No. 21-1244

In The Supreme Court of the United States

BEIJING SHOUGANG MINING INVESTMENT COMPANY, LTD., CHINA HEILONGJIANG INTERNATIONAL ECONOMIC AND TECHNICAL COOPERATIVE CORP., QINHUANGDAOSHI QINLONG INTERNATIONAL INDUSTRIAL CO. LTD.,

Petitioners,

v.

MONGOLIA,

Respondent.

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

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF FOR PROFESSOR GEORGE A. BERMANN IN SUPPORT OF PETITIONERS

MATTHEW E. DRAPER
Counsel of Record
CORINNE E. ATTON
DRAPER & DRAPER LLC
200 Park Avenue, 17th Floor
New York, NY 10166
(347) 442-7788
matthew.draper@draperllc.com

Counsel for Amicus Curiae Professor George A. Bermann

March 23, 2022

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2(b) of the Rules of this Court, Professor George A. Bermann moves this Court for leave to file the attached *amicus curiae* brief in support of Petitioners.

All parties were timely notified of the intent of Professor Bermann to file the attached brief as required by Rule 37.2(a). On March 18, 2022, Petitioners filed a blanket consent to the filing of *amicus curiae* briefs in support of either party or neither party, in accordance with Rule 37.2(a). Respondent Mongolia has withheld consent.

Amicus curiae George A. Bermann is the Jean Monnet Professor of EU Law, Walter Gellhorn Professor of Law, and the Director of the Center for International Commercial and Investment Arbitration (CICIA) at Columbia Law School. Professor Bermann is also an active international arbitrator in commercial and investment disputes; chief reporter of the ALI's Restatement of the U.S. Law of International Commercial and Investor-State Arbitration; co-author of the UNCITRAL Guide to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards; chair of the Global Advisory Board of the New York International Arbitration Center (NYIAC); co-editor-in-chief of the *American Review of International Arbitration*; and founding member of the

governing body of the ICC International Court of Arbitration.

The Second Circuit's holding in this case is of interest to Professor Bermann because it severely undermines one of the most fundamental decisions of this Court in the area of arbitration. That decision is *First Options of Chi., Inc.* v. *Kaplan*, 514 U.S. 938 (1995). There, the Court underscored the vital importance of courts, rather than arbitral tribunals, having primary authority to determine the arbitrability of a dispute if called into question. It did so by holding that parties may not be deprived of access to a court for independent, i.e., *de novo*, judicial review of arbitrability unless it is shown by "clear and unmistakable" evidence that the parties so agreed. Underlying *First Options* is the conviction that the principle of party consent, embodied in the Federal Arbitration Act and this Court's consistent case law, is the cornerstone upon which the entire edifice of arbitration, and its legitimacy, is built. The present case requires the Court's attention because it has the effect of stripping this Court's "clear and unmistakable" test of any meaning, by essentially depriving a claimant of *de novo* court review merely because it replies to a respondent's challenge to arbitrability.

For the foregoing reasons, Professor Bermann respectfully requests that the Court grant the motion for leave to file an *amicus curiae* brief.

Respectfully submitted,

MATTHEW E. DRAPER
Counsel of Record
CORINNE E. ATTON
DRAPER & DRAPER LLC
200 Park Avenue
17th Floor
New York, NY 10166
(347) 442-7788
matthew.draper@draperllc.com

Counsel for Amicus Curiae
Professor George A. Bermann

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

Page

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

Page

INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae George A. Bermann is the Jean Monnet Professor of EU Law, Walter Gellhorn Professor of Law, and the Director of the Center for International Commercial and Investment Arbitration (CICIA) at Columbia Law School. A Columbia Law School faculty member since 1975, Professor Bermann teaches courses in, and has written extensively on, transnational dispute resolution (international arbitration and litigation), European Union law, administrative law, and WTO law. He is an affiliated faculty member of the School of Law of Sciences Po in Paris, the MIDS Masters Program in International Dispute Settlement in Geneva, and the LL.M. program in international dispute resolution at the Institut des Sciences Politiques (Sciences Po) in Paris.

Professor Bermann is also an active international arbitrator in commercial and investment disputes; chief reporter of the ALI's Restatement of the U.S. Law of International Commercial and Investor-State Arbitration; co-author of the UNCITRAL Guide to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards; chair of the Global Advisory Board of the New York International Arbitration

[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus curiae* or his counsel, make a monetary contribution intended to fund the preparation or submission of this brief. All parties were timely notified of *amicus curiae*'s intent to file this brief. The Petitioners have consented to the filing of this brief. Respondent Mongolia has withheld consent. Therefore *amicus curiae* has filed a motion seeking leave to file this brief.

Center (NYIAC); co-editor-in-chief of the *American Review of International Arbitration*; and founding member of the governing body of the ICC International Court of Arbitration.

