No. 20-____

IN THE

Supreme Court of the United States

DEREK PIERSING, on Behalf of Himself and All Others Similarly Situated,
Petitioner,

v.

DOMINO'S PIZZA FRANCHISING LLC; DOMINO'S PIZZA MASTER ISSUER LLC; DOMINO'S PIZZA LLC; and DOMINO'S PIZZA, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

There must be "clear and unmistakable evidence" of parties' intent to have arbitrability decided by an arbitrator for a court to find that they agreed to upend the usual rule that courts decide arbitrability questions. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (cleaned up). Silence or ambiguity is insufficient. *Id.* at 945.

The question presented is: In the context of a form employment agreement, is providing that a particular set of rules will govern arbitration proceedings, without more, "clear and unmistakable evidence" of the parties' intent to have the arbitrator decide questions of arbitrability?

RELATED CASES

- *Blanton v. Domino's Pizza Franchising LLC*, No. 18-13207, U.S. District Court for the Eastern District of Michigan. Judgment entered Oct, 25, 2019.
- *Blanton v. Domino's Pizza Franchising LLC*, No. 19-2388, U.S. Court of Appeals for the Sixth Circuit. Judgment entered June 17, 2020.

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The opinion of the U.S. Court of Appeals for the Sixth Circuit (App. 1-23) is reported at 962 F.3d 842. The opinion of the U.S. District Court for the Eastern District of Michigan granting Respondents' motion to compel arbitration (App. 24-39) is unreported, but is available at 2019 WL 5543027.

JURISDICTION

The judgment of the court of appeals was entered on June 17, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

INTRODUCTION

The Sixth Circuit below followed other federal appellate courts in mistaking the designation of a set of rules to govern *how* arbitration will proceed for an agreement to allow an arbitrator to determine *whether* a dispute will be arbitrated in the first place. This misinterpretation of arbitral rules by federal courts of appeals conflicts with this Court's arbitration jurisprudence, conflicts with the conclusions reached by several state high courts, and is not supported by the language of the rules themselves. The error has permeated the federal courts, sending countless disputes about arbitrability into arbitration contrary to the expectations of the employee and consumer parties to those arbitration agreements. Only this Court can set this badly errant branch of delegation caselaw back on course.

First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995), and, after it, *Rent-a-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010), and *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019) (*Henry Schein I*), gave clear instructions to parties

who wished to change the usual rule that courts determine questions of arbitrability and instead delegate those questions to an arbitrator: Be explicit. Those instructions are not difficult to follow. Many form contracts, including the one at issue in *Rent-a-Center* and one of the contracts at issue in the district court in this case, unquestionably delegate arbitrability questions to the arbitrator by saying so expressly.

Nevertheless, the federal courts of appeals have unanimously relied on unsupported, cursory decisions based on pre-*First Options* jurisprudence to hold that by merely providing that a certain set of arbitral rules would govern arbitration proceedings, rules which supposedly include a delegation clause, an agreement to arbitrate contains a delegation clause. Only the Sixth Circuit in this case—the twelfth circuit court of appeals to address the question—has made any substantial attempt to justify what is now the prevailing rule.

This prevailing rule runs headlong into *First Options* and its progeny. *First Options* explained that, for a court to find that a contract delegates questions of arbitrability to the arbitrator, there must be "clear and unmistakable evidence" of the intent of the parties to so delegate. A specific jurisdictional rule buried in a referenced set of procedural rules does not meet that heightened standard of contract interpretation. Not only is it too oblique of a reference, but it is contrary to the most commonsense reading of arbitration agreements structured this way. The most commonsense, logical reading is that the referenced set of rules of arbitration procedures will govern just that: the procedures under which arbitration would

be conducted if arbitration is appropriate. For the class of contracts at issue here, there is nothing in the text of the contract that might hint the selected arbitral rules might also govern *whether* the dispute goes to arbitration in the first place. On top of those problems, the particular rule at issue—which gives arbitrators the authority to decide arbitrability questions—does not make clear that it is stripping courts of their authority to do the same. At best, it is ambiguous on that point, and ambiguities are decided in favor of the court deciding arbitrability. In short, it's anything but "clear and unmistakable."

In addition to being largely unreasoned and wrong, the prevailing circuit-court rule stands in conflict with several state high courts who have held that merely referencing a set of arbitral rules is insufficient to meet the *First Options* standard—if parties want to delegate, they must actually say so.

This question is not an obscure one. Employee and consumer arbitration agreements typically designate the set of arbitral rules that will govern any arbitration proceedings—most frequently the American Arbitration Association ("AAA") rules, the rules at issue here—even if they do not contain an express delegation clause. Deciding that *all* of those contracts contain clear and unmistakable delegation clauses—regardless of whether the parties actually intended to include a delegation clause, or whether they merely intended to provide a set of procedural rules for arbitration—undercuts the contractual nature of arbitration and the heightened standard for delegation imposed by *First Options*.

In short, this Court's intervention is badly needed to correct the unreasoned rule in the circuit courts,

align the circuit-court rule with this Court's jurisprudence, and resolve a federal-state court conflict on an issue with enormous practical implications for employees and consumers across the country.

STATEMENT OF THE CASE

A. Background.

This case revolves around the "rather arcane" question of who decides whether a dispute must be arbitrated, the court or the arbitrator. *First Options*, 514 U.S. at 945. The question falls under the umbrella of the Federal Arbitration Act ("FAA"), which codifies the basic principle that "arbitration is a matter of contract" and that contracts involving arbitration must be enforced "according to their terms." *Rent-a-Center*, 561 U.S. at 67.

This Court has recognized that "parties may agree to have an arbitrator decide not only the merits of a particular dispute but also "'gateway" questions of "arbitrability," such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy.'" *Henry Schein I*, 139 S. Ct. at 529 (quoting *Rent-a-Center*, 561 U.S. at 68-69). An agreement to arbitrate questions of arbitrability is "an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does any other." *Rent-a-Center*, 561 U.S. at 70. Agreements to have an arbitrator determine arbitrability questions are often referred to as delegation clauses.

