No. 19-963

In the Supreme Court of the United States

HENRY SCHEIN, INC., PETITIONER

v.

ARCHER AND WHITE SALES, INC.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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The question presented in this case is whether a provision in an arbitration agreement that exempts certain claims from arbitration negates an otherwise clear and unmistakable delegation of questions of arbitrability to an arbitrator. The answer to that question follows ineluctably from this Court's case law. Once a court finds clear and unmistakable evidence of a delegation, there is an antecedent agreement enforceable under the Federal Arbitration Act. The Arbitration Act's presumption in favor of arbitrability then operates on the antecedent agreement, just as it does on any other arbitration agreement. And under that presumption, a carve-out provision that is silent with respect to whether it acts on the delegation is not sufficiently clear to show that the parties intended the odd result of dividing responsibility for deciding arbitrability between a court and an arbitrator.

Respondent barely disputes that the presumption of arbitrability should apply to an antecedent agreement to arbitrate arbitrability. And application of that presumption makes this an easy case: the carve-out in the arbitration agreements at issue here is not sufficiently clear to overcome the presumption. Respondent tries to direct the Court's attention away from the presumption and toward the language of the particular arbitration agreements at issue. But because respondent makes no serious effort to explain why the presumption should not apply, its arguments on that score are largely irrelevant.

Tellingly, respondent gives the question presented short shrift, devoting most of its brief to an entirely different question: namely, whether the incorporation in an arbitration agreement of arbitration rules that permit the arbitrator to resolve questions of arbitrability constitutes a clear and unmistakable delegation of those questions to the arbitrator. But this Court denied respondent's cross-petition for certiorari presenting that question, and it declined to add that question as a question presented here. And for good reason: the court of appeals' holding that the incorporation of arbitration rules by reference was sufficient was consistent with the holdings of the ten other courts of appeals to have considered the question. That holding does not warrant the Court's review and is plainly correct to boot.

It is unsurprising that respondent refuses to join battle on the actual question presented. The court of appeals' holding on that question was indefensible, and it contravened this Court's case law requiring courts to treat delegation agreements just like other agreements under the Arbitration Act. The judgment below should be vacated.

A. The Exemption Of Certain Claims From The Scope Of An Arbitration Agreement Does Not Negate A Delegation Of Questions Of Arbitrability To An Arbitrator

On the actual question presented, respondent has precious little to say, relegating its treatment of that question to the back of its brief. When respondent finally gets around to the question presented, its responses are tepid and unconvincing.

1. Petitioner's position on the question presented is compelled by this Court's precedents. As the Court recognized in its previous decision in this case, an agreement to arbitrate questions of arbitrability is "simply an additional, antecedent agreement" on which the Arbitration Act operates "just as it does on any other" arbitration agreement. *Henry Schein, Inc.* v. *Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019). The regular body of federal rules that govern arbitration agreements subject to the Arbitration Act thus also govern an agreement to arbitrate arbitrability. See Pet. Br. 24-31.

In particular, the Court has made clear that Section 2 of the Arbitration Act operates on an agreement to arbitrate arbitrability just as it does on an agreement to arbitrate any other dispute. See *Rent-A-Center, West, Inc.* v. *Jackson*, 561 U.S. 63, 68-70 (2010). That section requires courts to "place[] arbitration agreements on an equal footing with other contracts and * * * enforce them according to their terms." *Id.* at 67 (citation omitted). And it establishes the fundamental rule that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration," including where "the problem at hand is the construction of the contract language itself." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (citation omitted).

It therefore follows inexorably from the Court's precedents that, once a court finds clear and unmistakable evidence of an agreement to arbitrate arbitrability, the presumption of arbitrability operates on that agreement in the same way it does on any other arbitration agreement within the ambit of the Arbitration Act. Under that presumption, a carve-out provision cannot limit the scope of an agreement to arbitrate arbitrability absent a clear indication that the parties intended to divide responsibility for arbitrability between the arbitrator and the court. The contrary approach of the court of appeals effectively guts the delegation, because it nonsensically requires a court to decide the underlying question of arbitrability itself in order to determine who should decide arbitrability. The carve-out provision at issue here—which speaks only in terms of *claims* or *actions*, as opposed to *particular questions of arbitrability*—is not sufficiently clear to act on the delegation.

