No. 20-763

In The
Supreme Court of the United States

ERICK RICHARDSON AND LUIS A. SILVA,
ON BEHALF OF THEMSELVES AND
ALL OTHERS SIMILARLY SITUATED,

Petitioners,

v.

COVERALL NORTH AMERICA, INC.,
SUJOL LLC, ABC CORPS., AND
JANE & JOHN DOES 1-20,

Respondents.

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

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent Sujol LLC discloses that: (i) it is a privately-held New Jersey limited liability company; and (ii) there are no parent corporations or publicly-held corporations owning 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

STATEMENT OF THE CASE

In sum and substance, this Court has already rejected certiorari on Petitioners' questions presented at least 5 times in the past. Petitioners attempt to evade these prior denials by couching their questions as new forms of old questions. They say that the old questions on delegation-of-arbitrability-by-reference did not distinguish between "sophisticated" and "unsophisticated parties" and did not address whether state or federal law provides the rule of decision. These new formulations do not change the fundamental question on which this Court has denied certiorari 5 times already and which every circuit has answered against Petitioners: parties may delegate arbitrability by "clearly and unmistakably" incorporating-by-reference the rules of an arbitral forum.

Contrary to Petitioners' assertions here, there is no circuit split on whether the incorporation-by-reference of arbitral rules is a sufficiently "clear and unmistakable" delegation of arbitrability to the arbitrator. Every circuit to address the question has answered that a plain reference to arbitral rules that delegates arbitrability to the arbitrator—such as the reference to the American Arbitration Association **("AAA")** rules here—is sufficiently clear and unmistakable. There was such a plain reference here, as the Third Circuit held: "[t]hat provision is about as clear and unmistakable as language can get." (5a.)

In an attempt to ignore the overwhelming precedent against them, Petitioners propose two rules that

up-end the "clear and unmistakable" rule they purport to be vindicating.

First, Petitioners propose that state law should govern delegation when state law *rejects delegation-by-reference in an arbitration clause*, but federal law should provide a "backstop" when, presumably, state law is *more favorable* to such delegation-by-reference. (Pet. at 29.) This proposal violates one of the central tenets of the Federal Arbitration Act **("FAA")** that arbitration clauses must be treated the same as any other contract under state law. *Rent-A-Ctr., Inc. v. Jackson*, 561 U.S. 63, 67 (2010). If state law generally permits incorporation-by-reference in contracts, then the "clear and unmistakable" rule applies to incorporation-by-reference of arbitral rules. The "clear and unmistakable" rule is a rule of federal law; if it is satisfied the delegation is permissible *regardless of state law* because "state law for the waiver of a judicial forum [cannot] provide a more onerous standard." *Darrington v. Milton Hershey Sch.*, 958 F.3d 188, 193 (3d Cir. 2020).[1]

Second, Petitioners propose that there should be two separate rules for delegation-by-reference: one for "sophisticated parties" and one for "unsophisticated parties." (Pet. at 2.) No circuit court has suggested such a dichotomy in this context, *see Brennan v. Opus Bank*, 796 F.3d 1125, 1130-1131 (9th Cir. 2015), but the Third Circuit below *assumed* that Petitioner Silva "lack[ed] sophistication." (6a n.3.) The Third

[1] The only possible exception being if state law flatly prohibits incorporation-by-reference in all contracts. *Infra* at p.9.

Circuit held, however, that it made no difference because the "clarity of Silva's agreement shows the intent to delegate arbitrability." (7a.) Purportedly "unsophisticated parties" are already protected by generally applicable state law doctrines such as procedural and substantive unconscionability, duress, and undue influence. Petitioners themselves raised procedural and substantive unconscionability before the district court, lost those arguments, and did not cross-appeal those particular determinations. (26a.)

The franchise contract signed by Silva with Respondent Sujol LLC plainly references the AAA rules. (5a.) "Rule 7" of the AAA rules clearly states that arbitrability is determined by the arbitrator. (39a.) In this day and age, it is not too much for any party to a contract—sophisticated or otherwise—to simply pull up their wireless phone and conduct an internet search to discover the arbitral rules being incorporated into a contract. For example, the AAA rules are easily accessible online and readily understandable; they are not couched in legalese or overly-academic language. A simple online search of "AAA commercial rules online" leads to the AAA rules incorporated into the arbitration clause here. *See* AAA Commercial Arbitration Rules and Mediation Proc., adr.org/sites/default/files/Commercial%20Rules.pdf (Oct. 1, 2013).

