No. 22-102

In The
Supreme Court of the United States

JOHN DOE & JANE DOE,

Petitioners,

v.

AIRBNB, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court of Florida

BRIEF OF *AMICUS CURIAE* PROFESSOR GEORGE A. BERMANN IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

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Professor Bermann is 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; co-editor-in-chief of the *American Review of International Arbitration*; and founding

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[1] Each party, through their counsel of record, has filed a blanket consent to the filing of amicus briefs in this case. Notice of the filing of this brief was given to each party's counsel of record. Additionally, certain disclosures regarding contributions this brief are required. Counsel for a party has not authored this brief in whole or in part. Counsel for a party has also not made a monetary contribution intended to fund the preparation or submission of the brief, and no person or entity other than other than the *amicus curiae*, its members, or its counsel has made such a monetary contribution to the preparation or submission of the brief.

member of the ICC International Court of Arbitration's Governing Body.

Professor Bermann is interested in this case because it addresses a central but unsettled issue of domestic and international arbitration law: Whether incorporation by reference of rules of arbitral procedure in arbitration clauses constitutes "clear and unmistakable" evidence that the parties intended "to arbitrate arbitrability," within the meaning of *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995). The United States Supreme Court has recognized that the issue of who—court or arbitrator—has primary responsibility to decide arbitrability "can make a critical difference to a party resisting arbitration" by removing a party's right to have a court determine the arbitrability of a dispute. *Id.* at 942.

SUMMARY OF ARGUMENT

Since *First Options*, the law has been settled that "[t]he question whether the parties have submitted a particular dispute to arbitration, *i.e.,* the '*question of arbitrability*' is an 'issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise.'" *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) (internal citations omitted). The *First Options* rule is based on two fundamental principles of arbitration.

The first is the principle of party consent. This Court repeatedly has held that "arbitration is a matter of contract" and that "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Howsam*, 537 U.S. at 83 (quoting *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960)).

The second is the principle that a party has the right to have a court determine whether consent to arbitration has been given. This right to a judicial determination of arbitrability is fundamental to the legitimacy of arbitration, precisely because it implicates party consent. Under a so-called "delegation," the arbitrability of a dispute ends up being determined by a body whose authority stems from the very arbitration agreement whose existence, validity, or applicability is in question.

In *First Options*, this Court struck an important balance. It recognized that "party autonomy" entitles parties to allocate issues of arbitral jurisdiction between courts and arbitral tribunals and, more particularly, to delegate to

arbitrators issues that courts ordinarily would decide. On the other hand, it viewed the question of whether the parties validly agreed to arbitrate as so fundamental as to require that judicial authority over that question be preserved unless the parties "clearly and unmistakably" agree otherwise.

While this issue has been litigated in federal courts, state courts have also taken conflicting positions. In the instant case, the court below found that a provision of rules of arbitral procedure that the parties incorporated by reference into their arbitration agreement authorizing tribunals to determine their own jurisdiction – known as a "competence-competence" clause – constitutes "clear and unmistakable" evidence of a delegation. However, such a provision falls well short of the clear and unmistakable evidence required by *First Options* to strip courts of the authority that they presumptively have to determine issues of arbitrability for several reasons.

First, the competence-competence text in this case, as in virtually all cases, simply confers authority on an arbitral tribunal to determine arbitrability. It says nothing about the presumptive authority and responsibility of courts to determine arbitrability.

Second, the term competence-competence has a well-established meaning in U.S. law. It confers on arbitral tribunals jurisdiction to determine their own jurisdiction. But while competence-competence *empowers* tribunals, in U.S. law it does not *disempower* courts.

Third, the proposition that competence-competence language in incorporated rules of

procedure amounts *per se* to "clear and convincing" evidence of a delegation undermines the basic principle enunciated in *First Options*. Virtually every set of arbitration rules and every modern international arbitration law now contain a competence-competence provision.

Finally, even if general competence-competence language could be viewed as a delegation, it still cannot be regarded as "clear and unmistakable" when it is buried in a lengthy and detailed set of incorporated procedural rules. For an intention to be "clear and unmistakable," it must be conspicuous. The way to make delegation language conspicuous is to place it in the arbitration agreement itself, not in a separate set of procedural rules understood as addressing only how the arbitration is to be conducted, rather than the basic relationship between a court and an arbitral tribunal in determining the arbitrability of a dispute.

