No. 19-963

In The Supreme Court of the United States

HENRY SCHEIN, INC.,

Petitioner,

v.

ARCHER AND WHITE SALES, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF PROFESSORS DANIEL D. BARNHIZER, JEFFREY L. HARRISON, DAVID HORTON, LEE KOVARSKY, STEPHEN I. VLADECK, AND ERNEST A. YOUNG AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

INTEREST OF *AMICI CURIAE*[1]

Amici are law professors who believe in the importance of addressing fairly included, subsidiary issues that facilitate this Court's "intelligent resolution" of questions presented. *See Ohio v. Robinette*, 519 U.S. 33, 38 (1996) (quoting *Vance v. Terrazas*, 444 U.S. 252, 258-59 n.5 (1980)); SUP. CT. R. 14.1(a). Supreme Court Rule 14.1(a) helps ensure that questions can "genuinely be answered" in a manner that offers meaningful guidance to litigants and lower courts. *See Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 579 n.4 (2008). In this case, *amici* contend that an important, fairly included question is whether a contract's incorporation of arbitration rules effects an implied delegation, reflecting the parties' clear and unmistakable intent to vest the arbitrator with exclusive jurisdiction over arbitrability disputes.

Amicus Daniel D. Barnhizer is Professor of Law, Associate Dean for Graduate and International Programs, and the Bradford Stone Faculty Scholar at Michigan State University College of Law. He teaches and writes in the fields of Contract Law and Theory and Commercial Transactions.

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[1] Both parties have submitted letters granting consent to the filing of *amicus* briefs. Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

of Law. His scholarship focuses on Contracts, Antitrust, Copyright, and Economics.

Amicus David Horton is Professor of Law at the University of California, Davis, School of Law. He teaches and frequently writes in the fields of Contracts and Federal Arbitration Law. His recent scholarship includes: *The Arbitration Rules: Procedural Rulemaking by Arbitration Providers*, 105 MINN. L. REV. ___ (forthcoming 2020); *Infinite Arbitration Clauses*, 168 U. PA. L. REV. 633 (2020); *Clause Construction: A Glimpse into Arbitral and Judicial Decision-Making*, 68 DUKE L.J. 1323 (2019); and *Arbitration About Arbitration*, 70 STAN. L. REV. 363 (2018).

Amicus Lee Kovarsky is the Bryant Smith Chair in Law and Co-Chair of the Capital Punishment Center at the University of Texas School of Law. He teaches and writes in the fields of Federal Courts, Civil and Criminal Procedure, and Habeas Corpus. Professor Kovarsky practices regularly before this Court, most frequently in habeas and capital cases.

Amicus Stephen I. Vladeck holds the Charles Alan Wright Chair in Federal Courts at the University of Texas School of Law and is a nationally recognized expert on Federal Courts, Constitutional Law, National Security Law, and Military Justice. Professor Vladeck has argued multiple cases before this Court and writes frequently about this Court's history and jurisprudence.

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Amici sign this brief in their individual capacities and not on behalf of their institutions.

SUMMARY OF ARGUMENT

Supreme Court Rule 14.1(a) facilitates this Court's "intelligent resolution" of the issues before it by specifying that the question presented comprises all subsidiary questions fairly included therein. *See* SUP. CT. R. 14.1(a); *Robinette*, 519 U.S. at 38 (quoting *Vance*, 444 U.S. at 258-59 n.5). This Court's common-sense approach to Rule 14.1(a) relies on a range of indicators that help identify subsidiary questions that *simply make sense* to address in the course of an opinion.

Sometimes subsidiary questions present "predicate" or "antecedent" questions involving the assumed premise on which a question presented rests. *See*, *e.g.*, *United States v. Grubbs*, 547 U.S. 90, 94 & n.1 (2006); *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 381-82 (1995). At other times, subsidiary questions implicate issues so "integral" or "intimately bound up with" the question presented that ignoring them would "beg the question" and strip an opinion of meaningful guidance. *See*, *e.g.*, *Richlin*, 553 U.S. at 579 n.4; *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 540 (1999) (quoting, in part, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 37 (1991) (Stevens, J.,

dissenting)). And often, when subsidiary issues are entwined with a question presented, those issues were argued and even decided in the courts below—causing no surprise when they resurface in this Court notwithstanding the narrower terms of the question presented. In all of these scenarios, Rule 14.1(a) helps guide this Court toward meaningful decision-making that is useful to litigants and lower courts, conserves this Court's resources, and wholly aligns with fairness concerns.

In this case, the question presented operates on an assumed premise that implicates a fairly included, subsidiary question this Court can and should resolve: whether an arbitration agreement's mere incorporation of arbitral rules is an implied delegation of arbitrability to the arbitrator. The question presented assumes that this delegation occurred and, leaping forward from that contested premise, asks whether certain disputes carved out from the parties' agreement also were carved out from the assumed, implied delegation.