Professor Bermann is interested in this case because the decision below severely undermines one of the most fundamental decisions of this Court in the area of arbitration. That decision is *First Options of Chi., Inc.* v. *Kaplan*, 514 U.S. 938 (1995). There, the Court underscored the vital importance of courts, rather than arbitral tribunals, having primary authority to determine the arbitrability of a dispute if called into question. It did so by holding that parties may not be deprived of access to a court for independent, i.e., *de novo*, judicial review of arbitrability unless it is shown by "clear and unmistakable" evidence that the parties so agreed. Underlying *First Options* is the conviction that the principle of party consent, embodied in the Federal Arbitration Act and this Court's consistent case law, is the cornerstone upon which the entire edifice of arbitration, and its legitimacy, is built. The present case requires the Court's attention because it has the effect of stripping this Court's "clear and unmistakable" test of any meaning, by essentially depriving a claimant of *de novo* court review merely because it replies to a respondent's challenge to arbitrability.

SUMMARY OF ARGUMENT

The issue at the heart of this case is among the most fundamental in both domestic and international arbitration. This Court has repeatedly and forcefully acknowledged that the foundation of arbitration is party consent and that neither arbitration agreements nor arbitral awards deserve recognition or enforcement unless they are the product of such consent.[2] Among the most salient of the Court's iterations of this principle is its decision in *First Options, Inc. of Chicago* v. *Kaplan*. There, the Court unanimously ruled that, because certain issues, denominated by the Court as issues of "arbitrability," so implicate the principle of consent, a party seeking vacatur of an award on arbitrability grounds is entitled to independent judicial review of a tribunal's arbitrability determination.[3]

The Court in *First Options* went on to allow that parties may forego their right to have a court primarily decide issues of arbitrability if they agree that a tribunal instead should have primary authority over the matter.[4] (In the usual parlance, when parties forego their right to independent judicial determinations of arbitrability, they make a "delegation" of authority to

---

[2] *See First Options Chi., Inc.* v. *Kaplan*, 514 U.S. 938, 945 (1995).

[3] *Id.* ("[C]ourts . . . hesitate to interpret silence or ambiguity on the 'who should decide arbitrability' point as giving the arbitrators that power, for doing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide.").

[4] *First Options*, 514 U.S. at 944.

the arbitral tribunal.) However, the Court very deliberately subjected the showing of a delegation to an exacting standard of proof. A court may find that the parties made a delegation only if presented with "clear and unmistakable" evidence that the parties agreed to that effect.[5] In sum, *First Options* laid down a powerful presumption of independent judicial review, rebuttable only by a showing *in no uncertain terms* that the parties had agreed otherwise. It considered that the principle of party consent required nothing less.

For the several reasons set out in this brief, the decision of the Court of Appeals in this case strikes at the very core of *First Options* and should not be allowed to stand.

It is important at the outset to appreciate what an inquiry into arbitrability does and does not entail. Issues of arbitrability, which nowadays commonly also go by the name of "gateway issues,"[6] are very few in number. Essentially, they comprise the following:

(a) was an arbitration agreement formed?;

(b) is the arbitration agreement valid?;

---

[5] *Id.*

[6] *See*, *e.g.*, *Rent-a-Ctr., W., Inc.* v. *Jackson*, 561 U.S. 63, 68–69 (2010) (recognizing that parties can agree to arbitrate "gateway questions of arbitrability, such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy" (cleaned up)); George A. Bermann, *The "Gateway" Problem in International Commercial Arbitration*, 37 Yale J. Int'l L. 1, 8 (2012) (defining gateway issues as "those threshold issues that a court, if asked to do so, will decide at the outset").

(c) can a non-signatory to an arbitration agreement be treated as if it were a signatory?; and

(d) does the dispute fall within the scope of the agreement to arbitrate?

This is a highly select list of issues, whose common feature is that they directly implicate the fundamental principle of party consent. In addressing these matters, a court is steering entirely clear of the merits of the dispute. Its sole concern is whether the parties actually conferred authority on an arbitral tribunal, rather than a court, to adjudicate their dispute and render an award binding on them.