For all these reasons, neither the letter nor the spirit of *First Options* permits a simple competence-competence provision in a set of incorporated arbitral rules to be treated as "clear and unmistakable" evidence of an intention to deprive parties of an independent judicial determination of arbitrability.

ARGUMENT

I. *First Options* entitles parties to an independent judicial determination of arbitrability unless they have "clearly and unmistakably" agreed otherwise.

Issues of arbitrability involve questions that are fundamental to the legitimacy of the arbitration process. "Gateway" issues, such as existence of a valid agreement, who is bound by that agreement, and whether the dispute at issue is covered by that agreement, implicate the consent of the parties to submit a dispute to an arbitral rather than a judicial forum.

A. The *First Options* Test.

In some cases, a party initially raises an issue of arbitrability before an arbitral tribunal. The tribunal, exercising its inherent power to determine its own jurisdiction (competence-competence), makes a jurisdictional determination. If it finds jurisdiction and issues an award, the losing party may seek to vacate the award. The court, upon request, will then make a *de novo* determination of arbitrability.

For example, in *First Options*, the Kaplans argued to the arbitral tribunal that they were not bound by an arbitration agreement concluded by their wholly-owned company. The tribunal rejected their argument and rendered an award against both them and their company, and the federal district court confirmed the award. On appeal, the Court of Appeals reversed, deciding that the couple was not obligated to arbitrate. The Supreme Court unanimously

affirmed, agreeing that the Kaplans had not "clearly and unmistakably" delegated to the arbitrators primary authority to determine arbitrability. *First Options*, 514 U.S. at 946. *Id.* at 944–45 (internal citations omitted).

In other cases, a party that has instituted litigation is met with a jurisdictional defense based on an arbitration agreement. If the plaintiff then contests the enforceability of the arbitration agreement, the court must independently resolve that question. That was the case in *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010). There, the Supreme Court reaffirmed that, to constitute a delegation, the language used by the parties must unambiguously establish their "manifestation of intent" to withdraw from courts the authority to determine arbitrability. *Id.* at 69 n.1.

Thus, regardless of whether a party chooses to contest arbitrability initially before a tribunal or a court, it is entitled to an independent judicial determination of arbitrability—an entitlement that cannot be overcome with anything less than "clear and unmistakable" evidence.

B. Application by the federal courts.

Litigants have argued that if an arbitration agreement incorporates by reference rules of procedure containing competence-competence language, that fact renders "clear and unmistakable" the parties' intention to give tribunals exclusive authority to determine arbitrability. Though this view

has won favor among the U.S. Courts of Appeals,[2] none of those courts' decisions provides any—let alone persuasive—analysis for reaching that conclusion. They instead assume without any basis that if arbitrators *have* authority to determine arbitrability, then courts necessarily *do not*. In one of the earliest such decisions, the Eighth Circuit said only:

> [T]he parties expressly agreed to have their dispute governed by the NASD Code of Arbitration Procedure. . . . [W]e hold that the parties' adoption of this provision *is* a "clear and unmistakable" expression of their intent to leave the question of arbitrability to the arbitrators.

FSC Sec. Corp. v. Freel, 14 F.3d 1310, 1312–13 (8th Cir. 1994). Worse yet, the great majority of the federal appellate decisions that followed do not even purport to address the issue. All they do is "join" the view of another circuit. *E.g.*, *Simply Wireless, Inc. v. T-Mobile US, Inc.*, 877 F.3d 522, 528 (4th Cir. 2017).

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[2] *See, e.g.*, *Oracle Am., Inc. v. Myriad Grp. A.G.*, 724 F.3d 1069, 1074–75 (9th Cir. 2013) (explaining the "prevailing view" is that incorporation of the UNCITRAL rules "is clear and unmistakable evidence that the parties agreed the arbitrator would decide arbitrability"); *Green v. SuperShuttle Int'l, Inc.*, 653 F.3d 766, 769 (8th Cir. 2011) ("By incorporating the AAA Rules, the parties agreed to allow the arbitrator to determine threshold questions of arbitrability."); *Awuah v. Coverall North Am., Inc.*, 554 F.3d 7, 11 (1st Cir. 2009) (explaining incorporation of AAA rules provides "clear and unmistakable evidence" that parties meant to arbitrate arbitrability).

