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 Writ of Certiorari to the Missouri Court of Appeals, Eastern District

REPLY BRIEF FOR PETITIONERS

MARK FILIP
ANDREW A. KASSOF
JAMES R.P. HILEMAN
DANIEL I. SIEGFRIED
KIRKLAND & ELLIS LLP
300 N. LaSalle Street
Chicago, IL 60654

ROBERT T. HAAR
LISA A. PAKE
JOZEF J. KOPCHICK
HAAR & WOODS, LLP
1010 Market Street
Suite 1620
St. Louis, MO 63101

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
ANDREW C. LAWRENCE
KIRKLAND & ELLIS LLP
1301 Pennsylvania Ave., NW
Washington, DC 20004
(202) 389-5000
paul.clement@kirkland.com

Counsel for Petitioners

January 8, 2020

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REPLY BRIEF 1

I. Courts Are Divided Over The Import Of This Court's "Clear And Unmistakable" Test For Assigning Questions Of Arbitrability To Arbitrators 2

II. The Decision Below Defies The FAA And This Court's Precedent 5

III. The Question Presented Is Exceptionally Important And Warrants Review Now 9

CONCLUSION 13

TABLE OF AUTHORITIES

Cases

Buckeye Check Cashing, Inc. v. Cardegna,
546 U.S. 440 (2006) 11

Dakota Foundry, Inc.
v. Tromley Indus. Holdings, Inc.,
737 F.3d 492 (8th Cir. 2013) 4

DIRECTV, Inc. v. Imburgia,
136 S. Ct. 463 (2015) 10

Ex parte Johnson,
993 So. 2d 875 (Ala. 2008) 3

First Options of Chi., Inc. v. Kaplan,
514 U.S. 938 (1995) 1

Flandreau Pub. Sch. Dist. No. 50-3
v. G.A. Johnson Constr., Inc.,
701 N.W.2d 430 (S.D. 2005) 4

Gateway Exteriors, Inc.
v. Suntide Homes, Inc.,
882 S.W.2d 275 (Mo. Ct. App. 1994) 8

Henry Schein, Inc.
v. Archer & White Sales, Inc.,
139 S. Ct. 524 (2019) 6

Kindred Nursing Ctrs. Ltd. P'ship v. Clark,
137 S. Ct. 1421 (2017) 1, 4, 6, 7

McAllister v. St. Louis Rams, LLC,
No. 16-cv-172 (E.D. Mo. Nov. 17, 2017) 5

Rent-A-Ctr., W., Inc. v. Jackson,
561 U.S. 63 (2010) 1

Roubik v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,
692 N.E.2d 1167 (Ill. 1998) 4

State ex rel. Pinkerton v. Fahnestock,
531 S.W.3d 36 (Mo. 2017) 9

Wells Fargo Advisors, LLC v. Sappington,
884 F.3d 392 (2d Cir. 2018) 2, 3

Other Authorities

David Horton, *Arbitration About Arbitration*,
70 Stan. L. Rev. 363 (2018) 2

REPLY BRIEF

Time and again, this Court has admonished that the Federal Arbitration Act (FAA) precludes courts from fashioning rules that single out arbitration agreements for disfavored treatment. *See, e.g.*, *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1424 (2017). At the same time, the Court has stated that courts should enforce arbitration agreements that delegate questions of arbitrability to the arbitrator only if the parties' intent is "clear and unmistakable." *See First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944-45 (1995); *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 69 n.1 (2010). The lower courts are divided over how to reconcile those principles, and the fatally flawed decision below is on the wrong side of the divide. This Court should grant certiorari to resolve the unsettled and important question of arbitration law that this case presents.

Respondents offer no valid reason to pursue a different course. Their cursory discussion of the division among the lower courts only confirms its existence. Their effort to defend the decision below ignores bedrock principles laid down by this Court. And they downplay the importance of the issue only by steadfastly ignoring the actual question presented. In reality, courts and commentators have long recognized the confusion surrounding the interplay between the FAA's equal-footing principle and the "clear and unmistakable" test. This is an opportune case to dispel that confusion once and for all, and to make clear that there is no arbitrability exception to the equal-footing principle.

I. Courts Are Divided Over The Import Of This Court's "Clear And Unmistakable" Test For Assigning Questions Of Arbitrability To Arbitrators.

As courts and commentators have recognized, "there has never been a shared understanding of what it means to have a 'clear and unmistakable' delegation clause." David Horton, *Arbitration About Arbitration*, 70 Stan. L. Rev. 363, 414 (2018); Pet.15-24. Most courts—including every federal court to address the issue—have understood that test to be an application of equal-footing principles requiring courts to enforce contract terms that assign arbitrability to the arbitrator if they speak with the same clarity required for other delegations under ordinary state-law contract principles. But a minority of courts—notably, all of them state courts—has concluded that the "clear and unmistakable" test obligates parties to manifest their intent with an extraordinary degree of clarity beyond that required in other contracting contexts.