In *First Options*, the Court addressed how courts must approach the analysis of determining whether

parties had agreed to delegate questions of arbitrability to the arbitrator. Because the default rule is that a court decides questions of arbitrability and the question of who decides is "rather arcane," the Court explained that—unlike the question of what substantive disputes would be subject to arbitration—a "party often might not focus upon that question or upon the significance of having arbitrators decide the scope of their own powers." *First Options*, 514 U.S. at 945.

For those reasons, courts must apply a different standard for determining whether parties agreed to delegate arbitrability than they apply when determining whether parties agreed to arbitrate a particular dispute. Specifically, *First Options* holds, "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so." *Id.* at 944 (internal quotation marks and alterations omitted). This "heightened standard," *Rent-a-Center*, 561 U.S. at 69 n.1, "reverses" the usual presumption in favor of arbitration: When it comes to deciding who decides, silence or ambiguity in the contractual language means that a court decides arbitrability, *First Options*, 514 U.S. at 945. Any other rule "might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide." *Id.*

Though this Court has encountered delegation clauses several times in the twenty-five years since *First Options*, including in *Rent-a-Center*, *Henry Schein I*, and now in the pending *Henry Schein II* case, it has yet to squarely grant certiorari on the question presented here: Whether selecting a

particular set of rules, rules that supposedly provide for delegation, to govern any arbitration proceedings is clear and unmistakable evidence the parties agreed to delegate questions of arbitrability to the arbitrator. *See Henry Schein I*, 139 S. Ct. at 531 ("We express no view about whether the contract at issue in this case in fact delegated the arbitrability question to an arbitrator.").

In the absence of further guidance from this Court, every circuit court of appeals to have addressed the question has held that providing arbitration will be governed by a certain set of rules, where those rules supposedly contain a delegation clause, means that the parties have agreed to delegate arbitrability questions to the arbitrator.

Those circuit decisions, however, can be traced back to *Apollo Computer, Inc. v. Berg*, 886 F.2d 469 (1st Cir. 1989), a pre-*First Options* decision from the First Circuit that held, in conclusory fashion and in the context of a contract between sophisticated companies, that designation of a certain set of rules was good enough. Later-deciding circuits have uncritically followed *Apollo*, and other decisions citing to *Apollo*, without meaningfully engaging with the *First Options* "clear and unmistakable evidence" standard. Meanwhile, several state high courts have reached the opposite conclusion—that merely referencing a set of arbitral rules is insufficient to find the parties agreed to delegate arbitrability to the arbitrator.[1]

[1] Citations and in-depth discussion in Parts I.A and I.B, *infra*.

B. Derek Piersing's Claims.

Derek Piersing began working as a delivery driver for a Domino's Pizza franchise owned by Noble Food Group, Inc., in Washington state in 2014. Compl. ¶ 105 (Jun. 27, 2019). In mid-2018, when Noble sold the Domino's store where Piersing had originally worked, Piersing arranged to be transferred to a different store also owned by Noble. *Id.* ¶ 107. At the same time, Piersing also successfully applied for a job at another Domino's Pizza store owned by a different franchise, Carpe Diem Pizza, Inc. *Id.* ¶ 108. By working at both stores simultaneously, Piersing hoped to increase his hours and, therefore, earn more money. *Id.*

But when Piersing called the manager at the new Noble location to get his schedule, Piersing learned that Noble had fired him because he had applied for the Carpe Diem job. *Id.* ¶ 109. The Noble manager explained that Noble's franchise agreement with Domino's corporate contained a no-poach, no-hire clause, meaning that Piersing could only work for Carpe Diem if he no longer worked for Noble. *Id.*

Piersing did work for Carpe Diem as a delivery driver until late 2018, when an unrelated medical issue requiring immediate treatment forced him to resign. *Id.* ¶ 110.

In June 2019, along with another impacted Domino's franchise employee, Piersing brought this class-action suit against Domino's corporate entities—the Respondents here (collectively

"Domino's").[2] Among other things, Piersing alleges that Domino's standard no-poach and no-hire franchise agreements, which give Domino's the right to terminate the franchise of any franchisee who violates the provisions, is an unreasonable restraint on trade that is *per se* unlawful under the Clayton Act, Sherman Act, and state law. *Id.* ¶¶ 143-62. As Piersing's complaint explains, Domino's no-poach, no-hire provisions operate to suppress worker wages and working conditions, limit worker mobility, and deprive workers of job growth opportunities. *Id.* ¶¶ 144-49. Piersing seeks damages, and declaratory and injunctive relief. *Id.* "Prayer for Relief."

Domino's sought to compel arbitration of Piersing's claims based on the arbitration agreement between Piersing and Carpe Diem governing his employment there.

C. Carpe Diem's Arbitration Agreement.

Carpe Diem requires any employees working for it to enter into a stand-alone arbitration agreement, and Piersing did so.[3]

Part 1 of the agreement requires both parties to pursue any covered claim through arbitration, and not court litigation. App. 41. Part 2 provides that "claims covered by this Agreement include any and all claims, disputes, or controversies arising out of or relating to Employee's employment with [Carpe Diem] and/or the termination of Employee's

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[2] Defendants-Respondents are Domino's Pizza Franchising LLC, Domino's Pizza Master Issuer LLC, Domino's Pizza LLC, and Domino's Pizza, Inc.

[3] The arbitration agreement is included in its entirety in the appendix at App. 40-47.

employment," and goes on to list examples. *Id.* Part 2 also contains jury-trial and collective-action waivers. App. 42.

Part 3 lists the types of claims that are *not* covered by the agreement to arbitrate, including worker's compensation claims and "[a]ny claim by either party for injunctive or declaratory relief arising from . . . unfair compensation [or] unfair business practices." *Id.*

Part 4 provides, in relevant part, "The American Arbitration Association ("AAA") will administer the arbitration and the arbitration will be conducted in accordance with the then-current AAA National Rules for the Resolution of Employment Disputes ("AAA Rule")." App. 43.