Despite the view of the circuits, a district court in one of the few federal circuits that has not yet spoken has forcefully resisted the trend:

> It is hard to see how an agreement's bare incorporation by reference of a completely separate set of rules that includes a statement that an arbitrator has authority to decide validity and arbitrability amounts to "clear and unmistakable" evidence that the contracting parties agreed to . . . preclude a court from answering them. To the contrary, that seems anything but "clear." And the AAA rule itself does not make the purported delegation of authority any more "clear" or "unmistakable." The AAA rule simply says that the arbitrator has the authority to decide these questions. It does not say that the arbitrator has the sole authority, the exclusive authority, or anything like that. The language of the rule does not suggest a *delegation* of authority; at most it indicates that the arbitrator possesses authority, which is not the same as an agreement by the parties to give him sole authority to decide those issues.

Taylor v. Samsung Elecs. Am., Inc., No. 19 C 4526, 2020 WL 1248655, at *4 (N.D. Ill. Mar. 16, 2020).[3]

C. Application by Florida and other state courts.

The situation is different at the state court level, where some courts have rejected the notion that the incorporation by reference of a generic competence-competence clause establishes "clear and unmistakable" evidence under *First Options*. When the Supreme Court of Florida decided the present case, it had before it conflicting decisions among the lower state courts. The intermediate appellate court in this case rejected the notion that the parties' agreement to arbitrate future disputes pursuant to the American Arbitration Association's Commercial Arbitration Rules and Supplementary Procedures for Consumer Related Disputes (the "AAA Rules") constituted a delegation merely because they contained in Article 7 a standard competence-competence provision, stating: "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 or the arbitrability of any claim or counterclaim." *Doe v. Natt*, 299 So.3d 599, 602

[3] Although a district court in another circuit felt obliged to follow the Court of Appeals' adoption of the prevailing view, it called that view "incongruous," "ridiculous" and "bordering on the absurd." *Ashworth v. Five Guys Ops., LLC*, No. 3:16-06646, 2016 WL 7422679, at *3 (S.D. W. Va. Dec. 22, 2016).

(Fla. Dist. Ct. App. 2020). The Second District did not read this language as "clear and unmistakable" evidence of a delegation for several reasons.

First, the Second District pointed out that the parties' agreement was "itself . . . silent on the issue of who should decide arbitrability." *Id.* at 606. Although the agreement incorporated the AAA Rules by reference, the reference to "a generic body of procedural rules" was "not a very helpful answer" to the question: "Who should decide if this dispute is even subject to arbitration under *this* contract?" *Id.* (emphasis added). Second, the Second District found the parties' reference to the AAA Rules "broad, nonspecific, and cursory." *Id.* Since the parties' agreement "did not quote or specify any particular provision" in the AAA Rules, the Second District reasoned it would be "a rather obscure way of evincing 'clear and unmistakable evidence.'" *Id.* Third, the Second District posited out that even if "passing reference to . . . the AAA Rules sufficiently showed an intent that those rules (whatever they may say) *could* supplant the trial court's presumed authority to decide arbitrability," that does not mean that "the AAA Rules, in fact, *did* so." *Id.* at 607 (emphasis in original). The Second District explained that while the "pertinent arbitration rule Airbnb relies upon . . . confers an adjudicative power upon the arbitrator . . . it does not purport to make that power exclusive." *Id.* Thus, the Second District concluded: "In our view, the parties'

'manifestation of intent' in the . . . agreement fell short of the clear and unmistakable evidence of assent that *First Options* requires." *Id.* at 607 (internal citation omitted).

Thereafter, and changing course from its previous approach, the Fourth District rallied to the well-reasoned views expressed by the Second District, concluding that a "general reference to 'AAA rules' did not 'clearly and unmistakably' supplant the trial court's authority to decide what is arbitrable." *Fallang Family Ltd. P'ship v. Privcap Cos., LLC*, 316 So. 3d 344, 349 (Fla. Dist. Ct. App. 2021). After distinguishing other cases involving agreements with specific incorporations, that court explained: "[I]n this case, the arbitration agreement was one paragraph stating merely that 'the AAA rules and procedure shall apply.' Like the Second District, we conclude that 'the reference to the AAA Rules was broad, nonspecific, and cursory.'" *Id.* at 350 (citing *Natt*, 299 So. 3d at 606).

However, other intermediate appellate courts in Florida disagreed and adhered to the view prevailing in the federal courts. For example, in *Reunion West Development Partners, LLLP v. Guimaraes*, 221 So. 3d 1278, 1280 (Fla. Dist. Ct. App. 2017), the Fifth District quoted the statement by a federal court of appeals that "when . . . parties explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability, the incorporation serves as clear and unmistakable evidence of the parties' intent to delegate such issues to an arbitrator." Similarly, in *Glasswall, LLC v. Monadnock Construction, Inc.*, 187 So. 3d 248, 251

(Fla. Dist. Ct. App. 2016), the Third District took the position it considered to be consistent with "the majority of federal courts."

