No. 17-1272

In the Supreme Court of the United States

HENRY SCHEIN, INC., ET AL., PETITIONERS

v.

ARCHER AND WHITE SALES, INC.

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a party is "aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration" (9 U.S.C. 4), where the ultimate contention that the dispute is subject to arbitration is "[im]plausible," "without merit," and "wholly groundless."

PARTIES TO THE PROCEEDING BELOW AND RULE 29.6 STATEMENT

Petitioners are Henry Schein, Inc., Danaher Corporation, Instrumentarium Dental Inc., Dental Equipment LLC, Kavo Dental Technologies, LLC, and Dental Imaging Technologies Corporation, the appellants below and defendants in the district court.

Respondent is Archer and White Sales, Inc., the appellee below and plaintiff in the district court. Archer and White Sales, Inc., has no parent corporation, and no publicly held company owns 10% or more of its stock.

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INTRODUCTION

According to petitioners, this case presents an important and recurring question that has divided the courts of appeals. But the court below decided only a "narrow" question with no widespread practical application. The issue arises only where a claimant lodges an arbitrability claim that is so baseless that the movant is not possibly "aggrieved," and the parties could not possibly have intended to endure a pointless detour for an arbitrator to confirm what everyone already knows: the dispute at issue is not even *plausibly* subject to arbitration. Indeed, the only time this issue will have any practical effect—aside from imposing undue burdens on parties and courts—is when an arbitrator would *disagree* with the ju-

diciary and declare an "implausible" argument the winner.[1] Whatever tiny subset of cases this affects (none are apparent) does not implicate an issue of sufficient importance to warrant this Court's review.

This narrow "exception" has been applied in various forms for decades without any obvious disturbance to the strong federal policy favoring arbitration. The Fifth Circuit—hardly known as a laggard when it comes to respecting arbitration rights—applied the same exception here, noting that it advances the parties' intent and avoids wasting judicial and party resources. The Fifth Circuit's ruling builds on the logic of other decisions, which likewise refuse to credit "meritless" arguments seeking arbitration, just as they refuse to credit baseless contentions on any other subject. The Federal Arbitration Act grants "aggrieved" parties a powerful mechanism for compelling arbitration, but it applies only where a counter-party fails or refuses to arbitrate under a written agreement. Where the movant's contentions are "frivolous" or "illegitimate," the movant is not "aggrieved" and has not established a counter-party's "failure to comply." No parties agree to subject themselves to frivolous claims. The Fifth Circuit's approach simply recognizes the good-faith inherent in all contracts and Congress's unwillingness to impose pointless burdens on parties and the courts.

This is perhaps why, contrary to petitioners' contention, there is no square circuit conflict. No court of appeals has rejected the "wholly groundless" exception in a case where the movant's argument was *actually* groundless, implausible, or frivolous, as it was found here; petitioners thus have failed to identify any square conflict on the facts

[1] Even worse is the reality petitioners might imagine: arbitrators making mistakes and ordering arbitration of disputes that the parties contractually agreed would be decided in court.

presented. There is a compelling argument to wait and see whether any court of appeals would refuse to apply the "wholly groundless" exception when confronted with a truly frivolous and implausible claim.

While there assuredly is some theoretical disagreement among the courts of appeals, that disagreement is recent and will rarely arise given the narrowness of the "wholly groundless" exception. Had petitioners below raised *any* legitimate argument, the Fifth Circuit would have compelled arbitration. In such circumstances, there is no need for this Court to immediately grant review without any indication that the disagreement has any practical effect.

In any event, this case is a poor vehicle for deciding the question presented. The "wholly groundless" exception is relevant only when parties delegate the gateway arbitrability issue to the arbitrator, and that delegation must be established by "clear and unmistakable" evidence. Here, the Fifth Circuit has already concluded that (i) the agreement's language is ambiguous; (ii) any ambiguity must be construed against the drafter (here, petitioners); and (iii) there is a "strong argument" that the delegation does not apply to this dispute. The writing is on the wall. It would take a complete about-face for petitioners to avoid the same fate on remand, should this Court not simply affirm on that alternative ground. The straightest path to affirmance thus does not even involve deciding the question presented, and any answer to that question will prove wholly academic in this case.

These serious defects render this case unsuitable for further review. The petition should be denied.

STATUTORY PROVISIONS INVOLVED

In addition to those provisions reproduced in the petition, Section 4 of the Federal Arbitration Act, 9 U.S.C. 4, provides in pertinent part:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. * * * The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. * * * If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue * * * .

STATEMENT

1. In August 2012, respondent commenced this action against Henry Schein, Inc., Danaher Corporation, and several of Danaher Corporation's subsidiaries: Instrumentarium Dental, Inc., Dental Equipment, LLC, KaVo Dental Technologies, LLC, and Dental Imaging Technologies Corporation. C.A. App. 16. Schein is a large wholesale distributor of dental equipment and supplies. *Id.* at

20. The other petitioners are major manufacturers of dental equipment and supplies. *Id.* at 19-20.[2]

Respondent is a small, family-owned distributor in the same industry. C.A. App. 21. Unlike its larger competitors, respondent uses elements of e-commerce to reduce its overhead and its prices. *Id.* at 21-22. Respondent alleges that Schein, Patterson, and Benco conspired to maintain supracompetitive margins by agreeing not to compete on price. *Id.* at 33-34. They enforce this conspiracy by boycotting low-margin distributors like respondent. *Ibid.* In particular, these distributors pressure major manufacturers, including certain petitioners here, to join the conspiracy by threatening to pull their products unless they stop working with low-margin distributors. *Ibid.* Because manufacturers are dependent on major distributors for sales, the manufacturers give in, as they did here, initially restricting respondent's sales territories and later terminating respondent's distributorships. *Ibid.*

Petitioners' conduct has prompted investigations by the FBI, the FTC, the Texas Attorney General, and the Arizona Attorney General, as well as an antitrust lawsuit brought by a class of dentists who had purchased overpriced dental products.[3]

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[2] Respondent amended its complaint in August 2017 to join as defendants two additional large distributors: Patterson Companies, Inc. and Benco Dental Supply Co.