The remainder of the agreement goes on to discuss other details, such as discovery, enforcement, fees, and definitions. *See* App. 43-46. The Carpe Diem agreement contains no language expressly stating that the arbitrator will decide disputes over whether a claim is subject to arbitration, or any other language that could be characterized as an express delegation clause.[4]

D. Proceedings Below.

Based on Piersing having agreed to Carpe Diem's arbitration agreement, Domino's moved to compel individual arbitration of his claims. App. 25. In its motion to compel, Domino's argued that, even though it was not a party to the Carpe Diem agreement, it could compel arbitration of Piersing's claims under a

[4] Domino's is not a party to or third-party beneficiary of the arbitration agreement between Carpe Diem and Piersing.

theory of equitable estoppel because Piersing had alleged a conspiracy between Domino's and its franchisees. App. 31. Moreover, Domino's argued, it could also compel arbitration of any questions about whether Piersing's claims were arbitrable because the agreement's reference to the AAA rules constituted a delegation clause in that the AAA rules supposedly provide for delegation. App. 36.

The district court agreed entirely with Domino's, first argument that equitable estoppel applies to permit Domino's to enforce the Carpe Diem agreement against Piersing. *See* App. 33-35. Second, the district court ruled that the clause providing the AAA rules would govern any arbitration amounted to "clear and unmistakable" evidence of Piersing's and Carpe Diem's intent to delegate questions of arbitrability to the arbitrator. App. 39. Though the court acknowledged that the reference to the AAA rules was not an "explicit" delegation clause and that the Sixth Circuit had not yet directly addressed the question, App. 36-37, it found that the agreement contained a delegation clause and compelled arbitration, including arbitration of any arbitrability questions—despite having already resolved arbitrability itself, App. 39.[5]

Piersing appealed, and the Sixth Circuit affirmed.

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[5] Piersing's co-plaintiff, Harley Blanton, had entered into a materially different arbitration agreement with the Domino's franchise he had worked for. App. 28. Blanton's agreement expressly provided that Domino's, as franchisor, could compel arbitration of Blanton's covered claims and Blanton's agreement also contained an explicit delegation clause. App. 29-30, 35. The district court easily compelled arbitration of Blanton's claims, and Blanton did not appeal that decision.

App. 1. The appellate court first addressed whether providing that the AAA rules would govern any arbitration means that questions of arbitrability are for the arbitrator to decide. *See* App. 5-9. The Sixth Circuit believed that this Court's decisions in *Henry Schein I*—in which this Court expressly disavowed deciding the question—and *Preston v. Ferrer*, 552 U.S. 346 (2008), combined to require that it find the parties agreed to delegate. App. 7. To support that conclusion, the Sixth Circuit pointed to its own precedent, albeit precedent not directly answering the question, Washington state-court decisions, and the unanimous decisions of its sister circuits. *See* App. 7-9.

The Sixth Circuit decision here is unique among the circuit-court decisions in that, while it primarily relied on the existing cursory caselaw, it did conduct *some* analysis of Piersing's arguments as to why providing that the AAA rules govern arbitration is not a delegation clause. *See* App. 11-18. In rejecting Piersing's argument that the structure of the agreement indicated that the AAA rules would not govern scope questions, the court below followed the existing caselaw and concluded that Piersing's reading would render the AAA rule superfluous. App. 12. The Sixth Circuit also dismissed Piersing's argument that the AAA rule did not itself give the arbitrator exclusive authority to decide arbitrability by analogizing to a family dinner-table scenario and predicting chaos if the rule were read as Piersing urged. App. 15-16. Finally, the Sixth Circuit reasoned that, given the prevalence of the circuit-court rule at the time Piersing entered into the agreement, the implications of designating the AAA rules should have been clear from judicial precedent. App. 20. But,

at the end of the day, like the other circuit courts, the court below failed to engage meaningfully with the substantive requirements put in place by *First Options*, instead relying primarily on the circuit-court cases that came before it.[6]

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari in order to correct the unanimous but deeply flawed conclusion of the circuit courts of appeal that merely providing that the AAA (or some other similar set of arbitral rules) will govern arbitration proceedings is "clear and unmistakable evidence" the parties intended to delegate arbitrability to the arbitrator. That conclusion is flawed because, first, the circuit-court decisions can largely be traced to a pre-*First Options* First Circuit holding that itself lacked any reasoning. In other words, though the circuit courts have reached a common conclusion, they have done so with precious little analysis—the prevailing rule stands on a foundation of sand.

Second, the decisions, perhaps because of their lack of analysis, contradict *First Options*' command that there be "clear and unmistakable evidence" of the parties' intent to upset the default presumption and delegate arbitrability to the arbitrator; providing for certain rules to govern arbitration is, at best, implied

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[6] The Sixth Circuit did not address the equitable estoppel question, as it viewed that as an arbitrability question for the arbitrator to answer. App. 23. As such, the question whether Domino's, as a non-party to the agreement, is entitled to compel arbitration of the merits of Piersing's claims under equitable estoppel is not before this Court. Piersing is not seeking certiorari on the question whether equitable estoppel is an arbitrability question.

delegation, not clear and unmistakable delegation. Precisely because nearly every circuit court has already reached a conclusion—the wrong one, and based on little to no rationale—this Court's intervention is necessary to correct course.

And while the federal appellate courts are unanimous, some state courts have come to the opposite conclusion: that, without more, providing that the AAA rules will govern arbitration proceedings is insufficient to constitute delegation. In other words, there is a conflict between state and federal appellate courts that only this Court can resolve.

Finally, this issue has immense practical impact on employees and consumers with standard-form arbitration agreements. Regardless of whether two sophisticated companies negotiating a contract can be assumed to understand the intricacies of arbitration rules and law, it is particularly extreme and implausible to conclude that ordinary workers—like Petitioner pizza-delivery-driver Piersing—clearly and unmistakably agree to delegate arbitrability based on merely referencing the AAA rules. That is especially true where the language and structure of the arbitration agreement suggest the rules only apply *when* an arbitration occurs; not that the rules will determine *whether* an arbitration occurs. At the same time, available empirical evidence indicates that a substantial swath of employee and consumer contracts present exactly this scenario: They provide that the AAA rules govern any arbitration that arises, but contain no express delegation clause. And, given the state of the circuit-court law, courts are increasingly compelling arbitration of arbitrability

questions on that basis.

Petitioner acknowledges that this Court recently denied certiorari of a cross-petition presenting a similar question. *Henry Schein, Inc. v. Archer & White Sales, Inc.*, No. 19-1080, __ S. Ct. __, 2020 WL 3146709 (June 15, 2020) (*Henry Schein II*). Unlike *Henry Schein II*, however, the question is presented in this case cleanly and as a stand-alone question. And, as this Court recognized in *Henry Schein I*, it remains unaddressed by this Court. This Court's intervention is badly needed, and this case presents an excellent vehicle for doing so.