REASONS WHY CERTIORARI SHOULD BE DENIED

The Petition should be denied for three reasons.

First, this Court has been presented with the delegation-by-reference question at least 5 times and denied certiorari each time. *Piersing v. Dominos Pizza*, No. 20-695, 2021 WL 231566 at *1 (U.S. Jan. 25, 2021); *Archer & White Sales, Inc. v. Henry Schein*, No. 19-10180, 2020 WL 3146709 (U.S. June 15, 2020); *Simply Wireless, Inc. v. T-Mobile U.S., Inc.*, 139 S.Ct. 915 (2019); *Limited Liab. Co. v. Doe*, 569 U.S. 1029 (2013); *Dunn v. Nitro Distrib., Inc.*, 549 U.S. 1077 (2003). In the last two terms alone, the Court denied certiorari in *Piersing* and *Archer & White Sales, Inc.* In the latter, the Court granted a petition on the following question:

> 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.

Petition of Henry Shein, *Archer & White Sales, Inc.*, 2020 WL 529195 (U.S. Jan. 31, 2020). But the Court denied a cross-petition on the question(s) now raised by Petitioners:

> Whether an arbitration agreement that identifies a set of arbitration rules to apply *if* there is arbitration clearly and unmistakably delegates to the arbitrator disputes about *whether*

> the parties agreed to arbitrate in the first place.

See Conditional Cross-Petition of Archer & White Sales, Inc., *Archer & White Sales, Inc.*, 2020 WL 1391910 (U.S. Mar. 2, 2020); *Archer & White Sales, Inc.*, 141 S.Ct. 113 (2020) (denial).[2]

Second, the circuits are unanimous in holding that delegation of arbitrability may be validly accomplished by incorporating the rules of an arbitral forum by reference. *See Awah v. Coverall N. Am., Inc.*, 554 F.3d 7, 11 (1st Cir. 2009); *Contec Corp. v. Remote Sol., Co.*, 398 F.3d 205, 209 (2d Cir. 2005); *Simply Wireless, Inc. v. T-Mobile U.S., Inc.*, 877 F.3d 522, 527-528 (4th Cir. 2017); *Petrofac, Inc. v. DynMcDermott Petrol. Operations Co.*, 687 F.3d 671, 675 (5th Cir. 2012); *McGee v. Armstrong*, 941 F.3d 671, 675 (6th Cir. 2019); *Fallo v. High-Tech, Inst.*, 559 F.3d 874, 878 (8th Cir. 2009); *Brennan v. Opus Bank*, 796 F.3d 1125, 1130 (9th Cir. 2015); *Dish Network L.L.C. v. Ray*, 900 F.3d 1240, 1246 (10th Cir. 2018); *Terminix Int'l Co., LP v. Palmer Ranch Ltd. P'Ship*, 432 F.3d 1327, 1332 (11th Cir. 2005); *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366, 1373 (Fed. Cir. 2006); *Chevron Corp. v. Ecuador*, 795 F.3d 200, 207-208 (D.C. Cir. 2015).

Third, Petitioners' proposed rules are incompatible with the FAA and this Court's FAA precedent. The

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[2] On January 25, 2021, the Court dismissed that petition as improvidently granted. *Archer & White Sales, Inc.*, 595 U.S. ___ (2021).

Third Circuit's holding below correctly applied both and does not warrant review.

This Court's "clear and unmistakable" rule is not a "backstop," as Petitioners put it; it is the rule of decision under federal law governing delegation of arbitrability to an arbitrator. *Darrington v. Milton Hershey Sch.*, 958 F.3d at 193; *see First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (describing the "clear and unmistakable" rule as an "important qualification" in application of state law). There is no "conflict among the Circuit Courts of Appeal" on this issue. (Pet. at 5.) *Wells Fargo Advisors LLC v. Sappington*, 884 F.3d 392, 396 (2d Cir. 2018), cited by Petitioners, did not hold that the "standard for delegating arbitrability" by reference is a "question of state law." (Pet. at 5.) It held that under the relevant state law parties were permitted to incorporate-by-reference in contracts generally *and* that such incorporation of arbitral rules was "clear and unmistakable" *as a matter of federal law*. *Id.*

This is precisely the analysis required by the FAA: (i) does state law generally permit incorporation-by-reference; and (ii) if so, is such incorporation of arbitral rules "clear and unmistakable" under federal law. *See Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S.Ct. 1421, 1426 (2017) (explaining that state law governs the formation of arbitration clauses but may not create specific rules that discriminate against arbitration and not against other contracts more generally).