Respondents' passing attempt to deny that division falls flat. Respondents try to dismiss "the federal Courts of Appeals' decisions" that conflict with the decision below on the theory that they did not address "the same question as presented here." Opp.20. According to respondents, "all" those cases concerned contracts "entered after the incorporated rules provided for delegation of arbitrability questions," while "many" implicated "class arbitration." Opp.20 (emphasis omitted). That is inaccurate and in all events irrelevant. *Wells Fargo Advisors, LLC v. Sappington*, 884 F.3d 392 (2d Cir. 2018), involved a contract that incorporated a version

of rules from the American Arbitration Association (AAA) that, at the time of incorporation, did not yet include a delegation provision. *See id.* at 396-97. The same goes for *Ex parte Johnson*, 993 So. 2d 875 (Ala. 2008), a case that respondents simply ignore. *See id.* at 884.

But more to the point, respondents fail to explain why it should matter whether a delegation provision in a set of third-party arbitral rules existed at the time of contracting. In fact, they freely concede that, in other contexts, it would not matter, as they agree with petitioners "that Missouri law allows parties to incorporate evolving procedural rules and standards into contractual agreements." Opp.17. It is only because this case involves arbitration, rather than "a mere … contract," that they insist that the general rule does not apply here. By respondents' own telling, then, this Court's "clear and unmistakable" test is the kind of special anti-arbitration rule that all of this Court's equal-footing cases reject. And that is precisely the argument that cases like *Sappington* and *Ex parte Johnson* rejected—and is precisely the reasoning on which the decision below rests. It is also the same reasoning that has been applied by the South Dakota Supreme Court, the Illinois Supreme Court, and several California courts, each of which has interpreted this Court's "clear and unmistakable" test as an exception to the equal-footing principle. *See* Pet.21-23.

Respondents insist that these courts did not "expressly reject" the equal-footing principle. Opp.20-21. But that is unsurprising: As this Court has recognized, state courts routinely seek to evade the

FAA "covertly." *Kindred Nursing*, 137 S. Ct. at 1426. And whether or not they have expressly rejected equal-footing principles, there is no denying that these courts have interpreted the "clear and unmistakable" test to require a deviation from ordinary contract-law principles. *Compare, e.g.*, *Flandreau Pub. Sch. Dist. No. 50-3 v. G.A. Johnson Constr., Inc.*, 701 N.W.2d 430, 432, 436-37 & n.6 (S.D. 2005) (holding that incorporation of AAA rules, which included delegation provision at time of contracting, failed the "clear and unmistakable" test because delegation language did not appear in arbitration agreement itself), *with Dakota Foundry, Inc. v. Tromley Indus. Holdings, Inc.*, 737 F.3d 492, 497 (8th Cir. 2013) (explaining general rule under South Dakota contract law that parties "may incorporate by reference another document"). *See also, e.g.*, *Roubik v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 692 N.E.2d 1167, 1176 (Ill. 1998) (Heiple, J., dissenting) (reprimanding majority for ignoring earlier state court decision concluding that relevant contract language was clear and unmistakable under ordinary state-law contract principles).

Respondents contend that "even if confusion exist[s], it is not implicated here because Missouri law very clear [*sic*] holds that the equal-footing doctrine applies in this context." Opp.21. But if that were true, then the decision below would have come out the other way. There is no better illustration of that than the fact that a federal court in Missouri considered *the exact same contractual provision* and concluded that it *did* clearly and unmistakably evince the parties' intent to arbitrate arbitrability under ordinary principles of Missouri contract law. *See McAllister v.*

St. Louis Rams, LLC, No. 16-cv-172 (E.D. Mo. Nov. 17, 2017), ECF. 276. The court below concluded otherwise only because it mistakenly viewed *this Court's* precedent as displacing ordinary state-law contracting principles in favor of a special federal-law rule disfavoring agreements to arbitrate arbitrability. It thus falls to this Court to resolve the clear conflict among the lower courts over the interplay between the "clear and unmistakable" test and the bedrock equal-footing rule.