[3] See Complaint, *In re Benco Dental Supply Co.*, FTC No. 9379 (Feb. 12, 2018); Agreed Final Judgment and Stipulated Injunction Between the State of Texas and Patterson Companies, Inc., *Texas* v. *Patterson Cos.*, No. D-1-GN-18-001916 (126th Judicial Dist. Apr. 19, 2018); Agreed Final Judgment and Stipulated Injunction Between the State of Texas and Henry Schein, Inc., *Texas* v. *Henry Schein, Inc.* No. D-1-GN-17-003749 (261st Judicial Dist. Aug. 3, 2017); Agreed Final Judgment and Stipulated Injunction Between the State of Texas and Benco Dental Supply, *Texas* v. *Benco Dental Supply Co.*,

After enduring this illegal conduct for years, respondent sued petitioners for violating the Sherman Act. Respondent sought both damages and "injunctive relief," because "[t]he violations * * * are continuing and will continue unless injunctive relief is granted." C.A. App. 35.

2. Shortly after respondent filed its original complaint, one petitioner, Dental Equipment, moved to compel arbitration under its distribution agreement with respondent, which authorized selling Pelton & Crane dental equipment. The agreement provided for arbitration of certain claims: "[a]ny dispute arising under or related to this Agreement (*except for actions seeking injunctive relief* and disputes relating to trademarks, trade secrets or other intellectual property of Pelton & Crane) shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association." C.A. App. 92 (emphasis added). The other petitioners then also requested arbitration; rather than invoke their own right to arbitrate, however, they argued that respondent was bound under equitable estoppel to arbitrate against everyone, even though its sole arbitration agreement was with Dental Equipment.[4]

In May 2013, the magistrate judge granted the motions and stayed the case. Pet. App. 39a-44a. The magistrate judge recognized that "the exception carved out for actions seeking injunctive relief is problematic to the motions to compel arbitration." *Id.* at 41a. And the magistrate judge further noted that "[i]f there were no reason-

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No. D-1-GN-15-001386 (353d Judicial Dist. Apr. 9, 2015); *In re Dental Supplies Antitrust Litig.*, No. 1:16-cv-00696 (E.D.N.Y.).

[4] Because Patterson and Benco had not yet been joined as parties, they did not seek to compel arbitration and did not participate in this interlocutory appeal.

able construction of the contract that allowed for arbitration, there would be nothing for an arbitrator to decide." *Ibid.* But the magistrate judge nevertheless felt that damages, not injunctive relief, was "the predominant relief sought," and it therefore concluded there was a "plausible construction" calling for arbitration. *Ibid.* Because the magistrate judge found that the agreement's adoption of the AAA rules implicitly delegated arbitrability issues to the arbitrator, it compelled arbitration. *Id.* at 4a.[5]

The magistrate judge next ruled that the "non-signatory defendants c[ould] avail themselves of the arbitration clause." Pet. App. 42a. In so ruling, the magistrate judge analyzed the Fifth Circuit's two-prong test for evaluating claims of equitable estoppel, and the judge rejected respondent's arguments under each prong of that test. *Id.* at 42a-43a.

Respondent filed an immediate "motion for reconsideration" of the magistrate judge's order. C.A. App. 444. The motion was fully briefed by early July 2013, but the case remained stayed until the district court sua sponte scheduled a status conference in October 2016. *Id.* at 626.[6]

3. The district court rejected the magistrate judge's ruling and denied petitioners' motions to compel arbitration. Pet. App. 18a-38a.

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[5] The magistrate judge did not identify any language in the contract supporting the view that the "predominant" relief was controlling or otherwise limiting the exception ("actions seeking injunctive relief") to mean anything other than what it plainly says. Pet. App. 39a-44a.

[6] The extended delay was the apparent result of confusion regarding whether respondent's motion sought reconsideration from the magistrate judge or review (in the form of objections) by the district court. See Pet. App. 20a. The district court construed the filing as "objections to the Order" and decided them accordingly. *Ibid.*

At the outset, the district court explained this Court's "'strong pro-court presumption'" on gateway issues of arbitrability. Pet. App. 23a (quoting *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U.S. 79, 86 (2002)). Unlike the usual presumption in favor of arbitration, those gateway questions are reserved for "judicial determination [u]nless the parties clearly and unmistakably provide otherwise." *Ibid.* (quoting *Howsam*, 537 U.S. at 83) (internal quotation marks omitted).