In the present case, the lower courts found clear and unmistakable evidence of a delegation in a specific procedural incident in the arbitral proceeding. When claimant, Beijing Shougang, initiated arbitration against the Republic of Mongolia, the latter challenged arbitral jurisdiction on the ground that the claim against it fell outside the scope of the parties' agreement to arbitrate. The parties agreed, as parties commonly do, that it would be more efficient for the tribunal to sequence the issues in the case by having the tribunal rule on the respondent's jurisdictional objection and liability before entertaining the question of damages or other relief. The proceeding was accordingly "bifurcated." Addressing jurisdiction first, the tribunal ruled in favor of Mongolia, finding that the dispute was not covered by the applicable investment treaty and dismissing the

claim on that ground.[7] Beijing Shougang unsuccessfully sought vacatur of the award in district court.[8]

On appeal, the Court of Appeals for the Second Circuit affirmed, holding that when (a) Beijing Shougang agreed with Mongolia that the proceedings should be bifurcated, (b) the tribunal decided to make its jurisdictional ruling in a first phase, and (c) Beijing Shougang then presented its jurisdictional arguments, it clearly and unmistakably forfeited its right to independent judicial review of the tribunal's jurisdictional determination that *First Options* promises.[9]

The logic of the Second Circuit is profoundly flawed and deprives the *First Options* test of any meaning, to the detriment of the fundamental principle of consent on which that decision rests.

First, Beijing Shougang did not, by its willingness to have the tribunal address the jurisdictional defense raised by the respondent, in any sense agree to delegate to the tribunal primary responsibility to determine its own authority. Under U.S. law, arbitral tribunals, once constituted, have "competence-competence," i.e., jurisdiction to determine their jurisdiction, *as a*

---

[7] *China Heilongjiang Int'l Econ. & Tech. Coop. Corp.* v. *Mongolia*, Case No. 2010-20, Award (PCA Case Repository 2017), https://www.italaw.com/sites/default/files/case-documents/italaw11026_0.pdf.

[8] *Beijing Shougang Mining Inv. Co., Ltd.* v. *Mongolia*, 415 F. Supp. 3d 363, 370 (S.D.N.Y. 2019).

[9] *Beijing Shougang Mining Inv. Co., Ltd.* v. *Mongolia*, 11 F.4th 144, 156–58 (2d Cir. 2021).

matter of law.[10] The tribunal had that authority whether a claimant, as the Second Circuit put it, "agreed" to it or not, and nothing Beijing Shougang (or, for that matter, Mongolia) did or said could alter that fact. Therefore, to say that upon "agreeing" that the tribunal would rule upon Mongolia's jurisdictional objection, Beijing Shougang relinquished its right under *First Options* to independent judicial review makes no sense.

Moreover, a tribunal does not actually exercise the competence-competence that it enjoys unless and until the *respondent* challenges its jurisdiction, as Mongolia did in this case. It is the respondent, and the respondent alone, that triggers a tribunal's exercise of its inherent jurisdiction to determine its own jurisdiction. Respondents in investor-State arbitrations frequently raise these jurisdictional objections, and regularly do so while seeking to bifurcate arbitral proceedings.

Second, the Court's error is highly consequential, since both jurisdictional objections and bifurcation are commonplace. This is especially so in investor-state arbitration, in which the questions of whether the claimant is an "investor" and whether it made an "investment," within the meaning of the applicable treaties, are considered to be fully jurisdictional in nature.[11] If a claimant is deemed to have clearly and unmistakably made a delegation merely by seeking to

---

[10] *See generally* Bermann *supra* note 6.

[11] *See*, *e.g.*, Michael Waibel, *Subject Matter Jurisdiction: The Notion of Investment*, 19 ICSID Rep. 25, 26 (2021).

refute the respondent's jurisdictional objections before the tribunal, then delegations will be found regularly and routinely. That cannot be what the Supreme Court intended when it propounded the "clear and unmistakable" evidence test.

Third, the notion that, when a party participates in a tribunal's exercise of competence-competence, it effectively forfeits its right to independent judicial review of arbitrability is flatly inconsistent with the very notion of competence-competence as understood in U.S. law. Under U.S. law, a tribunal enjoys competence-competence in the sense that, if its jurisdiction is challenged, it is empowered to address and decide the matter on its own.[12] This has considerable value in that a tribunal whose jurisdiction is challenged is therefore not required to suspend proceedings and await a judicial determination of arbitral jurisdiction. Competence-competence is accordingly understood in U.S. law as having a so-called "positive" dimension.[13] It

---

[12] *See*, *e.g.*, Gary B. Born, International Commercial Arbitration (3d ed. 2021), at 1153 ("U.S. courts have repeatedly held that arbitral tribunals have the inherent power to consider their own jurisdiction, subject to later judicial review. . . ."); Robert H. Smit, *Separability and Competence—Competence in International Arbitration: Ex Nihilo Nihil Fit? Or Can Something Indeed Come From Nothing?*, 13 Am. Rev. Int'l Arb. 19, 27–28 (2002) ("[T]he general rule in the United States has been that . . . arbitrators have authority under the FAA to consider challenges to their jurisdictions. . . .").