2. Respondent's contrary arguments lack merit.

a. Despite the Court's clear precedent, respondent suggests (Br. 28-29) that the presumption in favor of arbitrability should not apply to determine the scope of an antecedent agreement to arbitrate questions of arbitrability—*i.e.*, the question whether certain claims are carved out from the delegation. Instead, respondent contends that the Court should extend the "clear and unmistakable evidence" rule, which governs the question whether the parties *formed* such an agreement, to the scope question. But respondent offers no good reason—not even a half-decent one—for the Court to take that step.

The Court has made clear that, as an "exception" to the default presumption of arbitrability, the "clear and unmistakable evidence" rule applies in "narrow circumstance[s]" and has a "limited" reach. *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83, 85 (2002). That

alone counsels against its extension beyond the parties' initial "manifestation of intent" to arbitrate arbitrability. *Rent-A-Center*, 561 U.S. at 69 n.1 (emphasis omitted). But beyond that, applying the presumption of arbitrability to questions concerning the scope of a delegation provision aligns with the rationale behind the "clear and unmistakable evidence" rule and the likely intentions of the parties. Once there is clear and unmistakable evidence of a delegation of arbitrability, it is illogical to assume that the parties have not focused on the question of who decides arbitrability. See *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 945 (1995). Even respondent concedes that the justification for the "clear and unmistakable evidence" rule is "diminished" where parties have agreed to a delegation of arbitrability to an arbitrator. Br. 28 (citation omitted).

Respondent nevertheless contends that the "clear and unmistakable evidence" standard should apply to determine the scope of a delegation agreement because it reflects a default rule that courts, not arbitrators, will decide whether the parties agreed to arbitrate. Br. 28-29. Respondent argues that a delegation "is not an agreement like any other" because there is a "strong pro-court presumption" for questions of arbitrability. Br. 29 (citation omitted).

Respondent is doubly wrong. *First*, this Court has repeatedly made clear that an agreement to arbitrate arbitrability *is* like any other arbitration agreement: the Arbitration Act "operates" on those antecedent arbitration agreements "just as it does on any other." *New Prime, Inc.* v. *Oliveira*, 139 S. Ct. 532, 538 (2019) (internal quotation marks and citation omitted); see *Henry Schein*, 139 S. Ct. at 529; *Rent-A-Center*, 561 U.S. at 70. *Second*, although the default rule is that courts will decide questions of arbitrability, a thumb on the scale against arbitrability

is unnecessary—and incompatible with the objective intent of the parties—once a court determines that the parties have clearly and unmistakably agreed to deviate from that default rule.

b. Separately, respondent accuses petitioner of conflating carve-outs to the scope of arbitration with carve-outs to the scope of delegation. See Br. 26. According to respondent, "where, as here, the carveout *applies to the delegation*," the court must make the arbitrability decision. *Ibid.* But whether the carve-out applies to the delegation is the whole ballgame here—and it is properly understood to be a question of the scope of the agreement to arbitrate arbitrability. Under the presumption of arbitrability, the general carve-out in the provision at issue does not provide the requisite clarity to apply to the delegation.

c. Respondent also argues (Br. 26, 34) that the only reason for the bizarre results created by the court of appeals' approach is that the parties imposed the same carve-out as to both the arbitration and the delegation. That argument is entirely circular. In fact, the court of appeals' determination that the same carve-out exempted claims from both the arbitration and the delegation led to the predicament in which the court found itself—deciding the arbitrability question itself in order to determine who should decide that very question. Petitioner's approach avoids that ridiculous result.

Respondent suggests that that the circularity problem inherent in the court of appeals' decision is unlikely to come up in the "mine-run" of cases because this case involves an "*express* carve-out in the *same sentence* as the purported delegation." Br. 35. Yet almost every arbitration agreement excludes some disputes from its scope. Respondent concedes that "many arbitration clauses" contain a limitation to disputes "arising out of" the contract. *Ibid.* Such a limitation often appears in the same

sentence as the delegation—as is the case in the American Arbitration Association's model arbitration clause. See J.A. 119. In all of those cases, under the court of appeals' circular approach, a court would have to decide the scope of the arbitration agreement before determining whether the arbitrator should decide the question of arbitrability.