The district court then conducted that analysis under the "narrow circumstances" here, and rejected the magistrate judge's ruling on "two independent rationales." Pet. App. 32a.[7]

First, the district court found the parties "did not clearly and unmistakably agree to arbitrate the arbitrability of actions seeking injunctive relief." Pet. App. 32a. As the court explained, the agreement's carve-out for such "actions" was "clear on its face." *Id.* at 27a. "[T]he arbitration clause here 'cabins application of the AAA rules to disputes "arising under or related to" the Agreement that are *not* "actions seeking injunctive relief" or "disputes relating to trademarks, trade secrets or other intellectual property of Pelton & Crane."'" *Id.* at 33a. It found petitioners' contrary reading violated the clause's "plain language," tried to "read" limitations into the agreement, and lacked "any substantive basis." *Id.* at 27a-28a. "Indeed," the court explained, "it would be senseless to have the AAA rules apply to proceedings that are not subject to arbitration." *Id.* at 34a.

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[7] The district court separately noted that "[t]here is no *express* delegation clause in the [A]greement," but followed Fifth Circuit authority holding that "the adoption of the AAA rules" is an implicit delegation to "'arbitrate arbitrability.'" Pet. App. 32a-33a.

The court thus concluded that the case "falls squarely within the clause excluding actions like this from arbitration," and it refused to "re-write the terms of the Parties' agreement to accommodate a party—notably, the party that drafted the agreement—that could have negotiated for more precise language." Pet. App. 30a, 34a (footnote omitted). That decision alone was a sufficient basis for rejecting petitioners' motion. *Id.* at 35a n.5 ("even if [the "wholly groundless"] test ha[d] not been adopted by the Fifth Circuit," "the Court finds that there is not clear and unmistakable evidence that the Parties intended to send the question of arbitrability to an arbitrator").[8]

Second, the court held that even had it found a clear and unmistakable delegation, petitioners would still lose "in these unique circumstances" under the Fifth Circuit's "narrow" exception for "'wholly groundless'" arbitrability claims. Pet. App. 34a-37a (quoting *Douglas* v. *Regions Bank*, 757 F.3d 460, 463-464 (5th Cir. 2014)). As the court explained, the Fifth Circuit's test reflects "'the parties' intent'": no one agrees to an "absurd[]" process where a plaintiff is compelled "to go to an arbitrator merely to have the arbitrator 'flatly' explain that the claim did not fall within the scope of the agreement and promptly send plaintiff back to court." *Id.* at 35a-36a. That was precisely the "unequivocal response" the court expected here: petitioners' argument was "wholly without merit" given the clause's "plain language," and it would be "senseless to refer the issue of arbitrability to the arbitrator, only to have the arbitrator read the plain language of the clause and then send the Parties back to this Court." *Id.* at 36a-37a.

[8] The district court also highlighted that the "arbitration clause in this case is unique," and it "differs" from "standard arbitration clause[s] suggested by the [AAA]." Pet. App. 28a.

Without a "plausible" argument that the dispute was subject to arbitration, the "wholly groundless" exception applied under "the precise facts of this case." *Id.* at 38a.

In so ruling, the court stressed that this "narrow" exception was limited to "'exceptional' circumstances." Pet. App. 37a (quoting *Kubala* v. *Supreme Prod. Servs., Inc.*, 830 F.3d 199, 202 n.1 (5th Cir. 2016)). Indeed, the court explained, the rule "'is not a license for the court to prejudge arbitrability disputes more properly left to the arbitrator pursuant to a valid delegation clause,'" and any "'plausible' argument" is enough to require arbitration. *Ibid.* (quoting *Kubala*, 830 F.3d at 202 n.1). But given the utter implausibility of petitioners' arguments, the exception "is appropriate in this particular case." *Ibid.*[9]

4. a. Petitioners filed an interlocutory appeal, and respondent urged affirmance on each of the district court's independent grounds: "[t]he parties did not delegate the question of arbitrability to the arbitrator," and, even if they had, petitioners' "arbitrability argument is 'wholly groundless.'" Resp. C.A. Br. 17, 26.

b. The court of appeals affirmed. Pet. App. 1a-17a.

First, the court "ask[ed] if the parties 'clearly and unmistakably' delegated the issue of arbitrability." Pet. App. 6a. After examining the parties' contentions, it found a "strong argument" that the delegation clause does not apply to cases "within the [injunctive-relief] carve-out." *Id.* at 10a. It rejected petitioners' notion that "any mention in the parties' contract of the AAA Rules trumps all other contract language." *Ibid.* On the contrary, the court found, "the interaction between the AAA Rules and the

[9] Having rejected petitioners' arguments on multiple grounds, the court elected not to decide a potential *additional* ground for denying arbitration: "whether the third parties to the arbitration clause in this case can enforce such arbitration clause." Pet. App. 37a-38a.

carve-out is at best ambiguous," and state law requires any ambiguity to be "'construed against the drafter[s]'"—here, petitioners. *Ibid.* (quoting *T.M.C.S., Inc.* v. *Marco Contractors, Inc.*, 780 S.E.2d 588, 597 (N.C. Ct. App. 2015)).

Despite these "strong" points against petitioners' reading, the court did not ultimately decide if the agreement somehow reflected a "clear and unmistakable" delegation. Pet. App. 10a-11a. Instead, the court found it sufficient to reject petitioners' reading under the "'wholly groundless' inquiry." *Id.* at 11a.[10]

In explaining that inquiry, the court emphasized the "wholly groundless" exception was a "narrow escape valve," and that arbitration should be compelled "'in almost all cases.'" Pet. App. 5a, 11a. While the doctrine's exact "contours" are "not yet fully developed," the court confirmed it does not apply if there is *any* "legitimate argument that th[e] arbitration clause covers the present dispute." *Id.* at 11a, 15a. It was only where the party's assertions are "[im]plausible" that the exception applies: "This limited inquiry allows the parties to avoid jumping through hoops to begin arbitration only to be sent directly back to the courthouse." *Id.* at 11a, 12a n.35.

