement—it is not. It is about Petitioners' attempt to invoke an arbitration provision in an unrelated lease agreement, and the Missouri Court of Appeals' reasonable conclusion, under Missouri law, that: (1) the

court should decide questions of arbitrability because the parties did not specifically agree to arbitrate gateway questions at the time the lease was signed, and (2) the lease agreement's arbitration provision does not apply to this unrelated dispute.

Although Petitioners invoke an arbitration provision from a lease entered in connection with the Rams's 1995 move to St. Louis, this case is not about that move or the Petitioners' stadium desires at the time or the now-expired lease agreement[2]—it is about the Rams's move from St. Louis to Los Angeles in 2016 and the failure of Petitioners to comply with the binding rules in the NFL's Relocation Policy. *See generally* Pet'rs' App. 10-12 (Mo. Ct. App. April 16, 2019). Specifically, Respondents have alleged the following facts in support of their claims: For years leading up to Petitioners' departure from St. Louis, Petitioners assured Respondents that the team intended to remain in St. Louis and would negotiate in good faith

2. Much of Petitioners' Statement of the Case is irrelevant to the dispute before the Court. Most notably, this dispute has nothing to do with the Rams's stadium demands addressed in the 1995 Lease or whether the St. Louis Convention and Visitors Commission (CVC) complied with its obligations regarding the old stadium in the 1995 Lease. It should be noted, however, that contrary to Petitioners' assertions, Respondents did not participate or acquiesce in the arbitration regarding the 1995 Lease's first-tier requirements. Respondents St. Louis City and St. Louis County were never parties to that arbitration. Respondent St. Louis Regional Convention and Sports Complex Authority (RSA) was named as a party but was immediately and voluntarily dismissed from the arbitration by the Rams after Respondent filed a motion to dismiss and a motion for costs and fees because the RSA had no obligations related to the dispute. Therefore, the arbitration dispute was entirely between the Rams and the CVC.

as required by the Policy. Respondents spent significant funds in reliance on those assurances. Pet'rs' App. 11-12. Privately, however, Petitioners planned to seek relocation as soon as possible. In 2016, after refusing to put forth any credible effort to work with Respondents to stay in St. Louis, Petitioners petitioned the NFL under its Relocation Policy for permission to relocate to Los Angeles. Pet'rs' App. 10. This process was mandated by the NFL Policy, and Petitioners have admitted that they could not have relocated without receiving League approval. Pet'rs' App. 11 n.2; Pet'rs' App. 36 n.2 (Mo. Ct. App. Aug. 21, 2018). The NFL teams and owners voted on the Petitioners' petition multiple times: initially denying permission to relocate, and then, after a significant lobbying effort, approving the petition even though the conditions for relocation were not satisfied. Respondents' claims are based on these breaches of the contractual obligations in the NFL's Relocation Policy and on Petitioners' fraudulent statements throughout the process. Pet'rs' App. 11-12 (Mo. Ct. App. April 16, 2019).

Contrary to Petitioners' assertion, the parties did *not* enter any agreement which "govern[ed] the Rams'[s] tenure in St. Louis." *Cf.* Pet. for Writ of Cert., p. 7. Rather, the parties entered the 1995 Relocation Agreement, which governed the specifics of the Rams's move in 1995 from Los Angeles to St. Louis, and Petitioner the Rams and the Respondents entered the 1995 Amended Lease, which provided Petitioners with the use of a publicly-funded stadium and established the terms governing its use. Petitioner Kroenke was not a signatory to the 1995 Lease.[3]

3. Respondents have maintained throughout this litigation that Petitioner Kroenke cannot invoke the arbitration provision in an agreement he did not sign. The Missouri courts did not need to address that argument as they held, correctly, that the arbitration

As relevant here, Petitioners seek to rely on the arbitration provision in the 1995 Lease.[4] That provision indicated that "[a]ny controversy, dispute or claim between or among any of the parties . . . to this Amended Lease, *related to this Amended Lease*, including, without limitation, any claim arising out of, in connection with, or in relation to *the interpretation, performance or breach of this Amended Lease* shall be settled by arbitration." (emphases added). Pet'rs' App. 9-10 (Mo. Ct. App. April 16, 2019). Thus, the parties to the Lease agreed to arbitrate disputes related to the Lease, including issues connected with the interpretation, performance, or breach of that agreement. The arbitration provision also provided that the arbitration shall be "conducted before three arbitrators in St. Louis, Missouri, in accordance with the most applicable then existing rules of the American Arbitration Association (or its successor or in the absence

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provision does not apply to this dispute at all. *See, e.g.*, Pet'rs'. App. 25 (Mo. Ct. App. April 16, 2019).