It makes no sense, however, to skip past the predicate issue of whether an implied delegation in fact occurred. If there was no delegation, there is no need to answer the question presented: If the parties did not delegate arbitrability of *any* disputes, they did not delegate arbitrability of carved-out disputes. Moreover, the arbitrability of the carve-outs is inextricably bound up with the implied delegation, as both turn on the language of the same arbitration agreement and a determination whether, and where, it

reflects clear and unmistakable evidence of the parties' intent for the arbitrator to determine the arbitrability of all, some, or none of the disputes that arise between them.

The Court should resolve this fairly included question to lend much-needed guidance as to whether an agreement's incorporation of arbitral rules constitutes an implied delegation. Although the circuits have coalesced around a majority consensus endorsing that implied-delegation approach, those opinions are overwhelmingly conclusory; the ALI Restatement of the U.S. Law of International Commercial and Investor-State Arbitration rejects the premise on which the consensus rests; and conflicts exist within at least two circuits where state high courts have rejected the federal-consensus view—holding, instead, that an agreement's mere incorporation of arbitral rules does *not* reflect the clear and unmistakable intent required to delegate arbitrability under *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944-45 (1995). Given the prevalence of arbitration agreements throughout a wide range of commercial and consumer contracts, this Court should answer the fairly included, implied-delegation question to resolve uncertainty about the *First Options* test and the proper balance between courts and arbitrators in determining arbitrability.

ARGUMENT

I. THIS COURT TAKES A COMMON-SENSE APPROACH TO RULE 14.1(a) AND ADDRESSES FAIRLY INCLUDED, SUBSIDIARY QUESTIONS THAT IMPLICATE PREDICATE ISSUES, DISPUTED PREMISES, INTEGRAL CONSIDERATIONS, OR ISSUES THAT OTHERWISE ASSIST THIS COURT'S "INTELLIGENT RESOLUTION" OF THE QUESTION PRESENTED.

This Court's "power to decide is not limited by the precise terms of the question presented." *Procunier v. Navarette*, 434 U.S. 555, 559-60 n.6 (1978). As this Court's rules make clear, "[t]he statement of any question presented is deemed to comprise every subsidiary question fairly included therein." SUP. CT. R. 14.1(a). This prudential rule, *see Kolstad*, 527 U.S. at 540, means that this Court does not have to ignore or assume the answer to a subsidiary question that would facilitate "an intelligent resolution" of the question presented. *See Robinette*, 519 U.S. at 38 (citing SUP. CT. R. 14.1(a) and quoting *Vance*, 444 U.S. at 258-59 n.5); *see also Procunier*, 434 U.S. at 559-60 n.6 (considering subsidiary issues "'fairly comprised' by"[2] and "essential to" resolution of the question

[2] An earlier version of the rule governing questions presented used the phrase "fairly comprised" instead of "fairly included," but this Court has noted that the "changes in syntax obviously did not alter the substance of the Rule." *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 31 n.3 (1993) (per curiam).

presented, notwithstanding this Court's expressly limiting its grant to a narrower issue).

Indeed, "[t]he Court repeatedly has stated that when resolution of a 'question of law is a predicate to intelligent resolution of the question on which we granted certiorari,' it can be regarded as 'fairly comprised within it.'" STEPHEN M. SHAPIRO ET AL., SUPREME COURT PRACTICE ch. 6.25(g) (11th ed. 2019) (quoting *Vance*, 444 U.S. at 258-59 n.5, and citing, *inter alia*, *Grubbs*, 547 U.S. at 94 n.1; *Robinette*, 519 U.S. at 38). Accordingly, this Court has, and often does, address subsidiary questions "embraced within"—but not expressly stated in—the question presented. *E.g.*, *Lebron*, 513 U.S. at 379-82; *Vance*, 444 U.S. at 258-59 n.5; SUPREME COURT PRACTICE, *supra*, ch. 6.25(g) (collecting cases).

Although this Court has not prescribed an element- or factor-based test for determining when an issue is a subsidiary question within the meaning of Rule 14.1(a), this Court's precedent reflects a range of common-sense indicators consistently used to explain why an issue is fairly included in the question presented. Issues tend to fall on the fairly included, subsidiary-question side of the line when they are "'essential to analysis' of the decisions below or 'to the correct disposition of the other issues'" presented to this Court. SUPREME COURT PRACTICE, *supra*, ch. 6.25(g) (quoting *Procunier*, 434 U.S. at 559-60 n.6 (1978), and then quoting *United States v. Mendenhall*, 446 U.S. 544, 551-52 n.5 (1980)). Fairly included issues also may be an "antecedent" or "predicate" to

the question presented, may resolve disputed premises, or may even obviate the need to answer the question presented. *See*, *e.g.*, *Grubbs*, 547 U.S. at 94 & n.1; *Lebron*, 513 U.S. at 381-82. In other instances, fairly included questions may be "so integral to decision of the case" that they are "intimately bound up with" the express terms—or the premise—of the question presented. *See Kolstad*, 527 U.S. at 540 (quoting, in part, *Gilmer*, 500 U.S. at 37 (Stevens, J., dissenting)); *see also Lebron*, 513 U.S. at 381-82. Or it may be that "the question presented cannot genuinely be answered without addressing the subsidiary question." *Richlin*, 553 U.S. at 579 n.4. These common-sense indicators all point to circumstances in which a subsidiary question's resolution assists this Court in answering the question presented—a hallmark of what makes an issue "fairly included" within the meaning of Rule 14.1(a).