Looking to the facts here, the court determined this was the rare case warranting the doctrine's application. Pet. App. 11a-16a. The court examined petitioners' arguments in favor of arbitrability and declared each had "no footing within the four corners of the contract." *Id.* at 16a. The court found the contract "'clear and unambiguous,'" and found the arbitration clause "expressly exclude[d] certain types of disputes." *Id.* at 12a-13a, 15a-16a. Like the district court, the court of appeals saw "no plausible

[10] The court of appeals also noted the district court's observation that this arbitration clause has atypical language. Pet. App. 12a.

argument that the arbitration clause applies here to an 'action seeking injunctive relief." *Id.* at 16a; see also *id.* at 13a (repeating the district court's conclusion that petitioners' reading was "'wholly without merit'"). Petitioners' reading, in short, was at odds with "the clause's plain meaning." *Id.* at 16a.

The court of appeals concluded petitioners' arguments were "wholly groundless," and it thus affirmed the order denying petitioners' motion to compel arbitration. Pet. App. 16a-17a.

5. Both the district court and the court of appeals denied petitioners' requests for a stay pending appeal. Pet. App. 45a. The case proceeded through discovery and virtually all other pretrial phases and was set for trial on May 14, 2018. This Court then granted a stay (No. 17A859) pending its disposition of the petition for a writ of certiorari.

ARGUMENT

Petitioners argue that this case concerns an entrenched circuit conflict on a vitally important question. To the contrary, this case fails to implicate any square conflict; no court of appeals has refused to apply the "wholly groundless" exception when actually confronted with an implausible or frivolous claim. And the only two appellate decisions to criticize the exception arose just last year. There is every reason to let the issue percolate to see if those circuits are willing to endorse petitioners' wooden rule even when faced with frivolous or illegitimate arguments. And not only is this split illusory, but it is also unimportant. This "narrow" exception applies only in "exceptional" circumstances. Any plausible argument defeats the exception. Petitioners have not shown that its rare invocation precludes arbitration in any meaningful subset of cases, much less *improperly* so. Indeed, it is difficult to

think of many arbitrability arguments deemed "wholly groundless" by a court that would be endorsed by an arbitrator.

Nor would this be a suitable vehicle for deciding the question. The "wholly groundless" decision is academic if the parties did not delegate the gateway arbitrability issue. The district court so held below, and the Fifth Circuit left little doubt of its views; in fact, its discussion—finding "strong" arguments against delegation and declaring the clause "at best ambiguous"—are impossible to square with the "clear and unmistakable" standard. That means the Court can affirm in this case without reaching the question presented, and a failure to affirm would simply invite the court of appeals to reinstate the same judgment on remand. There is no merit to deciding the issue in this posture.

In any event, the decision below was correct. The FAA provides potent remedies for protecting arbitration. But a party is not "aggrieved" by a failure to arbitrate (9 U.S.C. 4) if there is no good-faith basis for arbitration. Likewise, a counter-party has not "fail[ed] to comply" with an arbitration clause (*ibid.*) if there is no plausible basis for reading the clause to cover the claims. The FAA's textual support for the "wholly groundless" exception reaffirms timeless principles of contract law: All contracts presume good-faith, and no one agrees to tolerate illegitimate, frivolous claims. Petitioners' contrary rule lacks a statutory hook in Section 4, and it invites the predictable waste of judicial and party resources. There is no indication that Congress set up arbitrability claims alone as immune from the basic principles of Rule 11.

Petitioners have failed to identify a direct conflict on an issue of substantial importance, or a vehicle where the answer to that question will have any practical effect. The petition should be denied.

A. There Is No Square Circuit Conflict, And Any Disagreement Between The Courts Of Appeals Is Recent And Insignificant

1. Contrary to petitioners' contention, there is neither a direct nor entrenched circuit conflict. The court of appeals below joined the Fourth, Sixth, and Federal Circuits in recognizing the "wholly groundless" exception. See *Simply Wireless, Inc.* v. *T-Mobile US, Inc.*, 877 F.3d 522 (4th Cir. 2017), petition for cert. pending, No. 17-1423 (filed Apr. 9, 2018); *Douglas* v. *Regions Bank*, 757 F.3d 460 (5th Cir. 2014); *Turi* v. *Main St. Adoption Servs., LLP*, 633 F.3d 496 (6th Cir. 2011); *Qualcomm Inc.* v. *Nokia Corp.*, 466 F.3d 1366 (Fed. Cir. 2006); see also *Local 205, United Elec., Radio & Mach. Workers of Am. (UE)* v. *Gen. Elec. Co.*, 233 F.2d 85, 101 (1st Cir. 1956). Petitioners maintain that the Tenth and Eleventh Circuits disavow that exception, but that is incomplete. In *Jones* v. *Waffle House, Inc.*, 866 F.3d 1257 (11th Cir. 2017), the court expressly found that the arbitrability claim was *not* "wholly groundless." And in *Belnap* v. *Iasis Healthcare*, 844 F.3d 1272 (10th Cir. 2017), the court stressed that the district court simply examined the arbitrability question on the merits, without asking whether the party's contention was baseless or (instead) plausible but simply mistaken.