[13] *See* Ashley Cook, *Kompetenz-Kompetenz: Varying Approaches and a Proposal for a Limited Form of Negative Kompetenz-Kompetenz*, 2014 Pepp. L. Rev. 17, 20–21; Bermann, *supra* note 6, at 48; Born, *supra* note 12, at 1219.

empowers tribunals to determine arbitral jurisdiction. It does not, however, *disempower* courts to do so if presented with the question in post-arbitration proceedings. Competence-competence accordingly has no so-called "negative" effect.[14]

Fourth, the ruling below unjustifiably discriminates, in regard to delegation, between claimants and respondents. If a respondent has a jurisdictional objection, as Mongolia did, it presents that objection to the arbitral tribunal. Indeed, if it fails to do so, it will be deemed to have waived it.[15] If the respondent then loses on the jurisdictional issue and also on the merits, it is entitled to seek vacatur of the award and in that proceeding the court, if asked to do so, will

---

[14] *See* Cook, *supra* note 13, at 25 (explaining that U.S. law does not "even contemplat[e] negative kompetenz-kompetenz"); Bermann, *supra* note 6, at 25.

[15] *See*, *e.g.*, *Williams Charles Constr. Co., LLC* v. *Teamsters Loc. Union 627*, 827 F.2d 672, 681 (7th Cir. 2016) ("To avoid waiver, a party must 'clearly preserve[ ] the question of arbitrability for judicial determination . . . by 'carefully and explicitly, in unambiguous language, ma[king] known to the arbitrator . . . its clear intention that it [is] maintaining its objections to arbitrability even though it [is] agreeing to proceed with the arbitration hearing."); *Opals on Ice Lingerie, Designs by Bernadette, Inc.* v. *Bodylines Inc.*, 320 F.3d 362, 268 (2d Cir. 2003) ("[I]f a party participates in arbitration proceedings without making a timely objection to the submission of the dispute to arbitration, that party may be found to have waived its right to object to the arbitration."); *cf. Lewis* v. *Cir. City Stores, Inc.*, 500 F.3d 1140, 1148–49 (10th Cir. 2007) ("The Supreme Court has observed that to the extent parties 'forcefully object[ ] to the arbitrators deciding their dispute,' they preserve their objection even if they follow through with arbitration.") (quoting *First Options*, 514 U.S. at 946).

independently review the tribunal's jurisdictional finding.[16] That is precisely what occurred in *First Options*: The Kaplans unsuccessfully objected to the tribunal's jurisdiction, preserved their objection, and proceeded to the merits. When they lost on the merits as well, this Court held that they were entitled to a *de novo* jurisdictional determination of arbitrability, and on that basis affirmed the vacatur of the award rendered against them.

There is no logical or policy justification for treating claimants and respondents differently in this important respect. If a *respondent* does not lose its right to a *de novo* judicial post-award determination of arbitrability by filing a jurisdictional objection, surely a *claimant* should not lose that right by responding to that objection.

Fifth, it is critical for a court, in finding clear and unmistakable evidence of an agreement based simply on party conduct, to consider the options that are available to that party in taking the act it did. Mongolia having raised a jurisdictional objection, what courses of action did Beijing Shougang have open to it? Surely, it cannot be expected to remain silent, essentially acquiescing in the objection and having its claim dismissed. Nor can it be expected to go first to court in quest of a declaratory judgment that its claim was arbitrable.

In short, Beijing Shougang had one and only one course of action available to it. Taking that only

---

[16] *See First Options*, 514 U.S. at 943.

available course of action cannot constitute evidence of a delegation, much less clear and unmistakable evidence of one.

ARGUMENT

I. BY ADDRESSING MONGOLIA'S JURISDICTIONAL OBJECTION, BEIJING SHOUGANG DID NOT CLEARLY AND UNMISTAKABLY DELEGATE TO THE TRIBUNAL PRIMARY AUTHORITY TO DETERMINE ARBITRAL JURISDICTION

The Court of Appeals predicates its finding of clear and unmistakable evidence on Claimant's having agreed to bifurcate the proceedings and submit the jurisdictional defense to the tribunal. The Court advances this argument repeatedly:

> [W]e hold that Petitioners-Appellants indisputably put the issue of the arbitrability of their claims to the arbitral tribunal when they *consented*, along with Mongolia, to the arbitration proceeding in two phases . . . In doing so, the Parties *agreed* to submit arguments as to the appropriate reach of the arbitrators' jurisdiction over Petitioners'-Appellants' claims under the Treaty to the arbitral tribunal.[17]
>
> . . .

[17] *Beijing Shougang*, 11 F.4th at 147–48 (emphasis added).

> [T]he Parties *agreed* that the first phase of the arbitration would cover jurisdictional and liability disputes. We now hold that this agreement was sufficient in the context of the present arbitration to evidence the Parties' intent to submit arbitrability issues to arbitration.[18]
>
> . . .
>
> [W]e have little doubt then that in *agreeing* that the tribunal would hear jurisdictional issues, Plaintiffs-Appellants knew they were submitting the key issue of arbitrability to resolution by the tribunal.[19]

Under the Second Circuit's theory, a claimant is deemed to have made a delegation, and relinquished its right to *de novo* post-award judicial review of arbitrability, whenever it is compelled to answer a respondent's jurisdictional objections. This theory fundamentally departs from the Court's instructions in *First Options*.