I. THE PREVAILING CIRCUIT-COURT RULE IS CONTRARY TO FIRST OPTIONS, CONFLICTS WITH STATE-COURT DECISIONS, AND SHOULD BE ADDRESSED BY THIS COURT.

A. No Circuit Court Has Thoroughly Engaged with the *First Options* Framework.

This Court's intervention is necessary to topple the house of cards built by the federal courts of appeal. Every circuit that has had the occasion to address the question—which is every circuit except the Seventh Circuit—has held that an arbitration agreement that states a certain set of arbitral rules will govern an arbitration contains a delegation clause if the arbitral rules supposedly include a delegation clause. But the courts' collective decisions fail to justify that result.

At the base of the house of cards comprising this prevailing rule is the First Circuit's pre-*First Options* decision in *Apollo*, 886 F.2d 469, the first federal

appellate decision holding that an invocation of a set of arbitral rules was sufficient to find the parties agreed to delegate arbitrability. *Apollo* involved an arbitration agreement between two companies providing that arbitration would be conducted in accordance with the Rules of Arbitration of the International Chamber of Commerce ("ICC"). *Id.* at 470. The ICC rules provided (and still provide) that where there is a *prima facie* agreement to arbitrate, "any decision as to the arbitrator's jurisdiction shall be taken by the arbitrator himself." *Id.* at 473. The First Circuit's conclusory holding was simply that the parties agreed to the ICC rules, and the relevant ICC provisions "clearly and unmistakably allow the arbitrator to determine her own jurisdiction." *Id.* Therefore, the arbitrator would decide the arbitrability dispute in the case. *Id.* at 473-74. The decision contained no further analysis or rationale whatsoever and, of course, was decided without the benefit of this Court's jurisprudence in *First Options*, *Rent-a-Center*, and *Henry Schein I*.[7]

Most other federal courts of appeals have reflexively followed *Apollo* and other circuit-court precedents without conducting virtually any independent—much less thorough—analysis of how implicit delegation via the designation of arbitral rules can be squared with the framework laid out by this Court in *First Options* and its progeny. They have simply rubber-stamped the holdings of their sister circuits. For example, in its leading case, the Eleventh

[7] *Awuah v. Coverall N. Am., Inc.*, 554 F.3d 7, 10-11 (1st Cir. 2009), presented this question to the First Circuit again. *Awuah* acknowledged that it might reach a different outcome on a clean slate, but concluded *Apollo* remained controlling. *Id.*

Circuit's entire analysis consisted of "[b]y incorporating the AAA Rules, including [the jurisdictional rule], into their agreement, the parties clearly and unmistakably agreed that the arbitrator should decide whether the arbitration clause is valid," followed by citations to *Apollo* and similar cases. *Terminix Int'l Co., LP v. Palmer Ranch Ltd. P'ship*, 432 F.3d 1327, 1332 (11th Cir. 2005). And the Fifth Circuit simply said, "[w]e agree with most of our sister circuits that the express adoption of these rules presents clear and unmistakable evidence that the parties agreed to arbitrate arbitrability." *Petrofac, Inc. v. DynMcDermott Petrol. Operations, Co.*, 687 F.3d 671, 675 (5th Cir. 2012). The other circuit cases largely fail to offer anything better. *See Shaw Grp. Inc. v. Triplefine Int'l Corp.*, 322 F.3d 115, 122-23 (2d Cir. 2003) (following *Apollo* and earlier Second Circuit case addressing slightly different issue); *Richardson v. Coverall N. Am., Inc.*, 811 F. App'x 100, 103 (3d Cir. 2020) (following *Awuah* and other circuit cases); *Simply Wireless, Inc. v. T-Mobile US, Inc.*, 877 F.3d 522, 527-28 (4th Cir. 2017) (following *Apollo* and other circuit cases); *Fallo v. High-Tech, Inst.*, 559 F.3d 874, 878 (8th Cir. 2009) (following *Apollo* and other circuit cases); *Oracle Am. Inc. v. Myriad Grp. A.G.*, 724 F.3d 1069, 1073-75 (9th Cir. 2013) (following other circuit cases as to basic rule; additional analysis regarding particular set of rules at issue); *Belnap v. Iasis Healthcare*, 844 F.3d 1272, 1283-84 (10th Cir. 2017) (following *Awuah* and other circuit cases); *Chevron Corp. v. Ecuador*, 795 F.3d 200, 207-08 (D.C. Cir. 2015) (following *Oracle* and other circuit cases); *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366, 1373 (Fed. Cir. 2006) (following other circuit cases).

The Sixth Circuit decision in this case tries to

rationalize the prevailing rule more than any of the cases that came before it—though it, too, relies heavily on the fact that its sister circuits are unanimous. App. 8 (following *Awuah* and other circuit cases); *see also* App 17-18 (rejecting Piersing's arguments as contrary to existing caselaw); App. 20 (explaining that Piersing's argument "runs into a solid wall of contrary authority"). And the lower court's primary analysis ignores entirely the unique analytical framework laid out in *First Options* applicable to delegation determinations. *See* App. 7.

Instead, the court below held that even though this Court had never reached the question, it was inevitable that it would find that selecting the AAA rules amounts to a delegation clause. *Id.* The Sixth Circuit reached that conclusion, first, on the basis that this Court recognized, in *Henry Schein I*, that the AAA rules give arbitrators "the power to resolve arbitrability questions." *Id.* And, second, because, in *Preston*, 552 U.S. at 361-63, this Court held that the AAA rules designated by the parties, rather than the state's law selected in the parties' choice-of-law clause, governed the procedures under which their dispute would be resolved, and in *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418-20 (2001), it looked to the AAA rules to decide whether the tribe had waived immunity. App. 7. The latter two cases did not present delegation questions, however, and the Sixth Circuit's reliance on them ignores that delegation questions necessitate a different standard under *First Options*. And when the court did eventually get to the "clear and unmistakable" standard, it did nothing but rely on pre-existing federal appellate caselaw. App. 20-21.