There accordingly is no conflict at all where the facts, as here, show that the assertion of arbitrability is "wholly groundless" and lacks any plausible support. Because the issue was not factually presented in the Tenth and Eleventh Circuits, there is no guarantee how those courts would in fact respond to a frivolous or illegitimate arbitrability demand.

a. In *Jones*, the arbitration agreement covered "all claims and controversies ('claims'), past, present, or future, arising out of any aspect of or pertaining in any way

to [plaintiff's] employment." 866 F.3d at 1263. When the plaintiff sued for the defendant's failure to give him a copy of the background checks run in connection with his job application, the defendant moved to compel arbitration. *Id.* at 1261-1262.

In granting the defendant's motion, the Eleventh Circuit stated it was "declining to adopt what has come to be known as the wholly groundless exception." 866 F.3d at 1269. And, to be sure, it suggested the same position ought to hold "regardless of how frivolous the court may deem [the gateway issues] to be." *Id.* at 1270. Yet the court candidly acknowledged that, "even if we were to apply the wholly groundless exception, we would still conclude that [movant's] arguments were not wholly groundless." *Id.* at 1271 n.1. And, indeed, the court found that the agreement's "language [was] broad and could be read to include" plaintiff's claims. *Ibid.*[11]

The factual predicate for the issue was thus not presented. Time will tell whether *Jones*'s broad reasoning will hold in the face of wasteful, frivolous gateway issues.

b. Likewise, in *Belnap*, the parties had agreed to arbitrate "any dispute * * * arising under or related to th[e] Agreement" to develop a surgical center. 844 F.3d at 1274-1275. When the plaintiff brought suit, his complaint

[11] The Eleventh Circuit reasoned that "[i]t's not for the courts to say the parties really didn't mean to [arbitrate gateway issues] in some circumstances, when the language they have employed allows for no such exceptions." 866 F.3d at 1270. This logic ignores the presumption of good-faith embedded in all contracts. Parties do not have to explicitly say they will arbitrate arbitrability *except* when the assertion is frivolous, *because it is already presumed that parties are not agreeing to invite frivolous claims*. The Eleventh Circuit's reasoning reflects an unrealistic view of ordinary conduct, and is inconsistent with basic contract-law principles.

made numerous references to the agreement and the proposed surgical center, and all of the causes of action were based on the same alleged misconduct and resulting harm. *Id.* at 1276-1277. When the defendants moved to compel arbitration, the district court did not reject their assertions as wholly groundless; on the contrary, the district court apparently ignored the delegation provision, and "proceeded to 'perform a preliminary analysis of all of the claims to determine if they fall within the scope of the contract.'" *Id.* at 1278.

The Tenth Circuit, unsurprisingly, held that the district court should have "compelled" all the claims to arbitration. *Id.* at 1279. And while it "decline[d] to adopt the 'wholly groundless' approach" (*id.* at 1286), there is no indication any claims were remotely groundless. Quite the opposite: on those facts, it was certainly plausible to argue that the broad arbitration clause (covering "any dispute * * * arising under or related to th[e] Agreement") applied.[12]

In short, given the facts in *Belnap* and *Jones*, those cases are not reliable indicators of what would necessarily happen if either court of appeals were confronted with an arbitrability argument that is unquestionably "groundless."

2. In any event, any disagreement in reasoning is not obviously entrenched. The purported split arose recently. The Tenth and Eleventh Circuit decisions issued last

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[12] The Tenth Circuit maintains its position is necessary "to effectuate the parties' intent regarding arbitration." 844 F.3d at 1286. This is question-begging: why would the parties, in this context alone, abandon the usual presumptions of good-faith? Is there any indication in the agreement that the parties intended to tolerate baseless assertions designed simply to force a needless, costly detour to an arbitrator before returning immediately to court? Like petitioners, the Tenth Circuit has no satisfactory response to these questions.

year, and it remains to be seen how those courts would apply those decisions to facts like the ones here. Nor is it clear those opinions reflect the final say of those courts; if a future panel did indeed endorse a truly frivolous arbitrability claim, it is entirely possible the full court would respond by taking up the issue en banc.

Moreover, as the court of appeals acknowledged, the "contours of the 'wholly groundless' exception [are] not yet fully developed." Pet. App. 15a. Additional percolation is likely to shed light on these questions. This Court should not devote its limited resources to resolving this issue before these additional developments have occurred.

3. In addition, petitioners overstate the practical significance of the purported split. The "wholly groundless" exception is a "narrow escape valve" (Pet. App. 11a); it applies only where the argument for arbitrability is "frivolous or otherwise illegitimate" (*Simply Wireless*, 877 F.3d at 529). The exception thus impacts very few cases. Indeed, even looking to the decisions constituting the "split," the Fourth Circuit discussed the "wholly groundless" exception before *ordering arbitration* (see *id.* at 528-29), and the Eleventh Circuit acknowledged it would have ordered arbitration even under the "wholly groundless" standard (*Jones*, 866 F.3d at 1270-71 & n.1). The same is generally true of other cases confronting the issue. In fact, respondent has identified only *four* other cases in which an appellate court has invoked the "wholly groundless" exception to refuse to order arbitration. *Douglas*, 757 F.3d at 464; *Turi*, 633 F.3d at 511; *Interdigital Commc'ns, LLC* v. *ITC*, 718 F.3d 1336 (Fed. Cir. 2013), vacated on other grounds, 134 S. Ct. 1876 (2014); *Evans* v. *Bldg. Materials Corp.*, 858 F.3d 1377, 1380 & n.1 (Fed. Cir. 2017) (accepting the "wholly groundless" standard for purposes

of the appeal because any contrary argument was waived).[13]