On the other hand, issues that "would not assist" resolution of the question presented are typically not fairly included, subsidiary questions. *See Yee v. City of Escondido*, 503 U.S. 519, 537 (1992). In particular, this Court has declined to address merely "*related*" or "*complementary*" questions that lie beyond the contemplation of Rule 14.1(a). *Id.* (emphasis in original). A question is merely related or complementary to the question presented when the two questions "exist side by side, neither encompassing the other." *Id.* (explaining that a regulatory taking issue was not fairly included in petitioner's question directed at the lower court's rejection of a physical taking because "neither of the two questions is subsidiary to the

other" and, *inter alia*, the regulatory taking was not fully litigated below). Because merely related or complementary questions expand—rather than tailor or facilitate intelligent resolution of—the question presented, they do not serve the interest in "economy" reflected in Rule 14.1(a). *See id.* at 535, 537.

That economy interest *is* furthered, however, by addressing subsidiary questions that align with the common-sense indicators above—presenting issues that are useful and expedient to resolve because they are "'essential to the analysis' of the decisions below"; facilitate "the correct disposition of the other issues" this Court must reach; involve disputed premises; require resolution before the question presented can "genuinely be answered"; or implicate "predicate" or "integral" issues fairly included within the question presented. *See Richlin*, 553 U.S. at 579 n.4; *Lebron*, 513 U.S. at 381-82; SUPREME COURT PRACTICE, *supra*, ch. 6.25(g) (quoting *Procunier*, 434 U.S. at 559-60 n.6, and then quoting *Mendenhall*, 446 U.S. at 551-52 n.5).

These indicators also, by nature, tend to identify cases in which resolving a subsidiary question does not raise fairness concerns. An issue that is essential, integral, or a predicate to the question presented typically is one that a party has openly pressed—and that courts below likely considered in some form—during various stages of the proceedings. *See*, *e.g.*, *Kolstad*, 527 U.S. at 540-41; *Missouri v. Jenkins*, 515 U.S. 70, 86 (1995). Thus, this Court exercises its "power to decide," *Procunier*, 434 U.S. at 560 n.6, beyond the discrete terms of questions presented when indicators

point to subsidiary questions that are useful, economical, and fair to resolve.

* * *

Looking more closely at the circumstances underlying several of this Court's decisions on fairly included questions confirms the correlation between the common-sense indicators and subsidiary questions that are useful, economical, and fair to reach. In *Lebron v. National Railroad Passenger Corp.*, for example, the question presented asked whether Amtrak's refusal to display petitioner's provocative billboard in Penn Station amounted to state action in violation of the First Amendment, citing the federal government's involvement in various aspects of Amtrak's operations as a presumably private company. 513 U.S. at 380 n.1. This Court determined that a subsidiary question—whether Amtrak is a private company or a "Government actor"—was fairly included in the question presented because "[t]he question of private-entity status is . . . a *prior* question." *Id.* at 381 (emphasis in original). As this Court explained, "it is quite impossible to consider whether the Government connections are sufficient to convert private-entity Amtrak into a Government actor without first *assuming* that Amtrak is a private entity." *Id.* (emphasis added). It makes sense to consider this type of fairly included "prior question" because otherwise the question presented rests on what may prove to be a false premise. *Id.* at 381-82.

Another example of a fairly included, premise-based subsidiary question is found in *United States v. Grubbs*, a case involving the Fourth Amendment's particularity requirement and anticipatory search warrants. *See* 547 U.S. at 93-94, 94 n.1. This Court considered what it described as an "antecedent question"—whether anticipatory search warrants are categorically unconstitutional—because the answer could obviate the need to resolve the circumstance-specific question presented: whether an anticipatory warrant satisfies the Fourth Amendment's particularity requirement when the "triggering condition" for a search occurs, but that condition was specified only in a supporting affidavit not presented at the time of the search. *See id*. Although a categorical prohibition on anticipatory warrants had been rejected by "every Court of Appeals to confront the issue," *id.* at 95, and thus presented no circuit conflict, this Court nonetheless took up the question, reasoning that "[i]t makes little sense to address what the Fourth Amendment requires of anticipatory search warrants if it does not allow them at all." *Id.* at 94 n.1.[3]

[3] As in *Grubb*s, this Court in *Ohio v. Robinette* addressed a threshold issue under the Fourth Amendment before proceeding with the narrower question presented. 519 U.S. at 35, 37-38 (deciding whether an officer's subjectively improper motives for continuing an objectively reasonable detention of a speeding driver negated the legality of that seizure—a "predicate to intelligent resolution" of the more specific question presented: whether a lawfully seized defendant must be advised that he is free to go before his consent to a vehicle search is recognized as voluntary).