The court of appeals' approach contravenes this Court's admonition in *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), that a court should avoid becoming "entangled in" the merits of a dispute subject to arbitration "even through the back door of interpreting the arbitration clause." *Id.* at 584-585. Respondent correctly notes (Br. 35) that *Warrior & Gulf* did not involve an agreement to arbitrate arbitrability. But in this very case, the Court has stated that the principle that a court has "no business weighing the merits" of a dispute assigned to an arbitrator "applies with equal force to the threshold issue of arbitrability." *Henry Schein*, 139 S. Ct. at 529-530.

Respondent's reliance on *AT&T Technologies, Inc.* v. *Communications Workers*, 475 U.S. 643 (1986), fares no better. See Br. 36. There, the Court reaffirmed the principle that a court should not "rule on the potential merits of the underlying claims" subject to arbitration. 475 U.S. at 649. Where the parties have validly delegated arbitrability to the arbitrator, it follows from this Court's precedents that a court should avoid ruling on the merits of a dispute about arbitrability and should instead resolve all doubts in favor of arbitration. See *id.* at 650.

d. Respondent argues that petitioner's approach would lead to illogical results because, if respondent had pursued preliminary injunctive relief in court under the carve-out provision, petitioner's approach would allow it to "force [a] detour to arbitration" by "demanding that the scope of the carve-out be put to the arbitrator." Br. 37.

As a preliminary matter, respondent is simply incorrect that petitioner could "put a stop" to a request for emergency injunctive relief by invoking the delegation clause. *Ibid.* The majority rule is that, in a dispute subject to arbitration, a district court has jurisdiction to grant preliminary injunctive relief to preserve the status quo pending the arbitration. See *Performance Unlimited, Inc.* v. *Questar Publishers, Inc.*, 52 F.3d 1373, 1380 (6th Cir. 1995) (collecting cases).

In any event, respondent's argument proves far too much, because it could be applied to *any* agreement to arbitrate arbitrability: the party resisting arbitration could be required to arbitrate a dispute about the scope of the arbitration provision even where that party will ultimately prevail in that dispute. Where parties have agreed to arbitrate arbitrability—ostensibly to avoid protracted litigation in court over threshold issues—there is nothing illogical about giving effect to the parties' intent to have an arbitrator resolve threshold arbitrability questions.

Still, respondent disputes (Br. 37) that parties will only rarely intend to divide responsibility for deciding questions of arbitrability between the court and the arbitrator. In respondent's view, parties may wish to do so in order to avoid "bifurcation" costs. See *ibid.* According to respondent, where a party initiates an action in one forum, it may be "more efficient for the parties to complete adjudication of their entire dispute in that same forum." Br. 38.

It strains credulity to think that parties who agree to have an arbitrator decide threshold questions of arbitrability would think that it could be more "efficient" to litigate the entire dispute in court. As this case illustrates, under respondent's view, a party could effectively unwind the agreement to arbitrate arbitrability simply by tacking

a single claim onto a complaint. The presumption of arbitrability properly assumes that parties do not intend such an unusual result unless their agreement clearly provides for it.

Instead of embracing that straightforward conclusion, respondent illustrates how parties *could* explicitly agree to divide responsibility between the court and the arbitrator with respect to the very same claims that are carved out from arbitration: parties could agree to two separate carve-outs, one referencing the arbitration and one referencing the delegation. See Br. 26-27. But that is not what the agreements here say. And that is hardly surprising; it is absurd to think that parties would intend such a self-defeating delegation. Indeed, respondent has not pointed to *any* agreement that explicitly exempts certain claims from a delegation of arbitrability, much less one that exempts the very same claims that are exempted from arbitration.