A. Beijing Shougang Took No Action Suggestive of a Delegation

Finding a delegation under *First Options* by definition presupposes that the party against which a putative delegation is invoked said or did something that in itself evidences an intention to relinquish its right to independent judicial review of arbitrability. *First Options* spoke of an agreement by both parties to

---

[18] *Id.* at 154 (emphasis added).

[19] *Id.* at 155 (emphasis added).

delegate primary authority to the tribunal to determine arbitrability questions.[20] In the present case, Beijing Shougang evidenced nothing of the kind. When a respondent challenges arbitral jurisdiction, a claimant has no choice but to respond. Its response is nothing more than that—a response to a challenge. It does not amount in the least to clear and unmistakable evidence of an agreement to delegate arbitrability. In fact, it is not evidence of a delegation *at all*.

B. A Tribunal does not Derive its Authority to Determine its Own Jurisdiction from a Party's Arguing Jurisdiction Before it

The notion that, by addressing the issue of arbitral jurisdiction (or agreeing on a schedule to do so), Beijing Shougang gave clear and unmistakable evidence of a delegation is further undermined by the fact that the United States recognizes the principle of competence-competence, as defined earlier.[21] Arbitral tribunals acquire their authority to determine their own jurisdiction the moment they are empaneled.[22] No action whatsoever from the parties is needed in order for that jurisdiction to arise.

As for the *exercise*, as distinct from the *existence*, of competence-competence, again Claimant bears no

---

[20] *First Options*, 514 U.S. at 944.

[21] *See supra* note 10 and accompanying text.

[22] *See*, *e.g.*, Restatement (Third) U.S. Law of Int'l Comm. Arb. § 2.8 (Am. Law Inst. 2019); Born, *supra* note 12, at 1153.

responsibility. All that is needed to trigger a tribunal's exercise of competence-competence is the filing of a jurisdictional objection by the respondent, the very step Mongolia took in this case. Not only is Claimant not the party that invited the tribunal's inquiry into arbitral jurisdiction, but it could do nothing to prevent it. Indeed, once Mongolia triggered the exercise of competence-competence, the tribunal was not only authorized, but required, to exercise it. Under these circumstances, to say that Claimant "agreed" to the tribunal's determination of its own jurisdiction is meaningless.

C. The Second Circuit Went So Far as to Find Clear and Unmistakable Evidence of Delegation in a Claimant's Initiation of Arbitration and Assertion of Arbitral Jurisdiction

The Second Circuit's position is even more extreme than may at first appear. In its decision, the Court restates approvingly the district court's finding that Beijing Shougang "initiated the arbitration and argued for the arbitrators' jurisdiction from their very first submission," and on that basis it is not entitled to independent review of the award.[23] In other words, Claimant made a delegation merely by "*initiat[ing] the arbitration*," and in that context "*argu[ing] for the arbitrators' jurisdiction.*"[24] But Claimant obviously

---

[23] *Beijing Shougang*, 11 F.4th at 152.

[24] *Id*. (emphasis added).

cannot have recourse to arbitration without "initiating" it. Nor can Claimant, both as a legal and a practical matter, pursue arbitration without "argu[ing] for the arbitrators' jurisdiction." This is especially so in investor-State arbitration where the claimant clearly bears the burden of establishing the tribunal's jurisdiction over the dispute.[25]

Obviously, if initiating arbitration and asserting arbitral jurisdiction amount in themselves to clear and unmistakable evidence of a delegation, then claimants would be deemed to have consented to delegation *in every single case*. Nothing could be further from what this Court said in *First Options*.

D. The Second Circuit's Reasoning Is in Direct Conflict with *First Options* in which this Court Expressly Held that Arguing Jurisdiction Before a Tribunal Is *Not* Clear and Unmistakable Evidence of a Delegation

The Second Circuit's error is all the more egregious given that in *First Options* this Court squarely rejected the very proposition upon which the Second Circuit relies:

---

[25] *See*, *e.g.*, Frédéric Sourgens, Kabir Duggal & Ian Laird, Evidence in International Investment Arbitration 37–41 (2018) ("The party invoking the jurisdiction of an investor-state tribunal—typically the investor—will . . . need to submit evidence that there is in fact a consent to arbitration by the host state. It must then submit evidence that the dispute which the investor is proposing to resolve by arbitral means falls within this consent. . . .").