4. Petitioners refer to arbitration provisions in both the Amended Lease and the 1995 Relocation Agreement. However, Petitioners make no argument as to how the 1995 Relocation Agreement is relevant to Respondents' claims arising from the Rams's departure from St. Louis 20 years later, and the arbitration provision in that agreement is effectively similar to the provision from the Amended Lease. Pet'rs' App. 10 (Mo. Ct. App. April 16, 2019) (quoting Relocation Agreement: "Any claim related to the Relocation Agreement, including without limitation, any claim arising out of, in connection with, or in relation to the interpretation, performance, or breach of this Relocation Agreement shall be settled by arbitration as set forth or as otherwise provided in Section 25 of the Amended Lease."). For ease of reference, this Brief In Opposition refers only to the Amended Lease and its arbitration provision. The same arguments apply equally to the 1995 Relocation Agreement.

of a successor, an institution or organization offering similar services)." Pet'rs' App. 9-10. The Lease expired in 2016.

This lawsuit is not about the old stadium or any of the rights or obligations in the corresponding 1995 Lease. Respondents have not alleged any breach of the Lease, and there is no need to interpret or apply the 1995 Lease in resolving Respondents' claims. Rather, this dispute rests solely on the fact that the NFL teams and owners, Petitioners included, agreed to be bound by the terms of the NFL's Relocation Policy and agreed that the Policy governed any request for Relocation. Respondents have alleged that Petitioners and the rest of the NFL violated those terms in the conduct leading up to Petitioners' relocation petition and in the consideration and vote on relocation in 2016. There is nothing in the 1995 Lease that impacts the resolution of those claims.[5]

5. Petitioners suggest the Missouri courts have ignored their defenses in ruling on the applicability of the arbitration provision, but the court below did consider Petitioners' defenses. Pet'rs' App. 29 (Mo. Ct. App. Oct. 2, 2018). In any event, Petitioners do not explain in any detail what defenses could require interpretation of the Lease and impact the resolution of Respondents' claims. At best, they hint at a "right to relocate" in the Amended Lease, but they also concede—as they must—that any purported "right" does not override the binding requirements of the NFL's Relocation Policy. Petitioners have admitted in court that the Rams needed permission to relocate from the other teams pursuant to the NFL's Policy, Pet'rs' App. 11 n.2 (Mo. Ct. App. April 16, 2019), and their conduct confirmed that fact as the Rams petitioned for approval under the NFL Policy. Given that Respondents' claims allege violations of the Policy which Petitioners concede controlled, no ambiguous "defense" under the 1995 Lease is relevant here, and Petitioners do not attempt to explain how it could be.

Even so, Petitioners have vigorously litigated their purported right to arbitrate under the 1995 Lease for the last two-and-a-half years. They filed a motion to compel arbitration in the Missouri Circuit Court, which was denied in December 2017. The Court held that this lawsuit fell outside the scope of the plain meaning of the arbitration provisions because the suit was unrelated to either the 1995 Lease or the 1995 Relocation Agreement. Pet'rs' App. 48 (Mo. Cir. Ct. Dec. 27, 2017). Petitioners did not raise the issue or seek delegation of the arbitrability question in their initial motion to compel, but they argued in their reply that the recent decision of the Missouri Supreme Court, *State ex rel. Pinkerton v. Fahnestock*, 531 S.W.3d 36, 43 (Mo. banc 2017), compelled the court to leave gateway questions of arbitrability for the arbitrators. The Court rejected Petitioners' argument because, unlike *Pinkerton*, the Court found no clear and unmistakable evidence the parties agreed to delegate that gateway question. Pet'rs' App. 53.

The Missouri Court of Appeals affirmed, concluding the parties did not enter into an arbitration agreement which applies to Respondents' claims. Pet'rs' App. 31 (Mo. Ct. App. Aug. 21, 2018). The Missouri Supreme Court accepted transfer and then re-transferred the case back to the Missouri Court of Appeals for reconsideration in light of two recent decisions, this Court's *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019), and the Missouri Supreme Court's *Soars v. Easter Seals Midwest*, 563 S.W.3d 111 (Mo. banc 2018).