In short, even though the circuit courts have unanimously held that choosing a particular set of rules (like the AAA rules) to govern arbitration amounts to a delegation clause, *no* federal appellate court has actually attempted to square that conclusion with the *First Options* framework. That alone warrants this Court's intervention.

B. The Prevailing Circuit-Court Rule Conflicts with the Holdings of Several State High Courts.

This Court's review is also warranted to resolve the conflict between the prevailing federal rule and contrary state high court decisions. Specifically, for the reasons laid out in Part I.C *infra*, state supreme courts in Montana, New Jersey, and South Dakota have held that simply referencing the AAA rules is insufficient to find the parties agreed to delegate arbitrability to the arbitrator. *Glob. Client Sols., LLC v. Ossello*, 367 P.3d 361, 368-69 (Mont. 2016) (finding no delegation where contract designated AAA rules); *Morgan v. Sanford Brown Inst.*, 137 A.3d 1168, 1181-82 (N.J. 2016) (finding no delegation where referenced paragraph designated AAA or National Arbitration Forum rules); *Flandreau Pub. Sch. Dist. #50-3 v. G.A. Johnson Constr., Inc.*, 701 N.W.2d 430, 437 n.6 (S.D. 2005) (rejecting *per se* rule that providing AAA rules govern arbitration satisfies *First Options*).

The Montana Supreme Court, for example, expressly rejected the so-called "general rule" that designating the AAA rules "constitutes an agreement to invalidate arbitrability." *Global Client Solutions*, 367 P.3d at 369. It explained that saying that the arbitration will be conducted pursuant to the AAA

rules—just as the Carpe Diem agreement does here, App. 43—conveys nothing whatsoever about delegation and fails to meet the clear and unmistakable standard. *Global Client Solutions*, 367 P.3d at 369. Rather, the Montana court explained, the clause indicates that the AAA rules will govern the logistics and procedures of arbitration. *Id.*

And in states where the high courts have not addressed this question, the prevailing intermediate appellate court decisions are contributing to the conflict as well. For example, the leading California state-court decision holds that designation of a particular set of rules is insufficient to delegate arbitrability. *Gilbert St. Developers, LLC v. La Quinta Homes, LLC*, 174 Cal. App. 4th 1185, 119-96 (Cal. Ct. App. 2009) (designating arbitral rules insufficient to meet requirements for delegation clauses). And the intermediate appellate courts in Florida are divided on the question of whether *First Options* requires a more explicit delegation clause or whether the state courts should reflexively follow the prevailing circuit-court rule. *Compare Doe v. Natt*, 299 So. 3d 599, 609 (Fla. Dist. Ct. App. 2020) (rule incorporation alone does not satisfy *First Options*); *with Miami Marlins, L.P. v. Miami-Dade Cty.*, 276 So. 3d 936, 940 (Fla. Dist. Ct. App. 2019) (following "abundant" federal and state-court law without further analysis).

Since all of the mentioned states fall within circuits with contrary rules, litigants in those states are subject to different rules, depending on whether federal-court or state-court rulings will apply to their dispute. And such conflicts make it impossible for contracting parties to anticipate how their agreements will be interpreted.

C. Providing that the AAA or Similar Rules Will Govern Arbitration Proceedings Is Not "Clear and Unmistakable Evidence" of an Intent to Delegate Arbitrability.

Not only is the prevailing rule in circuit courts based on virtually no reasoning at all and at odds with the conclusions of several state high courts, it is contrary to this Court's framework for determining whether parties agreed to delegate arbitrability to the arbitrator. In *First Options*, this Court held, unequivocally, that, for a court to find that parties intended to upend the default presumption that courts decide threshold questions of arbitrability, it must do so only on the basis of "clear and unmistakable evidence" that the parties intended that result. *First Options*, 514 U.S. at 944 (internal quotation marks and alterations omitted). Moreover, unlike for questions regarding arbitration generally, in the delegation context, silence and ambiguity cut *against* arbitration and in favor of courts determining arbitrability. That framework was reiterated in *Rent-a-Center*—which characterized the standard as a "heightened" one, 561 U.S. at 69 n.1—and again in *Henry Schein I*, 139 S. Ct. at 531. And, in *Henry Schein I*, this Court made clear that it has "express[ed] no view about whether" providing that the AAA rules govern arbitration in fact delegates arbitrability to the arbitrator. *Id.*[8]

[8] Though *Henry Schein I* did not resolve the question, whether designation of the AAA rules constitutes delegation was discussed at oral argument. Oral Ar. Tr., *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 2018 WL 5447972, at *7 (question from Ginsburg, J.), *42 (question from Gorsuch, J.), 139 S. Ct. 524 (2019).

But providing that the AAA or similar rules will govern arbitration is not "clear and unmistakable evidence" the parties intended to delegate threshold questions to the arbitrator: It is not explicit, it is contrary to the plain and commonsense construction of contracts like Piersing's here, and the AAA rule that is itself supposedly the delegation clause does not unambiguously delegate arbitrability to the arbitrator. Once a faithful analysis is performed, it becomes clear that the circuit courts' rote decisions are contrary to this Court's instructions.

1. "Clear and unmistakable" means explicit and express, and referencing an entire set of arbitral rules—whether or not they are considered to be "incorporated"—is not an explicit statement that the parties agree to have the arbitrator decide questions of arbitrability. Under the *First Options* standard, that should end the inquiry.

"Clear and unmistakable" is a high standard. This Court has held time and time again that contractual or statutory terms are only "clear and unmistakable" if they are explicit or express, and "admit of no other reasonable interpretation." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982) (quoting *St. Louis v. United R. Co.*, 210 U.S. 266, 280 (1908)). *See also, e.g.*, *United States v. Winstar Corp.*, 518 U.S. 839, 888 (1996) (plurality) (waivers of sovereign authority are only "clear and unmistakable" if they include an "express delegation"); *id.* at 920–21 (Scalia, J., concurring); *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983) (waiver must be "explicit" to be "clear and unmistakable"); *Home Tel. & Tel. Co. v. City of Los Angeles*, 211 U.S. 265, 273–77 (1908) ("express command" required to be "clear and unmistakable"). Moreover, a court cannot conclude that contracting

parties' intention is "clear and unmistakable" "from a general contractual provision." *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70, 79-81 (1998) (holding general agreement to arbitrate in a collective bargaining agreement did not require arbitration of age discrimination claim).