In short, respondent fails to provide any plausible explanation for why parties would agree to an arbitrability provision that leads to the incoherent outcome in this case—one in which a court decided the very question of arbitrability that the parties had delegated to the arbitrator. Applying the presumption of arbitrability to a delegation provision thus effectuates the parties' likely intent. And "without the help of a special arbitration-disfavoring presumption," *Howsam*, 537 U.S. at 86, a carve-out provision that is silent with respect to whether it acts on the delegation cannot be read to limit the delegation's scope.

e. With little to say about the presumption of arbitrability, respondent prefers to focus on the language of the contract. Respondent spends pages of its brief attempting to show that its interpretation of the arbitration agreement should prevail if no presumption applies. See Br. 29-34. But because respondent has made no serious effort to

demonstrate that the presumption would not apply, its arguments are beside the point. Respondent fails to show that the carve-out clearly applies to the delegation. And much of respondent's purported "interpretive" argument is simply a repackaging of respondent's now-primary argument that the incorporation of the AAA rules does not constitute a clear and unmistakable delegation. See pp. 12-21, *infra*.

To the extent respondent contends that its interpretation is the better one, that contention lacks merit. Because "dispute" is modified by the parenthetical "except for actions seeking injunctive relief," respondent asserts, an action seeking injunctive relief is not a "dispute" to which the incorporation of the AAA rules applies. Br. 30-31. But the same could be said about the phrase "arising under or related to this Agreement," which also modifies "dispute." According to respondent, a court would have to determine whether the dispute arose under the agreement *before* applying the delegation clause. That means that the incorporation of the AAA rules could *never* operate as a delegation of the question of scope—"except" clause or no "except" clause.

Respondent argues that petitioner's reading is "inconsistent with basic contract-interpretation principles." Br. 32-34. But it is respondent that fails to consider the entire context of the agreement and contravenes a fundamental principle of contract interpretation: courts should avoid construing a contract in a way that would lead to absurd results. See 11 Richard A. Lord, *Williston on Contracts* § 32:11, at 760-764 (4th ed. 2012) (Williston). Preferring to ignore that basic tenet, respondent invokes rules such as the one providing that, "[w]hen general and specific clauses conflict, the specific clause governs the meaning of the contract." Br. 33 (citation omitted). But even if it were clear that there is a "general" and a "specific" clause

here, there is no conflict between a delegation of questions of arbitrability and a carve-out of certain claims from arbitration, so that rule simply does not apply.[*]

In the end, respondent is left to argue feebly that, even applying the presumption of arbitrability, the carve-out acts on the delegation. See Br. 38-39. One cannot fault respondent for trying. But there is no escaping the conclusion that the carve-out provision is silent as to who decides arbitrability. Respondent suggests that the parties clearly reserved the arbitrability question for the court because they "expressly carved out 'actions seeking injunctive relief.'" Br. 39. But nothing in the language of the carve-out *expressly applies to the delegation*. And in the face of silence as to the scope of the delegation, a court should presume that the parties agreed to arbitrate all questions of arbitrability.

3. Finally as to the question presented, respondent argues that the carve-out should be interpreted to permit judicial resolution of the question of scope because the agreement makes its delegation by incorporating the AAA rules instead of by including a separate clause that states "[t]he arbitrator shall decide arbitrability." Br. 16. Respondent goes so far as to concede that petitioner's proposed approach—in which the presumption of arbitrability applies to determine the scope of a delegation—has "some force" in the context of an express delegation. Br. 29. But respondent contends it "carries little weight" in the context of an implied delegation. *Ibid.* Respondent provides no explanation for why the Arbitration Act—and

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[*] Respondent argues that the contract at issue should be construed against the drafter. Br. 34-35. But even if that were to make a difference (and it does not), this Court has indicated that such a rule impermissibly interferes with the Arbitration Act's presumption of arbitrability. See *Lamps Plus, Inc.* v. *Varela*, 139 S. Ct. 1407, 1417-1419 (2019).

its accompanying presumption of arbitrability—would apply differently to different types of delegations. Once again, respondent's argument is just a repackaged version of its lead argument: that the Court should reach beyond the question presented and hold that the incorporation of the AAA rules does not constitute a clear and unmistakable delegation. We now explain why the Court need not and should not do so—and why respondent is in any event incorrect.