Similarly, in *Gross v. FBL Financial Services, Inc.*, this Court considered a "threshold inquiry" under the Age Discrimination in Employment Act that was not included in the express terms of the question presented but could negate the premise on which that question rested. 557 U.S. 167, 169-70, 173 n.1 (2009). Before answering the question presented—"whether a plaintiff must present direct evidence of age discrimination in order to obtain a mixed-motives jury instruction in a suit" under that Act, *id. at* 169-70—this Court considered whether the type of burden-shifting framework that might require a special instruction exists for mixed-motive claims under the ADEA. *See id.* at 173-80. Concluding that the ADEA, unlike Title VII, does not shift the burden of persuasion for mixed-motive claims, this Court held that such instructions are never proper under the ADEA. *Id.* at. 170, 174-78. Resolving that "threshold inquiry" thus allowed the Court to remove a legally incorrect premise on which the question presented rested. *See id.* at 169-70, 180.

Sometimes threshold inquiries do not remove an incorrect premise but nonetheless inform how the question presented should be resolved. Thus, in *Missouri v. Jenkins*, a school-desegregation case that had been litigated for nearly twenty years, this Court considered the scope of the district court's remedial authority as a predicate to the State's question presented, which concerned the propriety of a remedial order mandating across-the-board salary increases for school employees. 515 U.S. at 74, 84. Although

respondents argued that the scope-of-authority issue was not before this Court—citing the denial of the State's cert. petition presenting that question in an earlier phase of the litigation—this Court disagreed, explaining that its earlier denial "neither 'approv[ed]' nor 'disapprov[ed] the Court of Appeals' conclusion that the District Court's remedy was proper.'" *Id.* at 83-84 (alterations in original) (quoting this Court's prior *Jenkins* opinion, 495 U.S. 33, 53 (1990)). Moreover, the parties were on notice that the State continued to press its challenge, and it had been passed on below. *Id.* at 86. Accordingly, the threshold, scope-of-authority issue was "properly before" this Court and "fairly included in the question presented." *Id.* at 83-86.

In other instances, this Court has determined that "the question presented cannot genuinely be answered without addressing the subsidiary question." *Richlin*, 553 U.S. at 579 n.4. In *Richlin Security Service Co. v. Chertoff*, the question presented asked whether the Equal Access to Justice Act allowed prevailing parties to recover expenses for paralegal services based on market rate or "cost only." *Id.* This Court determined that such services should be recovered at market rate, *id.* at 577-80; but, even if recovered at "cost," reasonable cost would refer to the amount paid by a party who is billed for paralegal services, not the compensation an attorney or firm employing paralegals pays for such services. *Id.* at 578. And the amount billed to the client presumably would be at market rate. *Id.* at 579-80. In reaching beyond the

express terms of the question presented to determine from whose perspective to measure the cost of paralegal services, this Court explained that "[a] decision limiting reimbursement to 'cost only' would simply beg the question of how that cost should be measured." *Id.* at 579 n.4.

In a similar vein, this Court has ventured outside the express terms of the question presented when subsidiary issues are "so integral to decision of the case that they could be considered 'fairly subsumed' by the actual questions presented." *Kolstad*, 527 U.S. at 540 (quoting *Gilmer*, 500 U.S. at 37 (Stevens, J., dissenting)). Thus, in *Kolstad v. American Dental Ass'n*, this Court determined the requisite mental state to support a punitive-damages award under Title VII and then also addressed an integral issue: "limitations on the extent to which principals may be liable in punitive damages for the torts of their agents." *Id.* at 540-41 (explaining that the agency issue was "intimately bound up with the preceding discussion on the evidentiary showing necessary to qualify for a punitive award" and thus "easily subsumed within the question on which we granted certiorari"). This Court noted, moreover, that addressing the agency question would cause no unfair surprise, as it "was the subject of discussion by both the en banc majority and dissent" below, with "substantial questioning at oral argument." *Id.*

* * *

In many of the cases discussed above, this Court could have assumed or skipped the answer to the subsidiary question and proceeded to the question presented as framed, but often it "makes little sense" to do so. *Grubbs*, 547 U.S. at 94 n.1. Addressing subsidiary issues that facilitate this Court's "intelligent resolution" of the question presented, *Vance*, 445 U.S. at 258 n.5, without causing undue surprise to the parties, allows this Court to direct resources to the inquiries that matter most, consistent with both the economy and fairness interests reflected in Rule 14.1(a).

II. WHETHER INCORPORATION OF AAA RULES IMPLICITLY DELEGATES ARBITRABILITY TO THE ARBITRATOR IS A FAIRLY INCLUDED, SUBSIDIARY QUESTION THAT THIS COURT CAN AND SHOULD ADDRESS.

Whether an agreement's mere incorporation of the AAA Rules removes the gateway arbitrability determination from the court—implicitly delegating it, instead, to the arbitrator—is fairly included in the question presented. *See* Pet. I. In this case, the question presented operates from an assumption that an implied delegation occurred, and it then asks whether certain carve-outs from arbitration also are carved out of that assumed, implied delegation—meaning that a court, not the arbitrator, would determine the arbitrability of those carved-out disputes. *See id.* If the court of appeals erred in concluding that an implied delegation occurred, the

question presented rests on a false premise. It therefore "makes little sense," *Grubbs*, 547 U.S. at 94 n.1, to consider the carve-out issue without first determining whether an implied delegation occurred at all. Doing so will serve this Court's interest in economy without raising concerns over fairness, aligning with the indicators used to identify subsidiary questions that will assist this Court's "intelligent resolution," *Vance*, 444 U.S. at 258 n.5, of the question presented. *See supra* Part I.