The practical effects are further minimized given the showing necessary to invoke the exception: *the movant's argument must be baseless*. Even without the exception, the overwhelming majority of disputes would simply end up back in court. There is no reason to presume any significant daylight between the views of arbitrators and the

[13] Application of the "wholly groundless" exception is extraordinarily rare even in district court. In petitioners' reply in support of their stay application, petitioners claimed there are "numerous" district-court decisions denying motions to compel arbitration based on the "wholly groundless" exception. But of the ten cases that petitioners identified, three denied the motion to compel arbitration because the parties had not clearly and unmistakably delegated the arbitrability question to the arbitrator. See *Andrio* v. *Kennedy Rig Servs., LLC*, Civ. No. 17-1194, 2017 WL 6034125, at *1, *4 (S.D. Tex. Dec. 6, 2017) (holding that agreement to arbitrate "[a]ny controversy or claim arising out of or relating to *work performed by Contractor*" refers only to "a specific subject area, and it does not clearly and unmistakably include arbitrability") (emphasis added); *Matson Terminals, Inc.* v. *Ins. Co. of N. Am.*, Civ. No. 13-5571, 2014 WL 1219007, at *4 (N.D. Cal. Mar. 21, 2014) (explaining that "neither party contends that the parties agreed to arbitrate arbitrability"); *Ellsworth* v. *U.S. Bank, N.A.*, Civ. No. 12-2506, 2012 WL 4120003, at *7 (N.D. Cal. Sept. 19, 2012) (holding that the parties had not delegated arbitrability because "it is not clear and unmistakable that the procedural issue of who decides arbitrability 'concerns Ellsworth's account' within the meaning of the Deposit Agreement"). Another three do not use the phrase "wholly groundless" at all. See *In re FBI Wind Down, Inc.*, 557 B.R. 310, 325 (Bankr. D. Del. 2016); *Imperial Valet, Inc.* v. *Woodard*, Civ. No. 14-1585, 2015 WL 13158506 (D.D.C. Mar. 24, 2015); *Cornett* v. *Cmco Mortg., LLC*, Civ. No. 12-169, 2012 WL 12925599 (E.D. Ky. Nov. 9, 2012). If the remaining four cases are the best that petitioners can do, that only confirms the relative insignificance of this issue from a practical perspective.

judiciary; if the judiciary finds the argument utterly implausible or illegitimate, it is the unusual case where the arbitrator not only finds the issue close *but meritorious*.

And even in such a case, there is a distinct possibility that a reviewing court would later have grounds to vacate the arbitrator's decision because the arbitrators exceeded their power. See 9 U.S.C. 10. When the parties have agreed to submit a question—such as arbitrability—to an arbitrator, the court must still "ascertain[] whether the party seeking arbitration is making a claim which *on its face* is governed by the contract." *United Paperworkers Int'l Union* v. *Misco, Inc.*, 484 U.S. 29, 36-37 (1987) (emphasis added) (quoting *Steelworkers* v. *Am. Mfg. Co.*, 363 U.S. 564, 567-568 (1960)). A court may confirm an arbitrator's award only "as long as the arbitrator is *even arguably* construing or applying the contract and acting within the scope of his authority." *Id.* at 38 (emphasis added); see also *George Day Constr. Co.* v. *United Bhd. of Carpenters & Joiners, Local 354*, 722 F.2d 1471, 1476-1477 (9th Cir. 1984) (explaining that courts may affirm an arbitration award only "if on its face, the award represents a plausible interpretation of the contract").

By definition, a wholly groundless argument is not supportable on the arbitration agreement's face, nor is it a plausible interpretation of the agreement. Therefore an arbitrator accepting such an argument would *not* be arguably construing the agreement, and any subsequent arbitration award could well be vacated. See, *e.g.*, *Kalb* v. *Quixtar, Inc.*, No. 3:07-cv-1061, 2008 U.S. Dist. LEXIS 25015, at *18 (M.D. Fla. Mar. 28, 2008) ("[A] court may vacate an arbitration award 'where the arbitrators exceeded their powers.' 9 U.S.C. 10. If it is later determined that the claims are not arbitrable, any arbitration award may be vacated as exceeding the scope of the arbitration agreement."); *Holz-Her U.S., Inc.* v. *Monarch Mach.*,

Inc., No. 3:97CV56, 1998 U.S. Dist. LEXIS 15394, at *23-*24 (W.D.N.C. July 24, 1998) (holding that arbitrators exceeded their powers by deciding a matter that the parties had not agreed to submit to arbitration). At worst, then, the "wholly groundless" exception merely applies the principles of 9 U.S.C. 10 *before* the parties, arbitrators, and courts have wasted incredible time and resources associated with years of futile and useless arbitration proceedings. That is a benefit, not a concern.