The Missouri Court of Appeals' second opinion (the decision below) addressed the question of arbitrability more fully. Specifically, the Missouri Court of Appeals

rejected Petitioners' argument that an arbitrator must decide whether the 1995 Lease's arbitration provision applies to this dispute even though the agreement contained no such delegation clause. Pet'rs' App. 14-19 (Mo. Ct. App. April 16, 2019). Following the direction of the Missouri Supreme Court, and consistent with case law from this Court, the Missouri Court of Appeals considered whether there was "clear and unmistakable" evidence of the parties' affirmative contractual intent for an arbitrator to decide arbitrability, as determined by state law. Pet'rs' App. 15 (citing *Pinkerton*, 531 S.W.3d at 43, and *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 69 n.1 (2010)). The Court of Appeals explained that "the language chosen must unambiguously establish the 'parties' manifestation of intent' to withdraw from courts the authority to resolve issues of arbitrability." Pet'rs' App. 15-16 (quoting *Rent-A-Center*, 561 U.S. at 69 n.1).

The Court then analyzed Missouri law and determined that the 'clear and unmistakable' evidence standard requires a clear expression of such an intent "measured '*at the time the parties signed the underlying agreement.*'" Pet'rs' App. 15 (quoting *Pinkerton*, 531 S.W.3d at 45 n.2) (emphasis in original). The Court noted that a delegation provision is merely "an additional antecedent agreement" the court is asked to enforce. Pet'rs' App. 16 (quoting *Soars*, 563 S.W.3d at 114 (delegation provision is an additional antecedent agreement considered separately from the underlying arbitration agreement). A court should look to the terms of the underlying arbitration provision, therefore, to see if the parties affirmatively addressed the question of who decides arbitrability. Pet'rs' App. 16 (citing *Dotson v. Dillard's, Inc.*, 472 S.W.3d 599, 602 (Mo. Ct. App. 2015); *Soars*, 563 S.W.3d at 114). Accordingly, the Missouri

Court of Appeals considered whether there was evidence in the arbitration provision that the parties to the Lease intended, when the agreement was entered in 1995, for an arbitrator to determine questions of arbitrability. The Court concluded there was none: The contract language expressed no such intent, and the referenced AAA rules did not provide for delegation at the time the contract was entered. Pet'rs' App. 16-19.

As they do in their Petition, Petitioners argued before the Missouri Court of Appeals that the arbitration provision and the incorporation of the AAA rules provided for the application of future rule amendments. Petitioners further argued that, therefore, the 2003 rule providing for delegation of arbitrability questions should apply under Missouri law.[6] The Missouri Court of Appeals acknowledged that the required evidence of contractual intent could be expressed through the incorporation of a rule providing for delegation. Pet'rs' App. 15. The Court explained, however, that *Pinkerton* directs courts to look for "'a clear reference to an identifiable, ascertainable set of rules'" measured at the time of contracting. Pet'rs' App. 15 (citing *Pinkerton*, 531 S.W.3d at 45 n.2). The Court then concluded that the parties' general acceptance of potential and unknown future rules did not provide clear evidence the parties intended, at the time of contracting, for an arbitrator to decide questions of arbitrability because there was no identifiable, ascertainable rule

6. Petitioners argue that the rule was adopted in 1999 and codified in 2003. Throughout this litigation, the Missouri courts have considered the rule as a 2003 rule, and this brief continues to use 2003 for consistency. For purposes presented here, it does not matter. The significant point is that the rule was not identifiable to the parties, or even in existence, when they signed the 1995 Lease.

authorizing delegation at that time. Pet'rs' App. 16-19. Specifically, the Court concluded that "an AAA arbitration rule first appearing in 2003 could not provide 'clear and unmistakable' evidence of the parties' affirmative contractual intent in 1995 for an arbitrator to have exclusive jurisdiction to decide arbitrability" as required under Missouri law. Pet'rs' App. 7.