B. This Court Should Not Reach The Incorporation Question, Which The Court Of Appeals Correctly Resolved

In what is surely a reflection of the weakness of respondent's arguments on the question presented, respondent devotes most of its merits brief to relitigating a battle that it lost at the certiorari stage: namely, whether the Court should resolve the question whether the incorporation of the AAA rules in the arbitration agreements constitutes a clear and unmistakable delegation of questions of arbitrability to the arbitrator. But after extensive briefing, the Court denied respondent's cross-petition for certiorari presenting that question, and it declined to add that question as a question presented here. Respondent offers no new arguments as to why the Court should consider it now. The court of appeals below—in line with every other court of appeals to have decided the question—correctly held that the incorporation of the AAA rules sufficed to delegate questions of arbitrability to the arbitrator. The Court was correct to decline respondent's invitation the first time around, and it should do so again now.

1. With apologies for rehashing arguments that have already been fully briefed, there is no reason for the Court to consider the incorporation question in this case.

a. The question whether to grant review on the incorporation question was squarely before the Court at the certiorari stage. In its brief in opposition, respondent argued at length that this case presented a poor vehicle for review because the question presented assumed that the incorporation of the AAA rules constituted a clear and unmistakable delegation of questions of arbitrability to the arbitrator. See Br. in Opp. 18-21. Lest the Court overlook the incorporation question, respondent also filed a cross-petition for certiorari asking the Court to resolve it, either by granting the cross-petition or in reviewing the underlying petition. See 19-1080 Pet. at i; 19-1080 Br. in Opp. 6-7; 19-1080 Cert. Reply Br. 10.

In the end, the Court chose to grant the underlying petition and deny the cross-petition without asking the parties to brief the incorporation question at the merits stage. And for a number of reasons of which the Court is already aware, that was the right call. See 19-1080 Br. in Opp. 6-10.

To begin with, respondent has expressly acknowledged that "[t]his Court need not reach" the incorporation question in order to resolve the carve-out question. 19A766 Opp. 22 n.8. The carve-out question proceeds on the assumption that the agreements at issue contain valid delegations of arbitrability, see Pet. Br. 15—just like the petition the Court previously granted in this case regarding the "wholly groundless" exception to the enforcement of delegation provisions. See *Henry Schein*, 139 S. Ct. at 528. Then as now, respondent argued that the case was an "unsuitable vehicle" because of the presence of the incorporation question. 17-1272 Br. in Opp. 20-22. The Court evidently did not agree.

More broadly, there is no confusion among the lower courts that warrants this Court's guidance. Eleven courts of appeals have addressed the issue, and all of them have

held that the incorporation of arbitration rules that permit the arbitrator to resolve questions of arbitrability is sufficient to delegate those questions to the arbitrator. See *Awuah* v. *Coverall North America, Inc.*, 554 F.3d 7, 11 (1st Cir. 2009); *Contec Corp.* v. *Remote Solution Co.*, 398 F.3d 205, 208, 211 (2d Cir. 2005); *Simply Wireless, Inc.* v. *T-Mobile US, Inc.*, 877 F.3d 522, 527-528 (4th Cir. 2017), cert. denied, 139 S. Ct. 915 (2019); *Petrofac, Inc.* v. *DynMcDermott Petroleum Operations Co.*, 687 F.3d 671, 675 (5th Cir. 2012); *Blanton* v. *Domino's Pizza Franchising LLC*, 962 F.3d 842, 845-846 (6th Cir. 2020); *Fallo* v. *High-Tech Institute*, 559 F.3d 874, 878 (8th Cir. 2009); *Brennan* v. *Opus Bank*, 796 F.3d 1125, 1130 (9th Cir. 2015); *Belnap* v. *Iasis Healthcare*, 844 F.3d 1272, 1283-1284 (10th Cir. 2017); *Terminix International Co.* v. *Palmer Ranch LP*, 432 F.3d 1327, 1332 (11th Cir. 2005); *Chevron Corp.* v. *Republic of Ecuador*, 795 F.3d 200, 207-208 (D.C. Cir. 2015), cert. denied, 136 S. Ct. 2410 (2016); *Qualcomm Inc.* v. *Nokia Corp.*, 466 F.3d 1366, 1373 (Fed. Cir. 2006); cf. *Chesapeake Appalachia, LLC* v. *Scout Petroleum, LLC*, 809 F.3d 746, 761-765 (3d Cir.) (recognizing the general rule but concluding that it did not apply to an alleged delegation of class arbitrability), cert. denied, 137 S. Ct. 40 (2016); *Commonwealth Edison Co.* v. *Gulf Oil Corp.*, 541 F.2d 1263, 1272-1273 (7th Cir. 1976) (holding that the selection of AAA rules in an arbitration agreement incorporated those rules into the agreement).