Providing generally that a set of arbitral rules will govern arbitration proceedings—particularly without pinpointing the specific rule that supposedly delegates arbitrability to the arbitrator—fails the "clear and unmistakable" standard at every turn. Delegation is not express or explicit in the agreement the parties enter into. At best, it is ambiguous as to whether such a reference could be considered explicit and exclusive of any other interpretation, which means that it is not clear or unmistakable. As *First Options* explained, ambiguities mean that the court determines arbitrability because any other rule "might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide." *First Options*, 514 U.S. at 945. That is of particular concern here, where it is entirely reasonable—as explained immediately below—for parties to conclude that the referenced body of rules only applies to the question of *how* arbitration is to be conducted, not *whether* it is to be conducted.

Here, where it is very easy for contract drafters to impose explicit delegation clauses instead of or in addition to relying on convoluted references to the AAA or similar rules, it is odd and unnecessary to make this stretch to find intent to delegate. For example, there was no question in *Rent-a-Center* that the clause at issue was a delegation clause: "The Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any

dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable." *Rent-a-Center*, 561 U.S. at 66 (internal alteration omitted). *See also, e.g.*,*Kubala v. Supreme Productions Servs., Inc.*, 830 F.3d 199, 204 (5th Cir. 2016) ("The arbitrator shall have the sole authority to rule on his/her own jurisdiction, including any challenges or objections with respect to the existence, applicability, scope, enforceability, construction, validity and interpretation of this Policy and any agreement to arbitrate a Covered Dispute."); *Parnell v. CashCall, Inc.*, 804 F.3d 1142, 1145 (11th Cir. 2015) (arbitration clause required arbitration of disputes, defined to include "any issue concerning the validity, enforceability of this loan or the Arbitration agreement").

Particularly for the drafters of take-it-or-leave it form contracts, there is no reason not to have added similar express language at some point in the twenty-five years since *First Options* was decided if they truly intended to delegate arbitrability to the arbitrator—as many have. Indeed, for employers or companies that operate nationally, it would be unwise not to do so, given that some state courts have found references to the AAA or similar rules insufficient.

2. Further, ordinary contract construction indicates the AAA rules in the Carpe Diem contract Piersing entered into—as well as any similarly structured contracts—do not come into play until *after* it has been determined that the dispute is the type of dispute the parties agreed to arbitrate. In other words, nothing about indicating that the AAA rules will govern *how* arbitration is to be conducted

makes it "clear and unmistakable" that those rules will govern *whether* arbitration will occur in the first place.

Part 2 of the Carpe Diem agreement lists what claims are covered by the arbitration agreement and must be arbitrated, and Part 3 lists the types of claims that are excluded—the exceptions. App. 41-42. Part 4 provides that the AAA "will administer the arbitration and that the arbitration will be conducted in accordance with the then-current AAA National Rules for the Resolution of Employment Disputes." App. 43.[9]

This contractual language thus sets up a multi-step process. First, figure out whether the claim at issue is a "claim[ ], dispute[ ], or controvers[y] arising out of or relating to Employee's employment with the Company and/or the termination of Employee's employment" and thus subject to the arbitration agreement under Part 2. App. 41. If so, then figure out whether one of the exceptions to arbitration in Part 3 applies—here, for example, Piersing could have argued his claims are exempt because they seek injunctive and declaratory relief arising from alleged unfair compensation or unfair business practice. *See* App. 42. Only once parts 2 and 3 have been examined is there potentially any arbitration to send to AAA under Part 4. *See* App. 43. In other words, the contract indicates that the AAA rules only apply to disputes that are subject to arbitration as outlined in Parts 2

[9] That the AAA rules—and potentially the supposed delegation clause—may change makes it even less "clear and unmistakable" that the parties are agreeing to delegate arbitrability to the arbitrator.

and 3. Those rules, therefore, cannot be used to determine whether arbitration is appropriate in the first place.[10]

This analysis does not change even if the AAA rules are considered to be incorporated into the arbitration agreement. That's because, even if the AAA rules were incorporated into the Carpe Diem contract, they would be incorporated for the purpose of determining *how* arbitration will be conducted, not *whether* it will be conducted in the first place. A reference by contracting parties "to an extraneous writing for a particular purpose makes it a part of their agreement only for the purpose specified." *Guerini Stone Co. v. P.J. Carlin Constr. Co.*, 240 U.S. 264, 277 (1916); 11 Williston on Contracts § 30:25 (4th ed. May 2020 update); *see also, e.g.*, *Arrow Sheet Metal Works v. Bryant & Detwiler Co.*, 61 N.W.2d 125, 130 (Mich. 1953); *Starr v. Union Pac. R.R. Co.*, 75 P.3d 266, 269 (Kan. Ct. App. 2003). Here—and as with these types of contracts in general—the particular purpose that is evident from the contract is that the AAA rules will govern arbitral proceedings, not decide whether the claims are arbitrable.

To hold that the AAA rules govern whether disputes are to be arbitrated in the first place conflicts with the language and structure of the arbitration

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[10] The dispute in this case is whether Domino's can invoke equitable estoppel to enforce the arbitration agreement against Piersing. The courts below treated this as an arbitrability question, and Piersing does not seek certiorari on whether that treatment was correct; it comes down to the question whether Domino's can enforce Parts 2 and 3 of the Carpe Diem agreement, an analysis that precedes the logistics of arbitration discussed in Part 4. *See* App. 14.

agreement. But at the very least, looking at the AAA rules reference in the context of the arbitration agreement as a whole muddies the waters enough that it is not "clear and unmistakable" that the parties intended the AAA rules to govern the question whether the claims should be arbitrated in the first place.

3. Finally, the language of the applicable AAA rule does not itself unambiguously delegate questions of arbitrability to the arbitrator. Rule 6(a) of the AAA employment dispute rules, the set of rules at issue here, provides that "the arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." App. 36. Many—though not all—of the other sets of AAA rules, including the AAA consumer rules, contain identical provisions, and other provider rules contain identical or similarly worded provisions. Nothing in the language of these rules makes clear that arbitrability disputes are to be *exclusively* decided by the arbitrator; that is, nothing in the rule purports to remove arbitrability questions from the court's purview. At most, it is ambiguous as to whether it does so, and *First Options* requires ambiguities to break in favor of the court deciding arbitrability.