Having determined that the court must resolve the gateway question of arbitrability, the Missouri Court of Appeals then rejected Petitioners' argument that the 1995 Lease's arbitration provision applies to this dispute. The Court noted that a party "cannot be required to arbitrate a dispute they have not agreed to submit to arbitration" and concluded that the parties did not agree to arbitrate disputes over the obligations in the NFL's Relocation Policy. Pet'rs' App. 20 (citation omitted). The Missouri Court of Appeals further explained that the claims at issue are wholly independent of the 1995 Lease and do not require reference to or construction of the Lease and that, therefore, the Lease agreement did not apply to this dispute. Pet'rs' App. 20-25. The Missouri Supreme Court denied review. Pet'rs' App. 1 (Mo. banc Sept. 3, 2019).

REASONS FOR DENYING THE PETITION

I. The Missouri Court of Appeals' Decision Interpreted and Applied Missouri Law and Did Not Decide Any Significant Federal Question.

A. The Missouri Court of Appeals Held The Parties Did Not Enter An Agreement to Arbitrate Arbitrability Under Missouri Law.

The legal principles which drive the resolution of this dispute are well-established and unquestioned. First and foremost, arbitration is a matter of contract. *See, e.g.*, *Rent-A-Center*, 561 U.S. at 67; *AT&T Tech., Inc v. Commc'ns Workers of Am.*, 475 U.S. 643, 648 (1986). It is axiomatic that a party cannot be forced to arbitrate an issue it did not agree to submit to arbitration. *See, e.g.*, *AT&T Tech.*, 475 U.S. at 648-49; *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 945 (1995). Thus, arbitration cannot be compelled until it is established that the parties have entered a valid arbitration agreement and that the particular dispute at issue falls within the scope of that agreement. *See, e.g.*, *AT&T Tech.*, 475 U.S. at 649. Once an agreement is found, however, it must be interpreted and enforced like any other contract, based on traditional state-law contract principles. *See, e.g.*, *First Options*, 514 U.S. at 944.

The threshold question before assessing the validity or scope of any arbitration provision is who—the court or an arbitrator—decides whether that arbitration provision applies. It is presumptively for a court to decide gateway questions of arbitrability. *See, e.g.*, *AT&T Tech.*, 475 U.S. at 649. However, like any other dispute, the parties can

agree to arbitrate those questions. *Id.* at 648-49. To do so, the parties enter an antecedent agreement to delegate arbitrability questions to the arbitrator, formed as any other contract must be formed under state law and separate and distinct from the underlying arbitration agreement. *See, e.g.*, *Rent-A-Center*, 561 U.S. at 69-72.

Given the importance and nature of the question, this Court requires that the intent to enter an antecedent delegation agreement be unambiguously expressed. *See id.* at 69 n.1; *First Options*, 514 U.S. at 943-45; *AT&T Tech., Inc.*, 475 U.S at 649. The parties must specifically intend to delegate resolution of arbitrability away from the court, and clear and unquestionable evidence of that intent is necessary to avoid forcing parties to arbitrate an issue (arbitrability) they did not agree to submit:

> On the other hand, the former question — the 'who (primarily) should decide arbitrability' question — is rather arcane. A party often might not focus on 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 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 945 (citations omitted).

The Missouri Court of Appeals properly applied this legal framework to the facts presented and determined there was no clear and unmistakable evidence the parties formed an agreement to delegate arbitrability questions under Missouri law. Pet'rs' App. 14-19 (Mo. Ct. App. April 16, 2019). The Court noted that an antecedent delegation agreement could be evidenced by an express delegation provision, as in *Soars*, 563 S.W.3d at 114, or by incorporation of an "identifiable, ascertainable rule," as in *Pinkerton*, 531 S.W.3d at 45, 48, but found neither was present here. In particular, the Court of Appeals concluded that, under Missouri law, the contractual intent to delegate is to be measured at the time the underlying agreement was signed and that, here, there was no clear evidence the parties agreed to delegate arbitrability questions at the time the Lease was signed in 1995. Pet'rs' App. 15, 19 (relying on *Pinkerton*, 531 S.W.3d at 45 n.2). Petitioners do not—and cannot—dispute that fact.