> First Options relies on the Kaplans' filing with the arbitrators a written memorandum objecting to the arbitrators' jurisdiction. *But merely arguing the arbitrability issue to an arbitrator does not indicate a clear willingness . . . to be effectively bound by the arbitrator's decision on that point.*[26]

In other words, a party does *not*, by arguing jurisdiction before a tribunal, relinquish its right to *de novo* post-award review. Put simply, in purporting to uphold the *First Options* decision, the Court of Appeals actually flouted it.

E. The Fact that an Award is "Final" Does Not Bar a Party from Challenging Arbitral Jurisdiction in a Vacatur Action

The Second Circuit purports to buttress its position on the ground that, at the close of briefing, the Claimant specifically requested the tribunal to issue an order for the purpose of "remind[ing] the parties that any award rendered by the tribunal is *final* and binding."[27] This request, according to the Court, "strongly belies their argument on appeal that they did not believe that the tribunal had authority to conclusively determine jurisdictional issues."[28]

This argument is devoid of any merit. It is universally understood that describing an arbitral award as

---

[26] *First Options*, 514 U.S. at 946 (emphasis added).

[27] *Beijing Shougang*, 11 F.4th at 158 (emphasis in original).

[28] *Id.*

"final" signifies nothing more than that, upon issuance of an award, the *merits* of the dispute have been conclusively established and cannot be reopened.[29] That an award is "final" does *not* mean that a tribunal's finding on arbitrability is shielded from post-award judicial review—and under *First Options*, presumptively *de novo* post-award judicial review. Indeed, the award in *First Options* was obviously also final, given that the arbitration had concluded, yet the Court afforded the Kaplans *de novo* post-award review. There is, in short, no inconsistency whatsoever between an award being "final" and an award being subject to independent judicial review in a vacatur action.

II. THE DECISION BELOW IS HIGHLY CONSEQUENTIAL

Jurisdictional objections are routinely asserted in international arbitration, and investor-State arbitration in particular.[30] "Investor" and "investment" are jurisdictional elements in investment arbitration,[31] and

---

[29] *See*, *e.g.*, Restatement (Third) U.S. Law of Int'l Comm. Arb. § 1.1 (Am. Law Inst. 2019) ("An 'arbitral award' is a decision in writing by an arbitral tribunal that sets forth the final and binding determination of the merits of a claim, defense, or issue, regardless of whether that decision resolves the entire dispute before the tribunal.").

[30] *See*, *e.g.*, Fredric G. Sourgens, *By Equal Contest of Arms: Jurisdictional Proof in Investor-State Arbitrations*, 38 N.C.J. Int'l L. 875, 876 (2012) ("The jurisdiction of investor-state tribunals is often the central issue in investor-state arbitrations").

[31] *See*, *supra* note 11.

States regularly argue that those elements are not met. States have a strong interest in defeating a claim on jurisdictional grounds because, if the case goes to the merits, they will have to defend governmental measures against any number of challenges, including that they are "unfair" and "inequitable." If a State loses on the merits, it risks incurring massive liabilities for which investor-State arbitration is known.

Bifurcation is likewise common since the outcome of an early phase of the proceedings may obviate the need for the arbitration to proceed further. Bifurcation does not in the least change the nature or stakes of the jurisdictional inquiry. It is merely a scheduling device, akin to a decision by a trial court to have a separate trial on liability and then, if needed, a trial on damages.

The fact that jurisdictional objections are ubiquitous in international arbitration makes the Second Circuit's error particularly consequential. Under the Court's logic, a claimant loses its presumptive right to independent judicial review of arbitrability every time a respondent objects to the tribunal's jurisdiction and the claimant responds. This is a recipe for finding a delegation of authority to determine arbitral jurisdiction in every case. Indeed, the logic of the Circuit's position is that a claimant loses the right to *de novo* review merely by initiating an international arbitration, an obviously absurd result.

This cannot be what this Court had in mind when it held in *First Options* that parties have a right in all

cases to seek independent post-award judicial review of a tribunal's jurisdictional finding, and that they lose that right only if they clearly and unmistakably so agree.[32] The Second Circuit's ruling eviscerates the "clear and unmistakable" evidence exception to the *First Options* rule and the central role of party consent on which it is based.

III. BECAUSE U.S. LAW DOES NOT VIEW A TRIBUNAL'S AUTHORITY TO DETERMINE ITS JURISDICTION AS EXCLUSIVE, RECOURSE TO A TRIBUNAL FOR A JURISDICTIONAL DETERMINATION CANNOT BAR POST-AWARD JUDICIAL REVIEW OF THAT DETERMINATION

The position taken by the Second Circuit is also at odds with the very meaning of "competence-competence" in U.S. law, which prescribes that an arbitral tribunal has inherent authority to determine its jurisdiction if it is challenged. Competence-competence is described in U.S. law as "positive" in nature.[33] Under positive competence-competence, if a respondent challenges the jurisdiction of a tribunal, the tribunal may itself proceed to rule on the question. Positive competence-competence has very considerable value since, if a tribunal could not determine its jurisdiction once challenged, it would need to suspend proceedings and await a definitive ruling on the matter from a

---

[32] *First Options*, 514 U.S. at 943.