Indeed, the view that this and similar language fails to give the arbitrator the exclusive authority to decide arbitrability was recently adopted by the ALI Restatement of the U.S. Law of International Commercial and Investor-State Arbitration. *See* Restatement (Third) U.S. Law of Int'l Comm. Arb. § 2-8 TD No. 4 (2015) (The language does "not purport to give arbitrators the exclusive authority to rule on the

enforceability of the arbitration agreement. [It] make[s] clear that arbitrators have the power to rule on such issues if raised before them," but does not "exclude[] judicial authority over those issues.").[11]

Moreover, interpreting the AAA rule and similarly worded rules to provide concurrent jurisdiction of the court and arbitrator over arbitrability is consistent with the way this Court has interpreted similar statutes. In the context of statutes granting federal-court jurisdiction over particular claims, this Court has made clear that language stating a federal forum "shall have" power to decide a particular question does not "oust" a state forum of concurrent authority. *Yellow Freight Sys. v. Donnelly*, 494 U.S. 820, 823 (1990). In *Donnelly*, the Court considered statutory language stating that "United States district court[s] . . . *shall have jurisdiction* over actions brought [under Title VII]." 42 U.S.C. § 2000e-5(f)(3) (emphasis added). It read this to "contain[] no language that expressly confines jurisdiction to federal courts" and affirmed state courts' concurrent jurisdiction over Title VII claims. *Donnelly*, 494 U.S. at 823; *see also Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 479 & n.5 (1981) (finding "[federal courts] shall have jurisdiction" language in the Outer Continental Shelf Lands Act not to preclude state court jurisdiction); *Garrett v. Circuit City Stores, Inc.*¸ 449 F.3d 672, 678-79 (5th Cir. 2006) (finding "shall have jurisdiction" language in the Uniformed Services Employment and Reemployment Act to confer only "concurrent"

[11]Though the citation is to a "draft," it has been finally approved by the ALI and is official. *See Actions Taken at the 92nd Annual Meeting*, American Law Institute, http://2015annualmeeting.org/actions-taken/.

jurisdiction); *Litgo N.J. Inc. v. Comm'r N.J. Dep't of Envtl. Protection*, 725 F.3d 369, 396 (3d Cir. 2013) (finding that "shall have jurisdiction" language is "merely a grant of authority" not inconsistent with state court jurisdiction). *See also Bouman v. Block*, 940 F.2d 1211, 1230 (9th Cir. 1991) (concluding that a California statute providing that state superior courts "shall have jurisdiction" over claims under the act did not preclude federal courts from exercising their own jurisdiction).

Moreover, constitutional grants of authority framed in "shall-have-power" terms are treated as permissive and non-exclusive. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 456 (1984) (holding that the constitutional phrase "Congress shall have the power" is permissive). For example, "[t]he grant of authority to Congress under the [P]roperty [C]lause states that 'the Congress *shall have power* . . . ,' not that *only* the Congress shall have power, or that the Congress shall have exclusive power." *Edwards v. Carter*, 580 F.2d 1055, 1057 (D.C. Cir. 1978) (emphases added); *see* U.S. Const. art. IV, § 7, cl. 2. Congress' Property Clause power thus operates concurrently with the Senate's power to dispose of property through self-executing treaty. *Edwards*, 580 F.2d at 1057-58. Identical language in the Taxing Clause leads to an identical result. While "[t]he Congress *shall have power* To lay and collect Taxes," U.S. Const. art. I, § 8, cl. 1 (emphasis added), that grant of authority is "not exclusive to Congress alone," *Retfalvi v. United States*, 930 F.3d 600, 609 (4th Cir. 2019). Likewise, the Treaty Clause states that the President "*shall have Power*, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur."

U.S. Const. art. I, § 10, cl. 3 (emphasis added). Nothing in the text mandates that this is "the only manner in which a treaty may be enacted." *Made in the USA Found. v. United States*, 242 F.3d 1300, 1313 (11th Cir. 2001).

In deciding that the AAA rule *did* grant exclusive authority to the arbitrator to determine their jurisdiction, the Sixth Circuit ignored this precedent, instead relying on a cutesy analogy to use of the family car and conclusions that Piersing's reading would cause chaos. *See* App. 15-16.

Not so. Rather, interpreted as a concurrent jurisdictional provision, the rule quite sensibly empowers the arbitrator to decide questions of arbitrability when they arise in the course of arbitration, giving the parties the option to avoid having to run to court every time such a dispute arises if they would prefer not to do so. For example, suppose two parties agree that the bulk of their dispute belongs in arbitration, and that one of them has initiated an arbitration proceeding. However, they disagree about whether a small portion of the dispute belongs in arbitration, or whether a single aspect of the arbitration agreement is unconscionable or unenforceable for some other reason. The AAA rule empowering the arbitrator to decide those questions allows the parties, at the time of the dispute, to elect to have the arbitrator decide the dispute and avoids the parties having to initiate a new court proceeding just to resolve it. In other words, it offers the parties a more streamlined and efficient proceeding—just as arbitration is intended to do.

In short, the prevailing rule runs headlong into this Court's delegation-clause jurisprudence, and this

Court should grant review to prevent its precedent from being undone wholesale in the federal appellate courts.

II. EMPLOYEES AND CONSUMERS DO NOT CLEARLY AND UNMISTAKABLY INTEND REFERENCE TO A SET OF PROCEDURAL RULES AS DELEGATION.

This Court should also grant certiorari because reference to the AAA or similar rules is ubiquitous in employee and consumer contexts like the one here. Moreover, reliance on those rules to find delegation is particularly problematic in the context of unsophisticated low-wage employees and ordinary consumers. An increasing number of companies are asking courts to find that referencing the AAA or a similar set of rules is enough to send arbitrability questions to the arbitrator in contexts where ordinary individuals are particularly ill-equipped to appreciate and understand the obscure, non-obvious implications of choosing a set of arbitral rules. And, of course, employees and consumers rarely have the option of negotiating any terms of these types of form contracts. This Court should weigh in on the question whether, as a practical matter, virtually all employee and consumer contracts providing for arbitration include a delegation clause, and it should find that, at least in the context of unsophisticated parties, delegation clauses must actually be explicit.