In holding that the parties must intend to enter an agreement at the time of purported contracting, the Missouri Court of Appeals did not rely significantly on federal law or the "heightened" nature of the clear and unmistakable evidence standard. Rather, the problem with Petitioners' argument was that evidence of the requisite intent to form an antecedent agreement was wholly non-existent at the time the underlying agreement was signed. In fact, there is no evidence the prospect of arbitrating arbitrability was even considered at the time the parties entered into the Lease. *Cf. First Options*, 514 U.S. at 945 (noting that clear and unmistakable evidence of an agreement to delegate is necessary because "'who should decide arbitrability'" is an "arcane" question the parties could easily overlook). The Missouri Court of Appeals held

that a subsequent amendment to potentially incorporated rules could not retroactively create an intent to contract where none existed when the parties signed the relevant documents. Petitioners ask this Court to correct the Missouri Court of Appeals' interpretation of Missouri contract-formation principles. As discussed below, there was no error, and, regardless, this fact-dependent request for error-correction of the interpretation and application of state law is not appropriate for this Court's review.

B. The Missouri Court of Appeals Decision Does Not Conflict With the Federal Arbitration Act.

Petitioners try to create a federal issue by suggesting that the Missouri Court of Appeals' decision violates the FAA. Specifically, Petitioners argue that the Court of Appeals rejected the FAA's "equal-footing" doctrine, 9 U.S.C. § 2, by applying a heightened standard to the purported agreement to arbitrate arbitrability that Missouri law does not apply to other contracts. Petitioners' argument fails, however, because they ignore the Missouri Supreme Court's definitive statement of Missouri law and mischaracterize the opinion below and Missouri contract principles.

First, Petitioners' argument is substantially undermined by the Missouri Supreme Court's decision in *Pinkerton*, which explored the clear and unmistakable evidence standard and the recognition of antecedent delegation agreements under Missouri law. *See generally* 531 S.W.3d 36. As significant here, *Pinkerton* expressly held that the equal-footing doctrine applies to antecedent agreements to arbitrate arbitrability. *Id.* at 48. In *Pinkerton*, the Missouri Supreme Court considered

whether there was clear and unmistakable evidence the parties agreed to delegate arbitrability when the parties' agreement incorporated identifiable rules which provided for delegation of such gateway questions at the time the contract was entered. The Court concluded that incorporation of the clear delegation rule was sufficient under Missouri law to create an agreement to arbitrate arbitrability. *Id.* at 45.

In so doing, the Missouri Supreme Court affirmed that traditional contract principles—and traditional contract principles alone—control whether the parties have formed a valid agreement to delegate. *Id.* at 47. Specifically, the Missouri Supreme Court stated that courts "cannot make a rule specifically applicable to arbitration delegation clauses" and that "[a]rbitration agreements are placed on equal footing with other contracts." *Id.* at 47, 48 (quotations omitted). Thus, the Court directed Missouri courts to "examine arbitration agreements in the same light as they would examine any contractual agreement." *Id.* at 48 (quotations omitted). It is clear, therefore, under Missouri law, that the question of whether parties entered an agreement to arbitrate arbitrability *must* be determined under traditional state-law contract formation principles.

The Missouri Court of Appeals did exactly that. The Court of Appeals relied on *Pinkerton* throughout its decision and considered whether there was a clear manifestation of an intent to delegate questions of arbitrability at the time the underlying agreement was signed. The court below did not reject, criticize, or limit *Pinkerton*'s holding regarding the equal-footing doctrine, and it did not purport to rely on anything other than Missouri contract principles in determining if an

agreement to delegate had been formed. Nor could the intermediate state court have held otherwise, as it was bound by the Missouri Supreme Court's exposition of Missouri law. The Missouri Supreme Court saw no need to correct the Missouri Court of Appeals' interpretation and application of state law in this closely-watched case. Petitioners' complaint that the Court of Appeals should not have evaluated the *Pinkerton* standard at the time of contracting under Missouri law does not implicate any significant federal question or warrant this Court's review.

Second, the Missouri Court of Appeals' decision does not reject the equal-footing doctrine *sub silentio* and is wholly consistent with applicable Missouri contract law. Petitioners try to avoid the obvious lack of a federal question by arguing, in essence, that the Missouri Court of Appeals must have impliedly rejected the equal-footing doctrine in this context because its decision is contrary to Missouri contract principles. Of course, this argument is simply a re-packaging of Petitioners' challenge to the Missouri Court of Appeals' interpretation and application of state law. But even leaving aside the state-law nature of the issue, Petitioners' argument fails because they do not focus on the appropriate principles of Missouri contract law.