Additionally, this Court should address the implied-delegation question because the circuits have coalesced around the same shaky premise adopted by the court below—yet only one circuit has supported its holding with any reasoning. *See infra* Part II.B. Instead, most circuits have perfunctorily followed a 1989 First Circuit decision that states, without explanation, that an agreement's incorporation of arbitration rules "clearly and unmistakably" delegates arbitrability to the arbitrator. *See Apollo Comput., Inc. v. Berg*, 886 F.2d 469, 473 (1st Cir. 1989); *see also*, *e.g.*, *First Options*, 514 U.S. at 944-45 (reinforcing the need for evidence of the parties' clear and unmistakable desire to remove the gateway arbitrability issue from the court).

Despite the widespread consensus in the federal courts of appeals, state high courts have not only questioned—but rejected—the premise of this type of implied delegation, creating conflicts with the circuits governing the states in which those state supreme courts sit. *Compare, e.g.*, *Flandreau Pub. Sch. Dist.*

#50-3 v. G.A. Johnson Constr., Inc., 701 N.W.2d 430, 437 n.6 (S.D. 2005) (holding that, in South Dakota state courts, references to arbitration rules do not demonstrate intent to delegate arbitrability), *with Fallo v. High-Tech Inst.*, 559 F.3d 874, 878 (8th Cir. 2009) (holding that, in federal courts within the Eighth Circuit, references to arbitration rules do demonstrate intent to delegate arbitrability). Such tensions compound the lack of reasoned analysis supporting implied delegation, leaving many companies and their counsel reluctant to rely on the doctrine. Resolving this issue before addressing the carve-outs in the question presented would provide much-needed guidance and help settle the law in a frequently occurring context, as many agreements specify the rules that will apply to any arbitrations that occur.

A. The Implied-Delegation Issue Is Fairly Included In The Question Presented And Will Facilitate "An Intelligent Resolution" Of That Question.

The implied-delegation issue is fairly included in the question presented. It is not possible to address the question presented—whether carve-outs from the arbitration agreement are also carved out from the implied delegation of arbitrability—"without first *assuming*" that arbitrability was in fact delegated to the arbitrator. *See Lebron*, 513 U.S. at 381 (emphasis in original). In addition, determining precisely how arbitrability was delegated (if at all) is "integral" to the

question presented. *See Kolstad*, 527 U.S. at 540. Thus, the question presented "cannot genuinely be answered," *Richlin*, 553 U.S. at 579 n.4, without addressing the subsidiary, implied-delegation issue.

The decision-making progression in the Fifth Circuit helps explain why the implied-delegation issue is fairly included in the question presented. First, the court below held that the mere incorporation of the AAA Rules implicitly delegated arbitrability to the arbitrator. Pet. App. 7a-8a. Only after that gateway determination did the Fifth Circuit consider the carve-outs, concluding that the implied delegation did not apply to disputes "carved out" from the arbitration clause. *Id.* When petitioner filed a petition for certiorari to challenge that determination, respondent argued in both a conditional cross-petition (at 9-18) and its brief in opposition to the petition for certiorari (at 18-21) that the predicate implied-delegation holding was wrong. If respondent is correct that there was no implied delegation at all, there is no need to address carve-outs from the arbitration agreement, because all questions of arbitrability would remain with the court, as is the starting assumption in any arbitration agreement. *See*, *e.g.*, *Howsam v. Dean Witter Reynolds*, 537 U.S. 79, 86 (2002).

As in *Lebron*, it does not make sense to skip steps and resolve the question presented without determining whether that question's threshold, arbitrability assumption is correct. *See Lebron*, 513 U.S. at 381 ("[I]t is quite impossible to consider whether the Government connections are sufficient to

convert private-entity Amtrak into a Government actor without first assuming that Amtrak is a private entity."); *cf. Gross*, 557 U.S. at 169-70, 173 n.1, 180 (considering "threshold inquiry" whether burdens shift for mixed-motive ADEA claims before answering the question presented that assumed the burden-shifting premise and asked about the evidence required to obtain a burden-shifting jury instruction). And, as in *Grubbs*, if the "antecedent question" is answered in one way—here, a holding that there was no implied delegation—it is unnecessary to answer the question presented. *See Grubbs*, 547 U.S. at 94-95 (answering whether anticipatory warrants are ever permitted before considering the requirements for such warrants).

The implied-delegation question is also "integral to decision of the case." *Kolstad*, 527 U.S. at 540. It makes no sense to determine the scope of an implied delegation without first determining whether—and how—that implied delegation occurred. In this case, whether arbitrability was delegated and whether exceptions to that delegation exist both depend not only on the same contract, but on the same sentence of the contract. *See*, *e.g.*, Resp. Br. 29-30. To attempt to interpret that sentence's limitations on delegation without first interpreting how that sentence accomplishes a delegation simply makes no sense. Additionally, interpreting the arbitration clause as an integrated whole will provide guidance far more useful to parties and lower courts than an unnaturally cabined analysis of the carve-out phrase.