[33] *See supra* note 13.

competent court. Requiring tribunals to stop in their tracks the moment a jurisdictional objection is lodged would defeat some of the key reasons why parties turn to arbitration in lieu of litigation in the first place, notably economy in time and cost.

However, some jurisdictions around the world, most notably France, also subscribe to a "negative" competence-competence. French courts, at least at the outset of arbitration, can avoid enforcing an arbitration agreement only if they can find that an arbitration agreement is "*manifestly* invalid or inapplicable,"[34] an especially difficult showing to make. U.S. courts by contrast do not practice negative competence-competence.[35] U.S. Supreme Court case law clearly establishes that, if the defendant in a court action challenges the court's jurisdiction on the basis of a putatively applicable arbitration clause, and the plaintiff challenges the validity or applicability of the agreement, then, absent a delegation, the court will entertain the challenge without any advance deference to any tribunal that may thereafter be constituted.[36]

---

[34] Code de Procédure Civile [C.P.C.] [Civil Procedure Code] art. 1448 (Fr.).

[35] *See* Cook *supra* note 13, at 25 (explaining that U.S. law does not "even contemplat[e] negative kompetenz-kompetenz").

[36] *See*, *e.g.*, *BG Grp., PLC* v. *Republic of Arg.*, 572 U.S. 25, 34 (2014) ("[C]ourts presume that the parties intend courts, not arbitrators, to decide . . . disputes about 'arbitrability' " unless "the parties clearly and unmistakably provide otherwise."); *see also Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002) (same); *Rent-A-Ctr.*, 561 U.S. at 69 n.1 (same).

Importantly, France—and those jurisdictions that have followed suit—strictly confine negative competence-competence to the *pre-arbitration* stage, as noted, denying enforcement of an arbitration agreement only if the agreement is shown to be manifestly unenforceable. However, French law considers the principle of consent so fundamental to international, as well as domestic, arbitration that it guarantees *de novo* judicial review of arbitrability at the *post-award* stage.[37] That the jurisdiction best known for the notion of negative competence-competence insists that it have no application in post-award actions to annul an award should give this Court great pause before introducing it into U.S. law, as the Court of Appeals in this case seeks to do.

This understanding is confirmed by the very terms of the Federal Arbitration Act, according to which arbitration agreements are valid and enforceable, "save upon such grounds as exist at law or in equity for the revocation of any contract."[38] Similarly, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Award presupposes that a court that is asked to enforce an arbitration agreement must do so, "unless it finds that the said agreement is null and

---

[37] *See* Emmanuel Gaillard & Yas Banifatemi, *Negative Effect of Competence-Competence: The Rule of Priority in Favor of the Arbitrators*, *in* Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice 257, 262 (Emmanuel Gaillard & Domenico Di Pietro eds., 2008); Born, *supra* note 12, at 1202; Cook, *supra* note 13, at 30.

[38] Federal Arbitration Act, 9 U.S.C. § 2 (2022).

void, inoperative or incapable of being performed."[39] If a tribunal's competence-competence were exclusive, a court could not, as the FAA and the New York Convention prescribe, determine whether an arbitration agreement is valid and enforceable, either before or after an arbitration.

Treating submission of a jurisdictional question to a tribunal as depriving a party of post-award *de novo* review of arbitrability is thus simply inconsistent with the U.S. conception of competence-competence. If a tribunal's authority to determine arbitral jurisdiction is not exclusive of a court's authority to make that determination, then by definition submission of that question to a tribunal cannot be viewed as clear and unmistakable evidence of a delegation.

IV. TO TREAT CLAIMANTS AS HAVING RELINQUISHED THEIR RIGHT TO POST-AWARD REVIEW OF ARBITRABILITY BY SUBMITTING TO A TRIBUNAL'S EXERCISE OF COMPETENCE-COMPETENCE CREATES AN UNACCEPTABLE ASYMMETRY BETWEEN THE PARTIES

As seen, the Court of Appeals in this case unjustifiably construed as clear and unmistakable evidence of a delegation Beijing Shougang's joining issue before the tribunal on the jurisdictional question. But built

[39] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, art. II(3), 21 U.S.T. 2517, 330 U.N.T.S. 38; *see also* 9 U.S.C. § 201.

into the Second Circuit's analysis is also a deeply troubling inequality in treatment of claimants and respondents.