Petitioners are correct that Missouri law allows parties to incorporate evolving procedural rules and standards into contractual agreements, but that principle is irrelevant here. The issue of who determines the validity and scope of an arbitration provision is not a mere procedural rule or contract term, and the court is not being tasked with determining the general rules to govern the conduct of an arbitration. Thus, the Missouri

cases relied on by Petitioners are all inapposite. *See Dunn Indus. Grp. v. City of Sugar Creek*, 112 S.W.3d 421, 435 n.5 (Mo. banc 2003) (per curiam) (separate construction contract was not incorporated by reference); *City of St. Joseph v. Lake Contrary Sewer Dist.*, 251 S.W.3d 362, 367-69 (Mo. Ct. App. 2008) (ordinances pertaining to sewers and sewage); *Griffin v. First Cmty. Bank of Malden*, 802 S.W.2d 168, 170 (Mo. Ct. App. 1990) (service and maintenance charges adopted by bank); *St. Louis Realty Fund v. Mark Twain S. Cty. Bank*, 651 S.W.2d 568, 573 (Mo. Ct. App. 1983) (interest rate).

Rather, an antecedent delegation agreement is itself a contract—separate and distinct from the underlying arbitration agreement—and that contract must be validly created under state-law contract *formation* principles. *See, e.g.*, *Rent-A-Center*, 561 U.S. at 69-72; *First Options*, 514 U.S. at 944; *Soars*, 563 S.W.3d at 114. Pursuant to fundamental Missouri contract law, the parties must agree to all essential terms of an agreement at the time of contracting. "If the parties have reserved the essential terms of the contract for future determination, there can be no valid agreement." *Gateway Exteriors, Inc. v. Suntide Homes, Inc.*, 882 S.W.2d 275, 279 (Mo. Ct. App. 1994); *see also Birkenmeier v. Keller Biomedical*, 312 S.W.3d 380, 392 (Mo. Ct. App. 2010) (same). The essential term of an antecedent delegation agreement is whether the parties agreed to arbitrate the gateway questions of arbitrability. Therefore, under traditional Missouri contract principles, there must be an actual agreement to delegate at the time of contracting. Not surprisingly, Petitioners have identified no contrary authority which would allow a binding agreement to be *created* upon the happening of some unknowable event years in the future

even though the parties did not intend to form such a contract when the relevant documents were signed.

Given these fundamental principles of Missouri law, it is plain the parties did not form a valid agreement to arbitrate arbitrability. The Lease does not expressly address who should determine questions of arbitrability, and there was no rule that delegated arbitrability to an arbitrator in 1995. Even if the parties agreed the rules governing the conduct of the arbitration could change in the future, the parties had no way of knowing in 1995 that years later those rules would delegate questions of arbitrability to an arbitrator. A subsequent rule change cannot force parties to arbitrate a dispute they did not specifically agree to submit to arbitration. The Missouri Court of Appeals' conclusion that the 1995 Lease does not express an antecedent delegation agreement is wholly consistent with Missouri contract law.

II. Petitioners Have Not Identified a Relevant Conflict Warranting This Court's Review.

Petitioners try to manufacture a conflict among the lower courts by arguing that there is confusion over the proper interplay between the equal-footing doctrine and the clear and unmistakable evidence standard. Whatever confusion Petitioners believe they have uncovered, however, is not implicated here, if it exists at all. Most fundamentally, Petitioners' purported conflict does not justify this Court's review because it simply does not matter here. As explained above, Missouri law *does* apply the equal-footing doctrine to agreements to arbitrate arbitrability, and the Missouri Court of Appeals did not reject that proposition or purport to limit it in any

manner. Thus, Missouri has already adopted the position Petitioners now propose.