While the Florida Supreme Court, over a strong dissent, has now spoken, favoring the latter line of cases, courts in several other states have ruled differently.[4] The Montana Supreme Court, for example, observed that one would consult the AAA Rules only for the purposes of "implementation of procedural and logistical rules," and nothing more. *Glob. Client Sols.*, 367 P.3d at 369. Intermediate state appellate courts in California[5], New Jersey[6], and South Dakota[7] have agreed.

Thus, there currently exists a sharp division among state courts on the proper application this Court's ruling in *First Options* that delegations of authority are not to be given effect unless stated in clear and unmistakable terms. This enduring division among state courts on the interpretation and application of the Federal Arbitration Act should concern this Court. Such cases are coming and will continue to come before state courts. The ongoing

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[4] *E.g.*, *Glob. Client Sols., LLC v. Ossello*, 367 P.3d 361, 369 (Mont. 2016).

[5] *E.g.*, *Ajamian v. CantorCO2e L.P.*, 137 Cal. Rptr. 3d 773, 782–783 (Cal. Ct. App. 2012); *Gilbert St. Developers, LLC v. La Quinta Homes, LLC*, 174 Cal. App. 4th 1185, 1195–96 (Cal. Ct. App. 2009).

[6] *Morgan v. Sanford Brown Inst.*, 137 A.3d 1168, 1181–82 (N.J. 2016).

[7] *Flandreau Pub. Sch. Dist. #50-3 v. G.A. Johnson Constr., Inc.*, 701 N.W.2d 430, 437 n.6 (S.D. 2005).

divergence between the case law of the state and federal courts on a matter of federal law is concerning.

II. Competence-competence language in arbitration rules does not constitute "clear and unmistakable" evidence under *First Options*.

There are four reasons why the mere presence of a competence-competence provision in procedural rules incorporated by reference in an arbitration clause cannot be read as "clear and unmistakable" evidence of a delegation. First, the language of the competence-competence provision in this case, as in others, fails to support the proposition that the parties foreswore their right to a judicial determination of arbitrability. Second, competence-competence, as understood in U.S. law, signifies only that tribunals may determine their authority; however, it does not make that authority exclusive. Third, treating standard competence-competence language as sufficient to establish "clear and unmistakable" evidence reverses *First Options*' strong presumption that parties are entitled to an independent judicial determination of arbitrability. Fourth, to be "clear and unmistakable," delegation language, however drafted, belongs in an arbitration agreement itself, not buried in referenced rules of arbitral procedure.

A. The competence-competence language in this case.

The standard competence-competence clause in Rule 7 of the AAA confers on arbitrators' the authority

to determine their own jurisdiction. But it gives no indication that it also divests courts of their presumptive authority to make that determination if so requested. To conclude that Rule 7 constitutes a delegation, one must read into the Rule the word "exclusive." That is a big and serious leap lacking textual support.

It is not necessary, in order for competence-competence language to have real utility, to read into it a waiver by the parties' of their right to an independent determination of arbitrability or the courts' loss of authority over the matter. But for such language, tribunals whose jurisdiction is challenged on arbitrability grounds might be stopped in their tracks and have to await a court's determination of the matter. The resulting delay and expense would compromise two of arbitration's strongest selling points: speed and economy. Competence-competence language happily serves to avoid that result.

B. The meaning of competence-competence in U.S. law.

The view that a competence-competence clause necessarily excludes judicial authority to determine an arbitrability question misconceives that term's meaning in U.S. law. Competence-competence under U.S. law has never been understood as depriving courts of the authority to determine the arbitrability of a dispute, much less "clearly and unmistakably." In U.S. law, competence-competence does no more than authorize arbitral tribunals to determine their own

authority.[8] As noted above, that authority is neither negligible nor to be taken for granted. Avoiding the need to suspend proceedings and await a court ruling on the matter contributes to the efficacy of arbitration as a dispute resolution mechanism.