The implied-delegation issue also has been fully briefed and argued, meaning it is fair for this Court to address the issue at this time. *See*, *e.g.*, *Kolstad*, 527 U.S. at 540-41; *Jenkins*, 515 U.S. at 86. The court of appeals explicitly ruled on implied delegation. Pet. App. 7a-8a. Moreover, both parties were heard on the issue below. *Id.* The issue was also addressed in respondent's Conditional Cross-Petition for Certiorari (at 9-18) and accompanying reply (at 2-10), as well as in respondent's Brief in Opposition (at 18-21).

The circuits' majority consensus does not cut against resolving the implied-delegation issue—especially given the dearth of reasoning among those courts, the resulting tensions with state high courts, and an apparent lack of reliance, in practice, on the incorporated-rules-based, implied-delegation approach. *See infra* Part II.B; *cf. Grubbs*, 547 U.S. at 94-95, 94 n.1 (considering a categorical prohibition on anticipatory warrants even though it had been rejected by "every Court of Appeals to confront the issue"). Nor does this Court's denial of the Conditional Cross-Petition limit this Court's ability to consider the gateway-arbitrability issue. As noted in *Missouri v. Jenkins*, a previous denial of certiorari on a question does not bar this Court's later consideration of that question when it is otherwise fairly included in the question presented, 515 U.S. at 83-85, as it is here.[4]

[4] In its Brief in Opposition to the Conditional Cross-Petition, petitioner argued (at 6-7) that no cross-petition was necessary to assert an alternative ground for affirmance, further indicating

B. This Court Should Answer The Implied-Delegation Question To Lend Certainty To A Vitally Important But Unsettled Area of Arbitration Law.

Without explaining how merely incorporating arbitral rules into an agreement constitutes clear and unmistakable evidence of the parties' intent to delegate the gateway arbitrability determination to the arbitrator, *see*, *e.g.*, *First Options*, 514 U.S. at 944, the majority of circuits have rubber-stamped that implied-delegation approach, overwhelmingly building on one circuit's conclusory statement from 1989 and offering virtually no explanation as to how an implied delegation based on an agreement's adoption of arbitral rules aligns with this Court's arbitration jurisprudence. Even the one circuit to offer some analysis—the Sixth Circuit in *Blanton v. Domino's Pizza Franchising LLC*, 962 F.3d 842 (6th Cir. 2020)—relies on the mere existence of the circuits' snowballed consensus for support. *Id.* at 846-51.

The consensus also has created conflicts within at least two states whose high courts reject this implied-delegation premise. With the shaky state of the law, practitioners and clients appear reluctant to rely on implied delegation, drafting express delegation language to cover all bets, even when an arbitration clause incorporates arbitral rules. This Court's

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petitioner's awareness that the implied-delegation issue could be considered by this Court.

guidance would provide much-needed certainty on this gateway delegation issue.

The circuits' implied-delegation approach to arbitrability rests on suspect origins. The first federal-appellate court to recognize an implied delegation through mere rule reference was the First Circuit in 1989 with its opinion in *Apollo Computer, Inc. v. Berg*, 886 F.2d at 473 (holding, without explanation, that an arbitration agreement's incorporation of Articles 8.3 and 8.4 of the International Chamber of Commerce Rules, which "clearly and unmistakably allow the arbitrator to determine her own jurisdiction," delegates arbitrability issues to the arbitrator).[5] Other circuits have subsequently cited *Apollo Computer*'s conclusory holding on implied delegation without adding further reasoning, entrenching the unexplained premise that mere incorporation of arbitration rules meets the "clear and unmistakable" standard for delegating arbitrability to the arbitrator.[6]

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[5] The language of the ICC Rules quoted in *Apollo Computer* mirrors the language of the AAA Rules quoted by the court below. *Compare Apollo Comput.*, 886 F.2d at 473, *with* Pet. App. 9a. The relevant language in the ICC Rules is now found in Articles 6.5 and 6.9. *See* INT'L CHAMBER OF COMMERCE, RULES OF ARBITRATION OF THE INT'L CHAMBER OF COMMERCE Art. 6.5, 6.9 (2011) (in force as of January 1, 2012).

[6] *See*, *e.g.*, *Contec Corp. v. Remote Sol. Co.*, 398 F.3d 205, 208, 210-11 (2d Cir. 2005); *Petrofac, Inc. v. DynMcDermott Petroleum Operations Co.*, 687 F.3d 671, 675 (5th Cir. 2012); *Fallo v. High-Tech Inst.*, 559 F.3d 874, 878 (8th Cir. 2009); *Belnap v. Iasis Healthcare*, 844 F.3d 1272, 1290-93 (10th Cir. 2017); *Terminix Int'l Co. v. Palmer Ranch Ltd. P'ship*, 432 F.3d 1327, 1332-33 (11th Cir. 2005); *see also Blanton*, 962 F.3d at 848-50 (bolstering

State supreme courts have been more reluctant to jump on the implied-delegation bandwagon. At least two that have considered the issue under the Federal Arbitration Act have held that incorporation of arbitration rules is not enough to implicitly delegate arbitrability. *Glob. Client Sols., LLC v. Ossello*, 367

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the circuit consensus with added reasoning); *Chevron Corp. v. Ecuador*, 795 F.3d 200, 207-08 (D.C. Cir. 2015) (following other circuits' precedent, without further analysis, to hold that incorporation of UNCITRAL Arbitration Rules constitutes delegation of arbitrability).