Furthermore, any conflict among the lower courts is largely illusory and, at best, poorly defined and undeveloped. For example, none of the federal Courts of Appeals' decisions cited addressed the same question as presented here. Rather, the decisions all involved contracts which were entered *after* the incorporated rules provided for delegation of arbitrability questions, and many of the cases addressed the plainly distinguishable issue of class arbitration. *See Dish Network L.L.C. v. Ray*, 900 F.3d 1240, 1245 (10th Cir. 2018) (contract was entered after incorporated rules provided for delegation and case involved class arbitration); *Spirit Airlines, Inc. v. Maizes*, 899 F.3d 1230, 1233-34 (11th Cir. 2018), *cert. denied* 139 S. Ct. 1322 (2019), (same); *Halliburton Energy Servs., Inc. v. Ironshore Specialty Ins. Co.*, 921 F.3d 522, 538 (5th Cir. 2019) (contracts entered after incorporated rules provided for delegation); *Wells Fargo Advisors, LLC v. Sappington*, 884 F.3d 392 (2nd Cir. 2018) (same). Clearly, the incorporation of an existing rule is fundamentally distinct from the question of whether incorporation of the potential for a future rule can create the requisite contractual intent. Petitioners have identified no holdings of the federal Courts of Appeals with respect to the latter question.

Similarly, on the other side, the purportedly contrary decisions of state courts of last resort cited by Petitioners do not contain any clear holdings regarding the equal-footing doctrine or arbitration-specific rules. As with the Missouri Court of Appeals' decision below, the cases cited do not expressly reject the application of the equal-footing

doctrine in this context, and they do not suggest that the creation of an antecedent agreement to delegate requires more than would be necessary to form a contract under traditional state-law contract formation principles. *See Flandreau Pub. Sch. Dist. v. G.A. Johnson Const., Inc.*, 2005 S.D. 87, ¶ 2, 701 N.W.2d 430, 432 (2005); *Roubik v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 181 Ill. 2d 373, 374, 692 N.E.2d 1167, 1168 (1998); *cf. Eakins v. Corinthian Colls., Inc.*, 2015 WL 758286, at *7 (Cal. Ct. App. Feb. 23, 2015); *Ajamian v. CanroCO2e, L.P.*, 203 Cal. App. 4th 771, 783, 137 Cal. Rptr. 3d 773, 783 (2012); *Gilbert St. Developers, LLC v. La Quinta Homes, LLC*, 174 Cal. App. 4th 1185, 1194, 94 Cal. Rptr. 3d 918, 924 (2009).

In short, there is no conflict among, or even relevant decisions by, the federal Courts of Appeals; the cited decisions of state courts of last resort do not contain holdings which conflict with federal law; and, most importantly, even if confusion existed, it is not implicated here because Missouri law very clear holds that the equal-footing doctrine applies in this context. Petitioners are left with a complaint that the decision below conflicts with other courts' interpretation of Missouri law and the observation that some federal district courts have reached contradictory conclusions under the laws of other states. Disagreement over Missouri law—or any state's law—is not the type of conflict justifying this Court's jurisdiction and consideration. *See, e.g.*, *Int'l Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 387 (1986) ("[W]e have no authority to review state determinations of purely state law . . . .").

III. This Case Does Not Present An Issue Worthy of Review or of Continuing or Widespread Significance.

Even if this Court wanted to address the interplay between the equal-footing doctrine and the clear and unmistakable evidence standard, this is not a good case in which to do so. First, this Court's review would not change the outcome. As explained, the Missouri Court of Appeals relied on state law and applied Missouri Supreme Court decisions to the facts presented. In so doing, the intermediate state appellate court did not purport to require anything beyond the traditional requirements for contract formation under Missouri law. Given this, any instruction by this Court to apply Missouri law and general contract principles would not result in a different outcome, and the accuracy of the Missouri Court of Appeals' interpretation of Missouri law is not before this Court.

Second, while the decision below is from a state intermediate appellate court, the conflicts which typically may warrant certiorari and this Court's resolution are conflicts involving decisions of the United States Courts of Appeals or state courts of last resort. Sup. Ct. R. 10. Those decisions frequently present the effective final word on an issue for a significant geographic area, and this Court may be called upon to reconcile inconsistent interpretations of federal law applicable in different areas of the country. The same is not true for decisions of state intermediate appellate courts. *Cf., e.g.*, *Huber v. N.J. Dept. of Envtl. Prot.*, 131 S. Ct. 1308 (2011) (the Chief Justice, Scalia, Thomas and ALITO, JJ., statement respecting denial of certiorari) ("[B]ecause this case comes to us on review

of a decision by a state intermediate appellate court, I agree that today's denial of certiorari is appropriate."). State intermediate appellate court decisions often have a narrower reach and can be corrected or amended, if necessary, by the state court of last resort. This is particularly significant when, as here, the decision encompasses substantial and pervasive state-law issues. It is a state's highest court which has the right and responsibility to definitively interpret the contours of state law. *See, e.g.*, *Montana v. Wyoming*, 563 U.S. 368, 377 n.5 (2011) ("The highest court of each State, of course, remains 'the final arbiter of what is state law.'" (quoting *West v. AT&T Co.*, 311 U.S. 223, 236 (1940))). The Missouri Court of Appeals, below, simply interpreted the contract before it; it did not purport to establish a generally applicable rule under Missouri law, and its decision will not have the effect of doing so.