II. The Decision Below Defies The FAA And This Court's Precedent.

The decision below not only contributes to a lower-court conflict, but also is wrong. Consistent with the FAA's equal-footing principle, the "clear and unmistakable" test merely requires parties to delegate arbitrability in a manner that is sufficiently clear and unmistakable to delegate any other matter under ordinary state-law contract principles. In Missouri, those principles permit contracting parties to incorporate third-party rules, such as building codes and product standards, that are expressly subject to change over time. The parties' agreement here did just that. Not only did they agree in the 1995 Contracts to abide by the AAA Commercial Arbitration Rules in existence at the time of any future dispute, but the then-extant AAA rules themselves made clear that they were subject to and would incorporate future amendments. And at the time of the dispute here, the AAA rules indisputably delegated arbitrability to the arbitrator. Nothing more would be required in any other context. By refusing to honor an agreement that Missouri courts

would recognize as clear and unmistakable in every other context, the court below impermissibly "single[d] out [an] arbitration agreement[] for disfavored treatment." *Kindred Nursing*, 137 S. Ct. at 1425; Pet.24-30.

Respondents have no meaningful answer.[1] They begin by suggesting that this case does not implicate a federal question. *See* Opp.12. Their effort to shield the decision below from this Court's review is understandable, but it is hard to take seriously when the first sentence of their merits discussion states that "[t]he legal principles which drive the resolution of this dispute" all come from this Court's FAA cases. Opp.12. To be sure, state law is relevant here, but only in the way that it was relevant in *Kindred Nursing* and similar cases: It provides the benchmark against which to determine whether a court has "place[d] arbitration agreements 'on equal footing with all other contracts,'" as the FAA demands. 137 S. Ct. at 1424.

The court below failed to honor the equal-footing principle, and respondents' efforts to defend its decision are as strained as they are baseless. Notably, respondents do not argue that the "clear and unmistakable" test permits deviations from ordinary state-law contract principles—in fact, just the opposite. *See* Opp.16 ("whether parties entered an agreement to arbitrate arbitrability *must* be determined under traditional state-law contract

[1] Much of respondents' statement of the case suggests that petitioners' arguments that the 1995 Contracts apply to this dispute are wholly groundless. *See* Opp.3-11. That proposition is wrong and in all events squarely foreclosed by *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 527-28 (2019).

formation principles"). Rather, they insist that the court below "properly applied" those ordinary state-law principles because the parties did not include "an express delegation provision" in the 1995 Contracts, and the AAA rules did not include a delegation provision in 1995. Opp.14-15. In respondents' view, that means that the parties lacked the "requisite intent" to arbitrate arbitrability. Opp.14.

But respondents give up the game when they candidly admit that "Missouri law allows parties to incorporate evolving procedural rules and standards into contractual agreements." Opp.17. Respondents therefore do not take issue with petitioners' argument that Missouri courts ordinarily enforce contracts that incorporate third-party building or safety codes that change over time. *Cf.* Pet.14, 30. Nor do they make the nonsensical claim that parties to *other* types of contracts could assert that they lacked the "requisite intent" to abide by new rules and standards because they did not know in advance how those rules would evolve over time. *But see* Opp.19 ("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."). Rather, respondents simply argue that the ordinary rule "is irrelevant here" because "[t]he issue of who determines the validity and scope of an arbitration provision is not a mere procedural rule or contract term." Opp.17. That is a quintessential example of a rule "too tailor-made to arbitration agreements … to survive the FAA's edict against singling out those contracts for disfavored treatment." *Kindred Nursing*, 137 S. Ct. at 1427.

Respondents try to suggest otherwise by claiming that this case actually turns on a state-law principle that the court below never mentioned: "'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)." Opp.17-18. Invoking that principle, respondents suggest that "the parties did not form a valid agreement to arbitrate arbitrability" because they left questions concerning delegation for future determination. Opp.18-19. But that is not the reasoning of the decision below and in all events is just another way of saying that agreements to arbitrate should be harder to create than other agreements.

Respondents' own case, *Gateway Exteriors*, confirms as much. There, the Missouri Court of Appeals concluded that an oral agreement that provided that the plaintiff would "install exterior siding on *certain* subdivision homes"—without more—was "unduly uncertain and indefinite" to qualify as a contract. *Gateway Exteriors*, 882 S.W.2d at 279-80. But the court explained that it would have reached a different conclusion had the agreement instead provided that the "plaintiff would exclusively side the *entire* subdivision or even all of the houses on which vinyl siding was ordered." *Id.* at 280. The latter reasoning perfectly describes the 1995 Contracts. They do not say that the parties should abide only by *some* AAA rules that exist at the time of a dispute. They instead say that the parties should abide by *all* such rules—and those rules have included a delegation provision since 1999. There is nothing "unduly uncertain and indefinite" about that; indeed,

not even the court below thought so. *See* App.18 (noting that the parties "clearly and unmistakably incorporate[d] … whatever rules are in use by AAA … at the time of a dispute"). Respondents' claim that the decision below is "wholly consistent with applicable Missouri contract law" thus blinks reality and only underscores the degree to which petitioners were subjected to anti-arbitration bias in a case where local passions run high. Opp.17.