In addition, numerous state courts of last resort have adopted the same rule. See *HPD, LLC* v. *TETRA Technologies, Inc.*, 424 S.W.3d 304, 310-311 (Ark. 2012); *Eickhoff Corp.* v. *Warrior Met Coal, LLC*, 265 So. 3d 216, 222 (Ala. 2018); *James & Jackson, LLC* v. *Willie Gary, LLC*, 906 A.2d 76, 80 (Del. 2006); *Ally Align Health, Inc.* v. *Signature Advantage, LLC*, 574 S.W.3d 753, 756 (Ky. 2019); *State ex rel. Pinkerton* v. *Fahnestock*, 531 S.W.3d 36, 43-

45 (Mo. 2017); *West Virginia CVS Pharmacy, LLC* v. *McDowell Pharmacy, Inc.*, 796 S.E.2d 574, 588 (W. Va. 2017); *Garthon Business Inc.* v. *Stein*, 86 N.E.3d 514, 514 (N.Y. 2017); *Kramlich* v. *Hale*, 901 N.W.2d 72, 78 (N.D. 2017). Not surprisingly, given that formidable phalanx of authority, this Court has had numerous opportunities to consider the incorporation question, and it has denied certiorari every time. See *Simply Wireless, Inc.* v. *T-Mobile US, Inc*, 139 S. Ct. 915 (2019); *Limited Liability Co.* v. *Doe*, 569 U.S. 1029 (2013); *Dunn* v. *Nitro Distributing, Inc.*, 549 U.S. 1077 (2006); cf. *Spirit Airlines, Inc.* v. *Maizes*, 139 S. Ct. 1322 (2019) (denying review on a similar question concerning class arbitrability).

b. Respondent's second attempt to convince the Court to reach the incorporation question is no more persuasive than its first one.

Respondent and its amici devote significant effort to showing that the Court has the ability to address the incorporation question here. See, *e.g.*, Resp. Br. 11-13; Law Professors Br. 6-20. But petitioner's argument is not that the Court lacks the *power* to address the incorporation question; instead, it is simply that the Court need not, and should not, address that question here.

Respondent argues that it "makes little sense" to decide what the arbitration provision at issue means without first deciding the incorporation question. Br. 11. But respondent made that pitch at the certiorari stage, see Br. in Opp. 18-21, and this Court apparently disagreed. And for good reason. The question presented concerns the effect of a carve-out provision on a clear and unmistakable delegation of arbitrability; it therefore presumes the existence of a delegation. The best evidence that the two questions are not unavoidably intertwined is the court of appeals' opinion in this case. The court of appeals first concluded that, by incorporating the AAA rules, the

agreements contained "clear and unmistakable evidence" the parties had "delegat[ed] the threshold arbitrability inquiry to the arbitrator for at least some category of cases." Pet. App. 7a, 8a. Proceeding from that premise, the court went on to determine the effect of the carve-out provision on that delegation. See *id.* at 11a. It is eminently sensible for this Court to review the court of appeals' decision on its own terms, and simply to vacate the court of appeals' patently erroneous holding on the question presented.

2. Despite all of that, should the Court choose to reach the incorporation question, it should reject respondent's arguments. The overwhelming consensus on the incorporation question is correct. Respondent offers no valid reason to upend the settled law in nearly every circuit.