Third, even when phrased in its most general terms, the issue raised in the petition has little national or continuing significance. Petitioners have identified only a handful of cases over the last 15 years which address the issue presented here, in its general form. *See* Pet. for Writ of Cert., pp. 18-23.[7] The AAA rules were amended

7. Most of the decisions cited by Petitioners as recognizing an agreement to delegate do not involve the same question presented here because they either address the issue of class arbitration and/or involve an arbitration agreement entered *after* the incorporated rule provided for arbitration of arbitrability questions. *See, e.g.*, *Dish Network*, 900 F.3d at 1245; *Spirit Airlines*, 899 F.3d at 1234; *Halliburton Energy Servs.*, 921 F.3d at 538; *Wells Fargo Advisors*, 884 F.3d 392. Similarly, Petitioners cite four petitions for writ of certiorari submitted over the last five years, Pet. for Writ of Cert., p. 31, but none of the petitions presented a comparable question for

16 years ago to provide for delegation of arbitrability questions. Therefore, only contracts which were entered before 2003 without an express delegation provision and which incorporate the AAA rules have the potential to create the question presented here. Not surprisingly, the only cases Petitioners cite addressing this issue within the last eight years are the two cases which involve this particular arbitration agreement: the Missouri Court of Appeals decision below and *McAllister v. St. Louis Rams, LLC*, No. 16-cv-172 (E.D. Mo. Nov. 17, 2017).[8] In short, this state-law issue has never engendered widespread interest, and it is, at best, of declining significance and unlikely to recur with any frequency.

Finally, any problem Petitioners perceive could easily be avoided in the drafting of the arbitration agreement. There is no need for this Court to add clarity; the rule is already clear. If an agreement to delegate gateway

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review. *See Spirit Airlines, Inc. v. Maizes*, No. 18-617 (U.S. filed Nov. 13, 2018) (questions presented involved standard for class arbitrability); *Simply Wireless, Inc. v. T-Mobile U.S., Inc.*, No. 17-1423 (U.S. filed Apr. 9, 2018) (presented similar question to that addressed in *Henry Schein*, 139 S. Ct. at 524, regarding wholly groundless exception); *Scout Petroleum, LLC v. Chesapeake Appalachia, LLC*, No. 15-1242 (U.S. filed Apr. 1, 2016) (questions presented involved contract entered after incorporated rules provided for delegation and issues of class arbitrability); *Crockett v. Reed Elsevier, Inc.,* No. 1-928 (U.S. filed Jan. 31, 2014) (questions presented involved issues regarding class arbitrability).

8. The other more recent cases cited by Petitioner involve contracts entered after the incorporated rules were amended to provide for delegation. *See, e.g.*, *Wells Fargo Advisors*, 884 F.3d 392; *Dish Network*, 900 F.3d at 1245; *Spirit Airlines*, 899 F.3d at 1234; *Halliburton Energy Servs.*, 921 F.3d at 538.

questions of arbitrability is established by clear and unmistakable evidence, that agreement will be enforced. Parties, therefore, know how to structure their agreements so as to include an enforceable delegation provision and provide certainty for financial dealings. The fact that the parties here failed to include such a provision does not impact any other arrangement.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court deny the Petition for Writ of Certiorari to the Missouri Court of Appeals.

Respectfully submitted,

Robert D. Blitz
Christopher O. Bauman
Kelley F. Farrell
Blitz, Bardgett
& Deutsch, L.C.
120 South Central Avenue,
Suite 1500
St. Louis, Missouri 63105
(314) 863-1500

James F. Bennett
Counsel of Record
Edward L. Dowd, Jr.
Michelle Nasser
Dowd Bennett LLP
7733 Forsyth Boulevard,
Suite 1900
St. Louis, Missouri 63105
(314) 889-7300
jbennett@dowdbennett.com

Counsel for Respondents