Some circuits have embraced the majority rule, albeit in qualified circumstances. *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366, 1372-73 (Fed. Cir. 2006) (following the majority consensus when the litigation arose within a circuit that embraces the implied-delegation-through-rule-reference approach and does not implicate a patent-specific right); *Richardson v. Coverall N. Am., Inc.*, 811 F. App'x 100, 103-04 (3d Cir. 2020) (determining, in non-precedential opinion, that an agreement's incorporation of AAA Rules without contrary indications of intent not to delegate arbitrability was an implied delegation). In particular, two circuits have considered the sophistication of the parties. The Ninth Circuit has followed *Apollo Computer* with respect to agreements between sophisticated parties but expressly declined to decide whether that rule extends to cases involving unsophisticated parties. *Brennan v. Opus Bank*, 796 F.3d 1125, 1130-31 (9th Cir. 2015); *see also Galilea, LLC v. AGCS Marine Ins. Co.*, 879 F.3d 1052, 1062 (9th Cir. 2018) (reserving judgment on applicability of the rule to unsophisticated parties). And the Fourth Circuit has addressed the question only in "the context of a commercial contract between sophisticated parties." *Simply Wireless, Inc. v. T-Mobile US, Inc.*, 877 F.3d 522, 527-28 (4th Cir. 2017), *cert. denied*, 139 S. Ct. 915 (2019).

Two decades after *Apollo Computer* was decided, the First Circuit revisited the implied-delegation issue in *Awuah v. Coverall N. Am., Inc.*, 554 F.3d 7, 10-11 (1st Cir. 2009) (Boudin, J.), criticizing *Apollo Computer* but following it as binding circuit precedent.

P.3d 361, 369 (Mont. 2016); *Flandreau Pub. Sch. Dist. #50-3*, 701 N.W.2d at 437 n.6; *see also Morgan v. Sanford Brown Inst.*, 137 A.3d 1168, 1181 (N.J. 2016) (rejecting argument that incorporation of the AAA Rules delegated arbitrability because it did not meet the New Jersey standard requiring an agreement to explain "that plaintiffs are waiving their right to seek relief in court"). The Montana Supreme Court rejected the notion that "mere reference to administering an arbitration pursuant to AAA rules constitutes a substantive agreement . . . to forego the general rule that arbitrability is to be decided by the court." *Glob. Client Sols.*, 367 P.3d at 369. Similarly, the South Dakota Supreme Court held that incorporation of the AAA rules did "not support a per se finding of intent to arbitrate arbitrability." *Flandreau Pub. Sch. Dist. #50-3*, 701 N.W.2d at 437 n.6.

Thus, while the robust consensus among the federal courts of appeals seems fixed, the litigation landscape nonetheless remains far from certain for parties to arbitration clauses—particularly in states where the state-court rule is in tension with the corresponding circuit's rule, as in South Dakota and Montana. *Compare Flandreau Pub. Sch. Dist. #50-3*, 701 N.W.2d at 437 n.6 (holding that, in South Dakota state courts, references to arbitration rules do not demonstrate intent to delegate arbitrability), *with Fallo v. High-Tech Inst.*, 559 F.3d at 878 (holding that, in federal courts within the Eighth Circuit, references to arbitration rules do demonstrate intent to delegate arbitrability); *compare also Glob. Client Sols.*, 367 P.3d at 369 (holding that, in Montana state courts,

references to arbitration rules do not demonstrate intent to delegate arbitrability), *with Brennan*, 796 F.3d at 1130-31 (holding that, in federal courts within the Ninth Circuit, references to arbitration rules demonstrate intent to delegate arbitrability, at least in contracts between sophisticated parties).

The circuit-consensus position also has been criticized by authors of the ALI Restatement of the U.S. Law of International Commercial and Investor-State Arbitration, who contend that arbitral rules do not confer exclusive jurisdiction on the arbitrator. *See* RESTATEMENT OF THE U.S. LAW OF INT'L COMMERCIAL AND INVESTOR-STATE ARBITRATION § 2.8 Reporter's Note b(iii) (AM. L. INST., Proposed Final Draft, 2019).[7] Thus, even if given effect through incorporation, arbitral rules would not wholly divest courts of the authority to determine gateway arbitrability issues. *See id.*; *see also* Br. of *Amicus Curiae* Professor George A. Bermann in Support of Respondent at 2, *Henry Schein, Inc. v. Archer & White Sales*, *Inc.*, 139 S. Ct. 524 (2019) (No. 17-1272) (stating, as chief reporter for the

[7] The Reporter's Note also states, however, that "the drafters of the AAA/ICDR International Arbitration Rules seem to suggest that the Rule had a broader effect, even though the language of the Rule itself does not support such an interpretation." RESTATEMENT OF THE U.S. LAW OF INT'L COMMERCIAL AND INVESTOR-STATE ARBITRATION § 2.8 Reporter's Note b(iii) (AM. L. INST., Proposed Final Draft, 2019) (quoting the AAA Task Force on the International Rules).