At bottom, it will be the exceptionally rare case where the "wholly groundless" exception works to deprive litigants of a *legitimate* right to arbitrate; in the mine run of cases, it will simply deny a party's implausible effort to invoke a right it never had. A question with such little practical import does not warrant the Court's review.[14]

B. For Multiple Reasons, This Case Is A Poor Vehicle For Deciding The Question Presented

Even if the question presented warranted review, this would be an unsuitable vehicle for deciding it. As the lower courts made clear, this Court could affirm without even addressing the "wholly groundless" exception—indeed, the district court adopted an "independent" rationale that

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[14] Contrary to petitioners' contention (Pet. 22), there is no genuine concern of "'forum shopping.'" No rational party chooses a forum for litigating its entire case based on the minute risk that an opponent will lodge a baseless request to arbitrate and an arbitrator will reward that "wholly groundless" request. Indeed, even were petitioners to prevail, the predicate outcome would be a temporary, and wasteful, trip for the arbitrator to confirm that the case indeed belongs back in court. The far more realistic concern is that parties (under petitioners' rule) would assert groundless arbitration claims to force a detour to arbitration, driving up litigation costs and generating unwarranted delays. In any event, many agreements with arbitration clauses also have forum-selection clauses, which eliminate any concerns about "forum shopping."

supports the same judgment (Pet. App. 35a n.5), and the Fifth Circuit all but endorsed that alternative ground below (*id.* at 10a-11a). The arbitration clause itself is unusual, and its atypical features pose other obstacles for review.[15]

1. The language in this arbitration clause departs from standard arbitration agreements by including a carve-out. See Pet. App. 28a ("The arbitration clause in this case is unique."). The clause provides:

> Any dispute arising under or related to this Agreement (except for actions seeking injunctive relief and disputes related to trademarks, trade secrets, or other intellectual property of Pelton & Crane), shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association [(AAA)].

Pet. App. 3a. That language implicates two predicate questions before the "wholly groundless" issue becomes relevant, each concerning whether the parties even intended to delegate the gateway issue.

a. First, a court must decide whether the parties agreed to arbitrate any arbitrability dispute. Unlike an agreement to arbitrate the merits of a dispute, "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." *First Options of Chi., Inc.* v. *Kaplan*, 514 U.S. 938, 944 (1995) (quoting *AT&T Techs., Inc.* v. *Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986)). For that reason, before reaching the "wholly

[15] In this respect, petitioners' question presented assumes the conclusion in stating this "agreement delegat[es] questions of arbitrability to an arbitrator." Pet. i. Petitioners lost on that argument in district court, and the shoe was poised to drop on the same point in the Fifth Circuit.

groundless" question, courts "first ask if the parties 'clearly and unmistakably' delegated the issue of arbitrability." Pet. App. 6a.

That inquiry is straightforward where the arbitration provision contains an express-delegation clause. See *Jones*, 866 F.3d at 1267; *Douglas*, 757 F.3d at 462 n.3. But it becomes more difficult where delegation is only implied. Several courts, including the Fifth Circuit, have held that a broad arbitration clause incorporating arbitral rules that themselves delegate arbitrability to the arbitrator (such as the AAA Rules) suffices as clear and unmistakable intent to delegate arbitrability. See Pet. App. 7a & n.21 (citing *Petrofac, Inc.* v. *DynMcDermott Petro. Operations Co.*, 687 F.3d 671, 675 (5th Cir. 2012)). This Court, however, has never considered implied delegation. And that issue is a logical predicate here to reaching the "wholly groundless" issue. If the parties did not delegate arbitrability questions, the court, not the arbitrator, must decide whether the dispute is arbitrable, regardless of whether the argument for arbitrability is "wholly groundless."

There is little benefit to taking up the question presented here, rather than awaiting a clean vehicle with an express-delegation clause or at least an implied delegation with fewer factual quirks.

b. Second, even if the parties agreed to arbitrate *some* arbitrability disputes, the express carve-out provision here presents further complications because the parties did not agree to arbitrate *this* arbitrability dispute. Compare *Qualcomm*, 466 F.3d at 1368 (agreement to arbitrate "[a]ny dispute, claim or controversy arising out of or relating to this Agreement"), and *Simply Wireless*, 877 F.3d at 525 (similar), with Pet. App. 3a (agreement to arbitrate "[a]ny dispute arising under or related to this Agreement (*except for actions seeking injunctive relief and disputes*

related to trademarks, trade secrets, or other intellectual property of Pelton & Crane)") (emphasis added).[16]

The parties below contested whether the express carve-out "removed the disputes from the ambit of both arbitration and the AAA Rules." Pet. App. 8a. The district court relied on the carve-out to hold that, in the unique context of this case, the arbitration agreement did not show a clear and unmistakable intent to delegate arbitrability. The court explained that "there is no reason to believe that incorporation of the AAA rules * * * should indicate a clear and unmistakable intention that the parties agreed to arbitrate the question of arbitrability * * * when an action falls squarely within the clause excluding actions like this from arbitration." *Id.* at 34a. Although the Fifth Circuit did not ultimately resolve the delegation question, its express rationale was unequivocal: (i) the agreement's language was "at best ambiguous";

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[16] Petitioners argued in their reply in support of their stay application that the implications of the carve-out were also for the arbitrator to decide. Reply 7-8. That gets the analysis exactly backwards. Before the arbitrator decides anything, the court must first determine whether the parties clearly and unmistakably agreed to delegate the arbitrability dispute to the arbitrator. Parties can agree to delegate only some arbitrability disputes to the arbitrator, just as they can agree to arbitrate only certain merits disputes. A simplified version of the arbitration clause could have read: "The parties will arbitrate disputes for money damages, with such arbitration being governed by AAA rules, unless the dispute also includes a claim for injunctive relief, in which case the dispute will be litigated in district court." Respondent's position is that such language does not clearly and unmistakably delegate to the arbitrator any issue (including arbitrability) having to do with an action seeking injunctive relief because the AAA rules apply only to disputes for money damages. To allow the arbitrator to decide the implications of the carve-out would be to shirk the court's duty to first locate clear and unmistakable intent to delegate arbitrability.