The only situation where delegating arbitrability by reference is a pure "question of state law" is if state law prohibits incorporation-by-reference *for all contracts*. In that situation, there could arguably be no "clear and unmistakable" delegation by reference under the FAA because state law treats all contracts the same: incorporation-by-reference is prohibited. *Id.*

Petitioners' reliance on New Jersey law here only reinforces this preemptive point under the FAA. Petitioners argue that the Third Circuit's holding "conflicts with decisions of the New Jersey Supreme Court, such as *Morgan v. Sanford Brown Inst.*, 225 N.J. 289 (2016)." (Pet. at 5.) This is false. Citing *Rent-A-Cntr.*, the New Jersey Supreme Court held that the delegation in *Morgan* was insufficient *as a matter of federal law*. *Morgan*, 137 A.3d at 1178.[3] Two years after *Morgan*, the New Jersey Appellate Division upheld a more specific incorporation-by-reference to arbitral rules that is functionally indistinguishable from the incorporation-by-reference here. *State Farm Guar. Ins. Co. v. Hereford Ins. Co.*, 183 A.3d 946, 947 (N.J. App. Div. 2018).

Under the FAA, the only question under New Jersey law here is whether incorporation-by-reference is permitted in contracts *generally*, and the answer to that is yes:

> in order for there to be a proper and enforceable incorporation by reference of a separate

[3] Petitioners' citation is to the New Jersey reporter; as is customary for federal courts, Respondents' citations are to regional reporters where applicable.

> document, the document to be incorporated must be described in such terms that its identity may be ascertained beyond doubt and the party to be bound by the terms must have had knowledge of and assented to the incorporated terms.

See, e.g., Alpert, Goldberg, Butler, Norton & Weiss, P.C. v. Quinn, 983 A.2d 604, 617 (N.J. App. Div. 2009). Petitioners notably do not argue that the delegation-by-reference here violates that general New Jersey law standard. They instead argue—in a misreading of *Morgan*—that New Jersey law on incorporation-by-reference *of arbitral rules* should govern here, but that argument quite obviously violates the FAA because it permits state law to discriminate against arbitration. This is why Petitioners' questions presented are just new forms of old questions that have been denied multiple times.

Petitioners' "unsophisticated party" rule is equally wrong under the FAA. As Petitioners concede—and indeed rely upon—state law controls the creation of an arbitration clause here. (Pet. at 8.) *First Options*, 514 U.S. at 944. As already explained, if state law does not contain an even-handed "unsophisticated party" rule applicable to all contracts, then state law cannot apply one to arbitration clauses. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). Put differently: in one argument Petitioners plead for a (mis)application of state law; in the next they argue for creation of a federal rule of decision for "unsophisticated part[ies]."

New Jersey does not generally distinguish between "sophisticated" and "unsophisticated parties" in contracts; it instead applies procedural and substantive unconscionability more generally, with a "sophistication" factor. *Moore v. Woman To Woman Obstetrics & Gynecology, L.L.C.*, 3 A.3d 535, 540 (N.J. App. Div. 2010). *State Farm Guar. Ins. Co.* applied an arbitration clause to a layperson arising out of car insurance. 183 A.3d at 947. Given that car insurance is required in New Jersey, N.J. Stat. Ann. § 39:6B-1 to 3, that application is more unilateral and "adhesive" than what Petitioners present to the Court.

Petitioners' "unsophisticated party" rule is nothing more than a re-argument of the procedural and substantive unconscionability arguments that they lost at the district court and did not cross-appeal. (26a-27a.) *See El Paso Nat. Gas Co. v. Neztsosie*, 526 U.S. 473, 479 (1999) ("[a]bsent a cross-appeal, an appellee may urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court, but may not attack the decree with a view either to enlarging his own rights thereunder") [cites/quotes omitted]. These and similar state law doctrines—such as duress and undue influence—*already apply* under the FAA, 9 U.S.C.A. § 2, and aptly protect purportedly "unsophisticated part[ies]." Under the FAA, "agreements to arbitrate [may] be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability." *AT&T Mobility LLC*, 563 U.S. at 339. The district court already rejected "unconscionability" as a

matter of state law, notably considering the alleged "relative lack of sophistication" of Petitioners. (27a.)

CONCLUSION

Petitioners cannot quite decide whether their questions presented are ones of state or federal law, but ultimately both questions have already been rejected numerous times and are simply incompatible with the FAA. The petition should be denied.

Respectfully submitted,

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