The incorporation question arises when an arbitration agreement expressly provides that a set of arbitration rules will govern arbitrations subject to the agreement. The answer to that question—whether such an incorporation constitutes a valid delegation of questions of arbitrability—turns on a straightforward application of fundamental contract principles. And under those principles, the correct answer is yes.

a. "[A]rbitration is simply a matter of contract," *First Options*, 514 U.S. at 943, and it is black-letter law that a document incorporated by reference into a contract forms a "single instrument" with the contract. Williston § 30:25, at 304, 306. Accordingly, when parties incorporate arbitration rules into a contract, they become a part of the contract as though they are fully set out therein. See *Blanton*, 962 F.3d at 845.

As respondent's amici acknowledge, arbitration agreements almost always incorporate rules such as those of the AAA. See Bermann Br. 2; Law Professors Br. 26.

That makes good sense. Incorporating widely available arbitration rules enhances the clarity of an agreement and increases efficiency by reducing the need to negotiate the rules of engagement.

In the face of the great weight of authority, respondents contends it is implausible that "anyone thinking about delegation" would address it through incorporation. Br. 16 n.5, 17-18. According to respondent, there is "little reason for parties even to pay attention" to the arbitration rules, and "no reason to think the parties would thumb through all the rules" and "isolate" Rule 7(a), the delegation provision. Br. 17. Relying on the notion that it is "doubtful that many people read the small print in form contracts," respondent argues that a delegation contained in a body of rules is too indirect to reflect clear and unmistakable evidence of a party's intent. Br. 17-18 (citation omitted).

That argument faces a fundamental problem: it flies in the face of the objective theory of contract formation. Under that theory, the existence of a contract is determined by the external acts of a party to a purported agreement, rather than by the subjective intent of the parties. See Williston § 31:4, at 392. It is thus entirely unsurprising that the vast majority of courts have viewed the incorporation of arbitration rules as an objective indicium of the parties' intent to make those rules—all of them—part of the contract. Indeed, this Court has resolved a number of arbitration cases that turned in part on the incorporation of arbitration rules into an arbitration agreement, and it has never once expressed doubt that those rules are fully binding on the parties. See, *e.g.*, *Preston* v. *Ferrer*, 552 U.S. 346, 361-363 (2008); *C&L Enterprises, Inc.* v. *Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418-419 (2001); *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 60-61 (1995).

Preston is particularly instructive. There, the Court considered whether, when parties agree to arbitrate questions arising under a contract, the Arbitration Act supersedes state laws lodging primary jurisdiction in another forum. See 552 U.S. at 349-350. The respondent in *Preston* argued that the contract's choice-of-law clause called for the application of California law granting exclusive jurisdiction to an administrative forum. See *id.* at 360-361. But the Court rejected that argument, relying on the contract's incorporation of AAA rules and specifically Rule 7(b), which provides that "[t]he arbitrator shall have the power to determine the existence or validity" of an arbitration agreement. *Id.* at 361-363 (citation omitted).

As the Court explained, "[t]he incorporation of the AAA rules, and in particular Rule 7(b), weigh[ed] against inferring from the choice-of-law clause an understanding" of the parties that "their disputes would be heard, in the first instance," in the administrative forum. 552 U.S. at 362-363. The Court thus concluded that the "best way to harmonize" the parties' incorporation of the AAA rules and the choice-of-law clause was to "read the latter to encompass" prescriptions governing substantive rights, but not the State's procedural rules limiting the authority of arbitrators. *Id.* at 363. Far from writing off Rule 7(b) as an "oblique" provision "tucked away in a copious set of rules," Resp. Br. 18-19, the Court gave the contract's incorporation of the AAA rules dispositive weight in determining the parties' intentions; indeed, the Court read Rule 7(b) to narrow the construction of another clause in the contract. The incorporation here is entitled to no less weight.

The decision in *Preston* likewise disposes of respondent's argument that parties incorporate the AAA rules merely to "provide the ground rules for any arbitration" and not to delegate questions of arbitrability. Br. 17. In

respondent's view, "when a clause has an obvious, independent reason for its existence," a reference to that clause cannot provide clear and unmistakable evidence that the parties "actually contemplated" anything about delegation at all. Br. 17-18. Again, however, it does not matter what the parties subjectively contemplated; what matters is the *objective manifestation* of their intent. See p. 17, *supra*. And in *Preston*, the Court recognized that the incorporation of the AAA rules indicated an intent to comply with Rule 7(b), regardless of whether it is fairly characterized as establishing a "ground rule" for the arbitration. So too here.