Even a casual reading of the key instruments of domestic and international arbitration law reveals the fallacy underlying the notion that, if tribunals have authority to determine their jurisdiction, courts necessarily do not. In the FAA, 9 U.S.C. § 4, Congress provided that courts should compel arbitration only once they were "s*atisfied that the making of the agreement for arbitration … [was] not in issue*." (emphasis added). Similarly, Article II of the New York Convention, to which the U.S. has been a party since 1970, directs courts to withhold enforcement of an arbitration agreement if they find the agreement to be "*null and void*, *inoperative or incapable of being performed*." Art. II, June 10, 1958, 330 U.N.T.S. 3 (emphasis added). By the time those instruments were produced, the competence-competence doctrine was already well established in this country. If competence-competence ousted the authority of U.S. courts to determine arbitrability, they could not

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[8] Ashley Cook, *Kompetenz-Kompetenz: Varying Approaches and a Proposal for a Limited Form of Negative Kompetenz-Kompetenz*, 2014 PEPP. L. REV. 17, 25 (2014) (explaining U.S. law does not "even contemplat[e] negative Kompetenz-Kompetenz"); William Park, *Challenging Arbitral Jurisdiction: The Role of Institutional Rules*, No. 15-40 Bos. Univ. Sch. of L. 16 (2015) ("[C]ourts will provide early decisions on the validity of a dispute resolution clause alleged to be void *ab initio* because, for instance, the person signing the contract lacked authority to commit the company sought to be bound.").

possibly perform the function that the FAA and the New York Convention require of them. In sum, the principle of competence-competence in U.S. law has never entailed the corollary that, if arbitrators *may* decide arbitrability, then courts *may not*.

By contrast, other jurisdictions, notably France, define competence-competence differently, attributing to it both a "positive" dimension (vesting tribunals with authority to determine arbitrability) and a "negative" dimension (divesting courts of that authority).[9] This sharp divide between the U.S. and French versions of competence-competence pervades the international arbitration literature.[10]

The delegation question received sustained attention at the time the recently-adopted ALI Restatement of the U.S. Law of International Commercial and Investor-State Arbitration was prepared. After lengthy deliberations, the ALI membership in May 2019 unanimously endorsed the view that the presence of competence-competence language in incorporated rules of procedure fails to meet the *First Options* test.[11]

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[9] *See generally* 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 (Emmanuel Gaillard & Domenico Di Pietro eds., 2008).

[10] *See, e.g.*, Jack M. Graves & Yelena Davydan, *Competence-Competence and Separability-American Style*, *in* INT'L ARB. AND INT'L COMMERCIAL LAW: SYNERGY, CONVERGENCE AND EVOLUTION (2011).

[11] Restatement of the U.S. Law of Int'l Commercial and Investor-State Arb. § 2.8, art. *b*, Reporter's n. *b* (iii), (Am. L. Inst. 2019).

C. A reversal of presumptions.

The Court in *First Options* made judicial authority to determine arbitrability the rule and delegation the exception. Parties must "go out of their way" to displace the authority to decide issues of arbitrability that courts ordinarily enjoy.

But today competence-competence provisions are ubiquitous. They are found in virtually every modern set of arbitral procedure rules; the AAA Rules are by no means exceptional. Competence-competence provisions are also found in virtually every modern arbitration law that states enact to regulate international arbitrations conducted on their territory.

As a result, it is the extremely rare arbitration that is conducted in the absence of competence-competence language. Such language has become, for all practical purposes, "boiler-plate." Parties do not need to "go out of their way" to subject their arbitrations to competence-competence. All modern arbitration laws and rules do that for them.

Treating competence-competence language as "clear and unmistakable" evidence thus destroys the strong presumption in favor of judicial determination of arbitrability that *First Options* established. General competence-competence language is too oblique and inconspicuous a means of informing parties of a matter as momentous as loss of the right to have a judicial determination of arbitrability.

D. A "clear and unmistakable" delegation belongs in arbitration agreements, not in incorporated procedural rules.

Given its profound implications for a party's right to a judicial determination of arbitrability, a delegation clause should be placed in an arbitration agreement itself, not relegated to a set of incorporated procedural rules. Parties can reasonably be expected to read a contractual arbitration clause carefully before agreeing to it. But they cannot realistically be expected to scrutinize lengthy and detailed rules of arbitral procedure, especially when only incorporated by reference and long before any dispute whatsoever has arisen. Nor is there any reason to suppose that a provision removing judicial authority to determine matters of arbitral *jurisdiction* would be found in rules addressing arbitral *procedure* only. Any contract drafter genuinely wanting to make a delegation clause "clear and unmistakable" would place it in the body of the arbitration agreement, as did the drafters in *Rent-A-Center*, 561 U.S. at 66, and not bury it in incorporated rules of arbitral procedure.