1. What empirical evidence is available indicates that reference to the AAA rules is ubiquitous in take-it-or-leave-it form contracts that include arbitration clauses. The Consumer Financial Protection Bureau's 2015 study ("CFPB Study") found that, of the 850 consumer financial services contracts it reviewed,

about half (between 39 and 63 percent of each industry) contained express delegation clauses similar to the one in *Rent-a-Center*. Consumer Financial Protection Bureau, *Arbitration Study: Report to Congress* (2015) § 2, at 42 (also noting that a few contracts contained anti-delegation provisions); *see id.* § 1, at 7. But, "almost all of the arbitration clauses without delegation clauses in the sample . . . selected one or more arbitration administrators." Indeed, *every* payday loan contract and mobile wireless contract that contained an arbitration clause, but not an explicit delegation clause, specified that arbitration would be governed by a particular set of arbitral rules, almost always the AAA rules. *Id.* § 2, at 42 n.109.

The upshot is that a conclusion that referencing the AAA rules amounts to a delegation clause adds delegation clauses to the vast majority of consumer arbitration agreements that do not already contain such a clause—whether or not the parties intended such delegation or merely intended to invoke the most prevalent set of consumer arbitration procedures to govern the arbitration once any arbitrability questions were resolved. Such a sweeping conclusion, which is the current prevailing rule amongst the courts of appeals, stands in significant tension with the principles that arbitration is a matter of contract and that intent to delegate arbitrability questions to the arbitrator must be "clear and unmistakable."[12]

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[12] Most of the circuit-court cases were decided in the context of agreements between sophisticated corporate actors, and two circuits have left open the possibility that a different rule might apply in the context of unsophisticated parties,

The disconnect the circuit-court rule creates between intent and result is particularly stark in situations like the one here, where the party (here, Domino's) seeking to compel arbitration of arbitrability is not a party to or drafter of the contract in question—and the party that did agree to the form contract disavows any intent to delegate.

Further, and unsurprisingly, it appears that the circuit courts' conclusion has led to an increasing number of delegation determinations resting solely on the designation of a set of arbitral rules. A Westlaw search of delegation decisions decided within the past year indicates that in approximately thirty percent of cases in which arbitration of arbitrability was compelled, that decision was based solely on the parties' selection of a set of arbitral rules, and not on any express delegation clause. *See, e.g.*, *Carrone v. United HealthGroup Inc.*, 2020 WL 4530032 (D.N.J. Aug. 6, 2020) (in context of employment contract, sole basis for delegation was incorporation of AAA employment rules; result would have been different in state court); *Willis v. Fitbit*, *Inc.*, 2020 WL 417943 (S.D. Cal. Jan. 27, 2020) (same, in context of consumer contract); *Taylor v. Dolgencorp, LLC*, 2019 WL 6135440 (E.D. Mo. Nov. 19, 2019) (same, in context of employment discrimination claim).

Given the increasing prevalence of this scenario—and its near-ubiquity in consumer arbitration agreements—this Court should weigh in on whether

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though neither has squarely addressed the issue. *See Brennan v. Opus Bank*, 796 F.3d 1125, 1130-31 (9th Cir. 2015); *Simply Wireless*, 877 F.3d at 527-28 (Fourth Circuit).

this implied delegation approach is consistent with *First Options*.

2. Moreover, low-wage workers like Piersing and ordinary consumers are particularly ill-equipped to appreciate the not-so-obvious meaning of the circuit courts' convoluted rule. Especially in the employee and consumer context, "clear and unmistakable" loses all meaning if one needs to be an expert in arbitration law—which the Sixth Circuit itself acknowledged is the case, App. 20—to understand the implications of providing that the AAA rules will govern any arbitration proceeding.

To have any appreciation of what is at stake, an employee or consumer would have to go through a number of steps to figure out the implications of delegation-by-reference. First, the individual would need to sort through what may be many pages of fine print to locate any arbitration clause, if it is not in a separate agreement like Carpe Diem's, and then also identify the reference to thee arbitral rules. Second, the individual would need to understand that—contrary to the most obvious reading of the contract—the rules will govern not only how the arbitration will be conducted, but also whether arbitration will take place at all. Third, they would need to locate and review a copy of the specific rules referenced in the agreement if the agreement even references a specific set of rules rather than invoking "AAA rules" generally, in which case they would have to figure out which set of the more than forty AAA rules would most likely apply. Fourth, the individual would need to pinpoint which rule sets forth the arbitrator's ability to hear disputes about its own jurisdiction. And fifth, they would need to understand that, even

when—as here—it doesn't say so, the rule removes arbitrability from the purview of the court. That a typical employee or consumer is likely to successfully navigate this process is fantasy. If a company wants to impose a delegation clause, it should have to say so clearly and understandably, just as *First Options* requires.

Making this process especially difficult, many employees and consumers enter into arbitration agreements in which they may not have the ability, as a practical matter, to consult and understand the referenced rules, even if it had occurred to them to do so. For example, it is not uncommon for a consumer to be asked to enter into an agreement containing an arbitration clause on a pinpad at a store. *E.g.*, *Nat'l Fed. of the Blind v. The Container Store, Inc.*, 904 F.3d 70, 75–76 (1st Cir. 2018); *Edwards v. Macy's Inc.*, 2015 WL 4104718, at *5 (S.D.N.Y. June 30, 2015). And companies have tried to enforce delegation-by-reference against minors with learning disabilities taking a college entrance exam. *See Bloom v. ACT, Inc.*, 2018 WL 6163128, at *1 (C.D. Cal. Oct. 24, 2018). Under those circumstances, it is absurd to think that a reference to a set of arbitral rules is somehow "clear and unmistakable evidence" of the employee's, consumer's, or minor's intent to overturn the default presumption that courts decide questions of arbitrability.

In short, the prevailing circuit-court rule threatens to send virtually every arbitrability dispute arising from an employee or consumer contract to an arbitrator. In doing so, it assumes that unsophisticated parties can navigate multiple layers of boilerplate to reach a conclusion that is not obvious

to anyone not steeped in arbitration law. It falls well short of the "clear and unmistakable evidence" *First Options* requires.

CONCLUSION

The Court should grant certiorari.

Respectfully submitted,

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