It has never been supposed in U.S. law that, when a respondent lodges a jurisdictional objection before a tribunal, loses on that issue and thereafter also loses on the merits, it forfeits its right to independent post-award judicial review of the claim's arbitrability. This Court's opinion in *First Options* makes that perfectly plain. There, Mr. and Mrs. Kaplan objected to arbitral jurisdiction in the proceeding initiated against them by First Options. They unsuccessfully argued that, as non-signatories, they were not bound by the arbitration agreement signed by their wholly-owned company. Unsuccessful in that challenge, they reserved their rights and proceeded to participate fully in the proceedings, albeit unsuccessfully. At no level of the proceedings in that case was it ever suggested that, by laying their objection before the tribunal, the Kaplans had relinquished their right to post-award review of arbitrability. On the contrary, they were allowed to seek vacatur of the award on that basis and have that determination made independently by the court. In fact, this Court, exercising independent review, ultimately ruled in their favor, finding that they had not in fact consented to arbitration, and proceeded to affirm vacatur of the award.[40]

First Options thus confirms, if there was any doubt, that there is no inconsistency between arguing

---

[40] *First Options*, 514 U.S. at 947–49.

jurisdiction, on the one hand, and enjoying *de novo* judicial determination of arbitrability, on the other. The Kaplans' success also shows how important a role *de novo* review of a tribunal's determination of arbitrability plays in vindicating the principle of party consent.

There is no justification for treating *claimants* differently in this regard than *respondents*. But that is precisely what the Second Circuit has done. If a *respondent* does not lose its right to *de novo* review when it files a jurisdictional objection, then a *claimant* should not lose that right when it responds. Both as a matter of logic and policy, claimants are as entitled to an independent judicial review of arbitrability as respondents, and there is no suggestion in *First Options* to the contrary.

V. A PARTY CANNOT BE DEEMED TO HAVE CLEARLY AND UNMISTAKABLY EVIDENCED AN INTENTION TO RELINQUISH ITS PRESUMPTIVE RIGHT TO *DE NOVO* REVIEW BY TAKING THE ONLY ACTION IN THE PROCEEDING AVAILABLE TO IT

When the respondent in an arbitration presents the tribunal with a jurisdictional objection, as Mongolia did here, the claimant does not have many courses of action open to it. It cannot be supposed that the claimant will acquiesce in that objection. That would bring to an end on non-arbitrability grounds an arbitral proceeding on a claim that the claimant believed, and was prepared if necessary to prove, was arbitrable.

Nor can a claimant be required at that point to turn to a court for a jurisdictional ruling in its favor. First of all, neither FAA Section 4[41] nor FAA Section 206[42] was available in this case since Mongolia was not refusing to arbitrate. No less important is the fact that in *First Options* this Court flatly rejected the notion that a party unhappy with a tribunal's resolution of a jurisdictional issue should be expected to go to court for a jurisdictional ruling in its favor. The Court could not have been clearer. It specifically held that, even if in that case the Kaplans could have gone to court, as First Options argued, that "simply *does not say anything* about whether the Kaplans intended to be bound by the arbitrators' decision."[43] In the present case, the Second Circuit simply ignores this holding.

The proper course of action for a *respondent*, such as the Kaplans, for whom establishing the absence of jurisdiction is key, is to present its jurisdictional arguments to the tribunal and, should it lose, preserve its objection and participate in the proceedings. If unsuccessful, it may then seek *de novo* judicial review of the tribunal's jurisdictional determination, as the Kaplans successfully did.[44] By the same token, the proper course of action for a *claimant*, such as Beijing Shougang, faced with a jurisdictional objection, is

---

[41] 9 U.S.C. § 4.

[42] 9 U.S.C. § 206.

[43] *First Options*, 514 U.S. at 946.

[44] *Id*. at 946–47.

likewise to present its arguments on jurisdiction to the tribunal and, should it lose and have its claim dismissed, seek through a vacatur proceeding *de novo* judicial review of the tribunal's jurisdictional ruling.

Put simply, Beijing Shougang, faced with Mongolia's jurisdictional objection, did the one and only thing it could. Recognizing the tribunal's competence-competence, it argued the jurisdictional matter before it. It had no other choice. Its taking that action therefore cannot reasonably be construed as an implied surrender of the right to an independent judicial determination of arbitrability.

Claimants would have had no idea—nor should they—that when they are met with a jurisdictional objection and then sensibly respond to that objection—which is in fact their only available course of action—they would be deemed to have clearly and unmistakably evidenced an intention to relinquish their right to post-award *de novo* review of arbitrability.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari in this case. If it does, it will have the opportunity to ensure that courts do not, as the lower courts here have done, eviscerate *First*

Options and the fundamental principle of party consent that undergirds it.

Respectfully submitted,

MATTHEW E. DRAPER
Counsel of Record
CORINNE E. ATTON
DRAPER & DRAPER LLC
200 Park Avenue
17th Floor
New York, NY 10166
(347) 442-7788
matthew.draper@draperllc.com

Counsel for Amicus Curiae
Professor George A. Bermann