(ii) any ambiguity must be construed against the drafter (here, those *seeking* arbitration); and (iii) "[t]here is a strong argument" that any delegation does not apply to this dispute. *Id.* at 10a. The Court thus could affirm on this alternative ground (*rendering the question presented irrelevant*), or it could decide the question and remand for the Fifth Circuit, predictably, to affirm on this alternative ground (*rendering this Court's opinion irrelevant*).

2. This Court usually grants review in cases where its decision is outcome-determinative. It should await a vehicle where the question presented is not wholly academic.[17]

C. The Decision Below Was Correct

Review is also unwarranted because the court of appeals' decision was correct. Petitioners' contrary view is incompatible with the FAA's plain text, its animating purpose, traditional legal rules, and common sense.

1. Under 9 U.S.C. 4, the FAA authorizes parties "aggrieved" by the "failure, neglect, or refusal of another to arbitrate under a written agreement" to seek an order compelling arbitration. It further instructs courts to grant relief "upon being satisfied" of the counter-party's "failure to comply." 9 U.S.C. 4.

This provision provides an obvious textual basis for the "wholly groundless" exception. When an arbitration claim is utterly frivolous, the movant is not "aggrieved" and there is no possible "failure to comply." This is precisely what the "wholly groundless" inquiry seeks to tease out: if there is *any* plausible argument, the courts will

[17] To further complicate matters, this series of questions resolves the arbitration question solely as to Dental Equipment LLC, the only petitioner who is a signatory to the arbitration agreement. The other petitioners, as non-signatories, would still need to rely on the doctrine of equitable estoppel to demand arbitration. See Resp. C.A. Br. at 40-49 (explaining why the doctrine is unsatisfied here). Neither the district court nor the court of appeals resolved that separate question.

compel arbitration. *Douglas*, 757 F.3d at 463; *Turi*, 633 F.3d at 511. But where a movant's claim is baseless or illegitimate, the court assuredly is not "satisfied" that the order compelling arbitration is appropriate. See *Qualcomm*, 466 F.3d at 1370, 1373 n.5. Petitioners cannot explain how parties are "aggrieved" simply because a litigant files a claim in court *that belongs in court*; and there is no cognizable prejudice from being denied the right to assert implausible claims or waste everyone's time with a pointless detour for an arbitrator to confirm the obvious. See, *e.g.*, *Douglas*, 757 F.3d at 463-464.[18]

2. These principles are consistent with the FAA's purpose and basic contract-law principles. "[A]rbitration is a matter of contract" (*Rent-A-Center, W., Inc.* v. *Jackson*, 561 U.S. 63, 67 (2010)), and no contract implicitly authorizes parties to act in bad faith. A delegation clause reflects the parties' agreement to resolve *legitimate* arbitrability issues before an arbitrator; it is not a license for the other side to subject a party to frivolous claims. See *McCarroll* v. *L.A. County Dist. Council of Carpenters*, 315 P.2d 322, 333 (Cal. 1957); cf. *Bell* v. *Hood*, 327 U.S. 678, 682-683 (1946) (refusing to exercise federal jurisdiction where a federal claim is "wholly insubstantial and frivolous").

The "wholly groundless" test simply honors "'the parties' intent'":

> When [plaintiff] signed the arbitration agreement containing a delegation provision, did she intend to go

[18] There is no textual basis, however, for refusing to compel arbitration because the underlying *claims* are frivolous. That is one reason the "wholly groundless" exception is perfectly consistent with decisions like *AT&T Techs., Inc.* v. *Comm'cns Workers of Am.*, 475 U.S. 643 (1986). See 475 U.S. at 649-650 (requiring arbitration "whether the claims of the party seeking arbitration are 'arguable' or not, indeed even if it appears to the court to be frivolous").

> through the rigmaroles of arbitration just so the arbitrator can tell her in the first instance that her claim has nothing whatsoever to do with her arbitration agreement, and she should now feel free to file in federal court? Obviously not.

Douglas, 757 F.3d at 464. Contract law ultimately seeks to identify a meeting of the minds. There is no conceivable meeting of the minds that justifies the lodging of baseless arbitration demands—and that is true even if the contract does not explicitly state the obvious. Contrary to petitioners' contention, the FAA does not impose an absolutist, wooden regime divorced from common sense: "If the argument that the claim at hand is within the scope of the arbitration agreement is 'wholly groundless,' surely [the parties] never intended that such arguments would see the light of day at an unnecessary and needlessly expensive gateway arbitration." *Ibid.*

3. Petitioners' arguments are also at odds with basic litigation norms. As reflected in Fed. R. Civ. P. 11, no one is entitled to file bad-faith, frivolous, or harassing claims. An attempt to force a party to arbitrate arbitrability where the arbitration clause indisputably does not apply fits squarely within such prohibited conduct. See, *e.g.*, *Simply Wireless*, 877 F.3d at 528-529 (drawing the parallel to Rule 11, and holding that "a district court need not, and should not, enforce a delegation provision when a party's assertion that a claim falls within an arbitration clause is frivolous or otherwise illegitimate"). There is no indication that Congress intended to exempt the FAA from the general rules applicable to all other litigation practice.

Refusing to compel arbitration where the arbitration claim is wholly groundless—where the parties never genuinely thought an arbitrator would decide the dispute—"enforce[s] [the agreement] according to [its] terms,"

Rent-A-Center, 561 U.S. at 67; *Douglas*, 757 F.3d at 464. Nothing in law or logic requires courts and parties to tolerate (indeed, *promote*) the wasteful actions of parties filing frivolous arbitration demands. The decision below was correct, and further review is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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