Finally, respondents claim that "Petitioners' argument is substantially undermined" by the fact that the Missouri Supreme Court adhered to the equal-footing principle in a different case—*State ex rel. Pinkerton v. Fahnestock*, 531 S.W.3d 36 (Mo. 2017) (en banc). Opp.15. But the fact that Missouri courts may abide by the FAA in cases involving "aviation maintenance technical engineer program[s]," *Fahnestock*, 531 S.W.3d at 40, but have no trouble abandoning course in "closely-watched case[s]" like this one, Opp.17, is all the more reason for this Court to intercede, for such fair-weather adherence to the FAA deprives parties of the benefits of arbitration when they are needed most.

III. The Question Presented Is Exceptionally Important And Warrants Review Now.

This Court's guidance regarding the "clear and unmistakable" test is critical. Questions regarding that test frequently recur, and the present division in the lower courts cleaves along federal-state lines. This case illustrates the problem, as the dispute here would have proceeded to arbitration had this litigation started in federal rather than state court. Pet.31-33.

There is nothing to be gained by allowing this state of affairs to continue.

Respondents' suggestions to the contrary are meritless. Respondents first contend that "address[ing] the interplay between the equal-footing doctrine and the clear and unmistakable evidence standard … would not change the outcome" here because the court below "did not purport to require anything beyond the traditional requirements for contract formation under Missouri law." Opp.22. That is incorrect for all the reasons just explained, as Missouri courts quite obviously would have enforced the 1995 Contracts and their incorporation of evolving rules under ordinary state-law contract principles if this case did not implicate the "clear and unmistakable" test or arbitration.

Respondents next suggest that the Court should avoid expounding upon the "clear and unmistakable" test here because this case comes from an intermediate state appellate court and unavoidably involves some state-law interpretation. Opp.22-23. Such arguments have not moved the dial in previous FAA cases, and they should not here either. *See, e.g.*, *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 467 (2015) (granting review in FAA case arising from California Court of Appeal after California Supreme Court denied review). The decision below, just like the decisions under review in *DIRECTV* and some of this Court's other FAA cases, has created a square conflict between federal and state courts in the same jurisdiction. Pet.32. That dynamic grievously undermines Congress' desire to achieve a "national" arbitration policy, *Buckeye Check Cashing, Inc. v.*

Cardegna, 546 U.S. 440, 443 (2006), and cannot be excused simply because a state court of last resort declined to step in to give a defendant the benefit of its bargain in a dispute where local passions run high.

Respondents also suggest that "the issue raised in the petition has little national or continuing significance" because it concerns only those "contracts which were entered before 2003 without an express delegation provision and which incorporate the AAA rules."[2] Opp.23-24. But the actual "issue raised in the petition" is not unique to the facts of this case at all, as it concerns the general meaning of this Court's "clear and unmistakable" standard and how to reconcile it with bedrock equal-footing principles. Notably, respondents do not dispute that the actual question presented has far-reaching importance in the field of arbitration law.

Respondents conclude with the circular argument that this Court need not clarify the meaning of the "clear and unmistakable" test because contracting parties can easily avoid delegation-related disputes by delegating arbitrability in a "clear and unmistakable" manner. Opp.24-25. Of course, the entire problem is that this Court has never provided meaningful guidance about how to accomplish that feat, which is why parties keep asking this Court to do so. *See* Pet.31. Petitioners blithely dismiss those persistent calls for help, but the bases on which they attempt to distinguish those petitions are superficial at best. *See* Opp.23-24 nn.7-8. And in all events, that confusion

[2] Respondents do not dispute that the AAA delegation provision first appeared in 1999, but they continue to use 2003 as the benchmark "for consistency." Opp.10 n.6.

regarding the "clear and unmistakable" has arisen in a wide variety of contexts only underscores the broad importance of the question presented and the pressing need for this Court's review.

In the end, the equal-footing principle is simply too important a component of this Court's FAA jurisprudence to be cast aside by state courts in the arbitrability context. That those courts justify their departure by citation to this Court's "clear and unmistakable" test makes clear that only this Court can fix this problem and vindicate the FAA.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

MARK FILIP
ANDREW A. KASSOF
JAMES R.P. HILEMAN
DANIEL I. SIEGFRIED
KIRKLAND & ELLIS LLP
300 N. LaSalle Street
Chicago, IL 60654

ROBERT T. HAAR
LISA A. PAKE
JOZEF J. KOPCHICK
HAAR & WOODS, LLP
1010 Market Street
Suite 1620
St. Louis, MO 63101

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
ANDREW C. LAWRENCE
KIRKLAND & ELLIS LLP
1301 Pennsylvania Ave., NW
Washington, DC 20004
(202) 389-5000
paul.clement@kirkland.com

Counsel for Petitioners

January 8, 2020