b. Respondent contends that, if parties want to delegate the question of arbitrability to an arbitrator, they can do so by including language stating that "[t]he arbitrator shall decide arbitrability." Br. 16. But the objective approach to contract interpretation has never required such express language as proof of parties' intent. For example, in *First Options*, the Court considered the parties' conduct to determine whether they had agreed to arbitrate arbitrability; it did not purport to look for a magic-words clause like respondent suggests. See 514 U.S. at 944, 946-947. If such a clause is the only way to express a clear and unmistakable intent to delegate arbitrability, the Court could have said so when it announced the "clear and unmistakable" rule in *First Options*. There is simply no basis for such a requirement in this Court's case law, and the Court should not adopt one now—particularly for sophisticated parties like the ones before the Court here. Cf. Resp. Br. 18 (arguing that the incorporation of arbitration rules cannot amount to clear and unmistakable evidence of "an unsophisticated party's intent").

Respondent suggests that, without an express-language requirement, state law would effectively override federal law (*i.e.*, the "clear and unmistakable evidence"

rule). See Br. 23-24. But the "clear and unmistakable evidence" rule is simply an "interpretive rule" that assumes that parties expect a court to decide arbitrability unless they agree otherwise. *Rent-A-Center*, 561 U.S. at 69 n.1 (citation omitted). It does not alter the type of evidence a court should use to determine whether an agreement has been formed. The better view is that the "clear and unmistakable evidence" rule must be understood against the backdrop of settled principles of contract law.

Respondent further asserts that, at minimum, a valid delegation here requires a direct reference to Rule 7(a). See Br. 23. But that is not how incorporation works—parties can incorporate another document wholesale without identifying the specific parts of the document they are incorporating. Indeed, the whole point of incorporation is that they do not have to do so. (It is worth noting that AAA rules are only an internet search away, as this Court itself has demonstrated, see *Preston*, 552 U.S. at 362.) Respondent's concocted requirement runs counter to core incorporation principles, which provide that a document incorporated by reference into a contract forms a "single instrument" with that contract. Williston § 30:25, at 304.

3. Respondent's final strategy is to claim that the language of Rule 7(a) does not actually mean what it says. Respondent contends that Rule 7(a) does not confer exclusive authority on the arbitrator to decide arbitrability. See Br. 19-20. But there is evidence that the AAA adopted Rule 7(a) in the wake of *First Options* precisely in order to satisfy the "clear and unmistakable evidence" rule. See, *e.g.*, *AAA Revises Commercial Arbitration Rules*, 53 Disp. Resol. J. 4, 95-96 (1998). What is more, respondent's understanding of Rule 7(a) would strip it of any meaningful effect, as a party would always be able to force an arbitrability question into court. The arbitrator would have jurisdiction over the arbitrability question only if both

parties consented—surely an unlikely occurrence, given that a dispute about arbitrability by definition involves one party arguing that the dispute is not subject to arbitration. Respondent's interpretation would thus render Rule 7(a) effectively superfluous, violating a "cardinal principle of contract construction." *Mastrobuono*, 514 U.S. at 63.

Consistent with this Court's law and the law of every court of appeals to have addressed the issue, the incorporation of the AAA rules constitutes a clear and unmistakable delegation of arbitrability. Parties—especially sophisticated parties like the ones here—are assumed to have understood the contract and any incorporated documents. See pp. 17-19, *supra*. As respondent recognizes, numerous contracts incorporate the arbitration rules of organizations such as the AAA, see Br. 13, and the parties to those contracts have every reason to believe that such incorporation validly delegates arbitrability. Respondent's rule would upset that settled understanding and have sweeping implications for the many contracts that have been formed in reliance on it.

Regardless of whether the Court reaches the delegation question, therefore, the Court should apply the presumption of arbitrability to the delegation in this case and hold that the carve-out provision is not sufficiently clear to exempt claims from that delegation. The court of appeals' contrary holding is simply indefensible, and the Court should reject it.

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The judgment of the court of appeals should be vacated and the case remanded for further proceedings.

Respectfully submitted.

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