III. A delegation fully disables courts from ensuring the arbitrability of a dispute.

It would be a mistake to assume that, if courts lose their authority to determine the arbitrability of a dispute prior to arbitration, they will recover it at the end of the arbitral process. Under U.S. law, once a proper delegation is made, courts are sidelined, not only pre-arbitration but also in post-award review. Case law holds that, under a proper delegation, courts also cannot, in a vacatur or confirmation action,

meaningfully ensure that the award debtor consented to arbitration. They are required to accord extreme deference to a tribunal's determination whether an arbitration agreement exists, is valid, is applicable to a non-signatory, and encompasses the dispute at hand. *Schneider v. Kingdom of Thai.*, 688 F.3d 68, 71 (2d Cir. 2012); *Chevron Corp. v. Republic of Ecuador*, 949 F. Supp. 2d 57, 65–67 (D.D.C. 2013). According to the Restatement, § 4.12, Reporters' note *d*, in order to be overturned, a tribunal's finding of arbitrability must be "baseless," resting this conclusion on the Supreme Court's ruling in *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 569 (2013).

Accordingly, if a delegation is made, *at no point* in the arbitration life-cycle will parties have the benefit of an independent judicial determination of whether they validly consented to arbitrate a given dispute. That is too drastic a result to follow from the mere presence of standard competence-competence language in referenced rules of procedure. Even French law, which essentially precludes courts from determining the arbitrability of a dispute on a *pre-arbitration* basis, authorizes courts to examine arbitrability at the *post-award* stage, and to do so on a *de novo* basis.[12] Thus, French courts fully regain at the end of the process the role they were denied at the outset. Under a delegation clause, U.S. courts do not.

IV. The presumptive authority of courts to determine the arbitrability of a dispute is central to arbitration's legitimacy as a

[12] Ina C. Popova, Patrick Taylor & Romain Zamour, *France*, *in* EUROPEAN ARBITRATION REVIEW 29 (2020).

means of international dispute resolution.

Depriving parties of the right to a judicial determination of questions of arbitrability is inimical to the fundamental principles that (a) parties are not required to submit their claims to arbitration without their consent and that (b) they are entitled, upon request, to an independent judicial decision on that threshold issue.

But there is more. Preserving that right, absent "clear and unmistakable" evidence that a party has abandoned it, is essential to the legitimacy of arbitration itself.[13] Issues of arbitrability, such as the question whether the parties actually and validly agreed to arbitrate a particular dispute, go to the heart of that legitimacy. It is not news that arbitration is increasingly under attack.[14] That makes it all the more essential that, to the fullest extent possible, nothing is done to place that legitimacy at risk.

CONCLUSION

The stakes associated with the delegation of authority to determine arbitrability are extremely high. Though the issue is one of federal law, it arises regularly in state as well as federal courts because

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[13] George A. Bermann, *The "Gateway Problem" in International Commercial Arbitration*, 37 YALE J. INT'L L. 1 (2012).

[14] *See generally Practising Virtue: Inside International Arbitration* (David D. Caron, Stephan W. Schill, Abby Cohen Smutny & Epaminontas E. Triantafilou eds., Oxford Univ. Press 2015).

these courts share concurrent jurisdiction over actions to enforce arbitration agreements under the FAA. Yet state courts are divided on the question of whether simple competence-competence language in procedural rules incorporated by reference in an arbitration agreement satisfies *First Options*, some of them taking a position squarely at odds with what had already become the prevailing view in the federal courts.

Only this Court can definitively resolve that issue and ensure that parties do not forfeit their right to a judicial determination of arbitrability unless they manifest that intention clearly and unmistakably. Twenty-five years have elapsed since *First Options* was decided. Over that time, the Court has had no occasion to clarify what it meant by "clear and unmistakable" evidence. The question of whether incorporation by reference of arbitration rules containing standard competence-competence language meets the "clear and unmistakable" test is now fully crystallized. The state and federal courts, as well as all users of arbitration in the United States, need clarity and certainty as to whether incorporated rules of arbitral procedure containing simple competence-competence language qualifies as "clear and unmistakable" evidence of an exclusive delegation within the meaning of *First Options*. Moreover, such a decision will leave it to the contracting parties to make their intention clear in their arbitration agreement.

For the foregoing reasons, this Court should grant the pending petition for certiorari in the present case.

Respectfully submitted,

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