The scholarly debate over implied delegation and the AAA Rules is showcased in the following dialogue between two professors with active roles in the Restatement's creation: *Gateway-Schmateway: An Exchange Between George Bermann and Alan Rau*, 43 PEPP. L. REV. 469 (2016).

Restatement, that "[a]lthough 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.").

Unsurprisingly, the shaky consensus among circuits does not appear to have fostered certainty about implied delegation among practitioners who write arbitration clauses or the many U.S. businesses that use them. *See*, *e.g.*, Imre Stephen Szalai, *The Prevalence of Consumer Arbitration Agreements by America's Top Companies*, 52 U.C. DAVIS L. REV. ONLINE 233, 234 (2019) (noting that 81 Fortune 100 companies utilize arbitration agreements and, "[i]n 2018, at least 826,537,000 consumer arbitration agreements were in force"). Arbitration agreements often incorporate entire sets of arbitral rules. *See* Christopher R. Drahozal & Peter B. Rutledge, *Contract and Procedure*, 94 MARQ. L. REV. 1103, 1126-27 (2011). Yet, despite the consensus among circuits that incorporation of arbitral rules constitutes an implied delegation of arbitrability, many arbitration agreements that incorporate such rules nonetheless include separate, express provisions addressing delegation of arbitrability. *See*, *e.g.*, *Netflix Terms of Use*, NETFLIX HELP CENTER, https://help.netflix.com/legal/termsofuse (incorporating AAA Rules yet also explicitly stating

that "issues relating to the scope and the enforceability" of the agreement go to the arbitrator); *Facebook Commercial Terms*, FACEBOOK, https://www.facebook.com/legal/commercial_terms/update (incorporating AAA Rules but stating that "issues are for an arbitrator to decide, except that only a court may decide issues relating to the scope or enforceability of this arbitration provision"). At least one of those agreements specifies that the AAA Rules are the source of the delegation rather than relying on the implied-delegation consensus to do that work. *See Microsoft User Agreement*, MICROSOFT, https://www.microsoft.com/en-us/servicesagreement ("Under AAA Rules, the arbitrator rules on his or her own jurisdiction, including the arbitrability of any claim."). Others specify that arbitrability is reserved to courts notwithstanding the agreement's incorporation of AAA Rules. *See*, *e.g.*, *Google Arbitration Agreement—Devices, Related Accessories, and Related Subscription Services*, GOOGLE STORE HELP, https://support.google.com/store/answer/9427031?hl=en (specifying that the AAA Rules will govern the arbitration but expressly noting that "only a court may decide issues relating to the scope and enforceability of these Arbitration Terms").

Indeed, law firms routinely advise clients to include express-delegation clauses rather than rely on the majority consensus. *See*, *e.g.*, Robert K. Cox, *When Your Contract Includes an Arbitration Clause: Who Decides the Arbitrability of the Dispute?*, WILLIAMS MULLEN (July 28, 2018), https://www.williamsmullen.

com/news/when-your-contract-includes-arbitration-clause-who-decides-arbitrability-dispute (discussing implied delegation through incorporation of AAA and JAMS Rules, advising that "[p]arties wishing to ensure resolution of 'gateway' questions of arbitrability by a specific decision-maker . . . should spell out their preference as clearly as possible").[8] This type of advice belies the notion that implied delegation through rule incorporation is reliable, settled law. This Court should answer the fairly included, implied-delegation question and lend much-needed guidance on the *First Options* test and the proper balance between courts and arbitrators in determining arbitrability.

[8] *See also* Carolyn M. Branthoover & Max A. Gelertner, *U.S. Supreme Court Rejects "Wholly Groundless" Test and Reminds Parties of the Power of the Arbitration Agreement*, K&L GATES (Jan. 9, 2019), https://www.klgates.com/US-Supreme-Court-Rejects-Wholly-Groundless-Test-and-Reminds-Parties-of-the-Power-of-the-Arbitration-Agreement-01-09-2019 ("The message to practitioners should be clear: Be specific in your contracting. . . . [T]he parties are well served to be explicit about their intent in their arbitration agreements. And if the opposite is the case, the parties should consider incorporating an 'anti-delegation' clause that specifically gives a court the authority to determine the scope and applicability of their arbitration agreement."); James P. Duffy IV et al., *The Third and Sixth Circuit clarify when arbitrators decide arbitrability*, REED SMITH (July 1, 2020), https://www.reedsmith.com/en/perspectives/2020/07/the-third-and-sixth-circuit-clarify-when-arbitrators-decide-arbitrability ("[R]ather than simply relying on arbitral rules . . . and case law that could theoretically change, [parties] should expressly state their intent in the arbitration clause, which avoids costly and uncertain satellite litigation.").

CONCLUSION

Prior to addressing the carve-out issue in the question presented, this Court should determine whether the agreement's adoption of the AAA Rules implicitly delegated the gateway issue of arbitrability to the arbitrator.

Respectfully submitted,

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