No. 17-1272

IN THE
Supreme Court of the United States

HENRY SCHEIN, INC., *ET AL.*,
Petitioners,

v.

ARCHER AND WHITE SALES, INC.
Respondent.

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

BRIEF *AMICUS CURIAE* OF ATLANTIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Federal permits a court to decline to enforce an agreement delegating questions of arbitrability to an arbitrator if the court concludes the claim of arbitrability is "wholly groundless."

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES (cont'd)

Page

CASES (cont'd)

TABLE OF AUTHORITIES (cont'd)

INTEREST OF *AMICUS CURIAE*[1]

The Atlantic Legal Foundation is a non-profit public interest law firm founded in 1976 whose mandate is to advocate and protect the principles of less intrusive and more accountable government, a market-based economic system, and individual rights. It seeks to advance this goal through litigation and other public advocacy and through education. Atlantic Legal Foundation's board of directors and legal advisory committee consist of legal scholars, corporate legal officers, private practitioners, business executives, and prominent scientists. Atlantic Legal's directors and advisors are familiar with the role arbitration clauses play in the contracts entered into between companies and between companies and consumers. Some of Atlantic Legal's directors and advisers have decades of experience with arbitration – as legal counsel, as arbitrators, and as members or supporters of organizations that administer arbitration regimes. They are familiar with the benefits of arbitration, especially the role of arbitration (and other "alternative dispute

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[1] The parties have consented to the filing of this brief, which consents have been lodged with the Court

Pursuant to Rule 37.6, *amici* affirm that no counsel for any party authored this brief in whole or in part and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary or other contribution to the preparation or submission of this brief.

resolution" mechanisms) in facilitating business and commerce and in alleviating the burdens on courts and parties.

INTRODUCTORY STATEMENT

Respondent Archer and White Sales, Inc. ("Archer"), a distributor, seller, and servicer for multiple dental equipment manufacturers, brought suit against Petitioners, Henry Schein, Inc., Danaher Corporation and certain subsidiaries of Danaher, distributors and manufacturers of dental equipment, alleging violations of Section 1 of the Sherman Antitrust Act and the Texas Free Enterprise and Antitrust Act, seeking both damages ("estimated to be in the tens of millions of dollars") and injunctive relief.

Petitioners moved to compel arbitration pursuant to a clause in a contract between one of the Petitioner's predecessors and Archer.

The district court referred the case to a United States Magistrate Judge. Following a hearing, the magistrate judge issued a Memorandum Order holding that, *inter alia*, (1) the incorporation of the AAA Rules in the arbitration clause clearly evinced an intent to have the arbitrator decide questions of arbitrability; (2) there is a reasonable construction of the arbitration clause that would call for arbitration in this dispute. The district court vacated the magistrate judge's order and held that the court could decide the question of arbitrability, and that the dispute was not arbitrable because the plain language of the arbitration clause expressly excluded suits that involved requests for

injunctive relief. *Archer & White Sales, Inc. v. Henry Schein, Inc.*, No. 2:12-cv-572- JRG-RSP, 2013 WL 12155243 (E.D. Tex. May 28, 2013), *vacated*, 2016 WL 7157421 (E.D. Tex. Dec. 7, 2016).

The court of appeals outlined its analytical process thus: Enforcement of an arbitration agreement involves two analytical steps. First, a court must decide "whether the parties entered into *any arbitration agreement at all*; this inquiry is one of pure contract formation, and it looks only at whether the parties formed a valid agreement to arbitrate some set of claims. Pet. App. 4a. The next step is to determine whether the dispute at issue is covered by the arbitration agreement."[9] Before this step, however, the court must answer a third question: "[*w*]*ho should have the primary power to decide*' whether the claim is arbitrable." Pet. App. 5a This question turns on "whether the agreement contains a valid delegation clause – that is, if it evinces an intent to have the arbitrator decide whether a given claim must be arbitrated.'" *Id.*

The Fifth Circuit succinctly noted that "[T]he parties. . .disagree on whether the court or an arbitrator should decide the gateway question of arbitrability – and relatedly, whether the underlying dispute is arbitrable at all. *Id.*

The court of appeals affirmed, based on that court's decision in *Douglas v. Regions Bank*, 757 F.3d 460, 464 (5th Cir. 2014). In *Douglas* the court held that even if the parties "clearly and

unmistakably" intended to delegate the question of arbitrability to an arbitrator, the motion to compel arbitration should nevertheless should not be granted "[i]f the argument that the claim at hand is within the scope of the arbitration agreement is 'wholly groundless." *Douglas*, 757 F.3d at 464. The court of appeals then held that where there is no "plausible argument . . . the district court may decide the 'gateway' issue of arbitrability despite a valid delegation clause.'" Pet. App. 6a.

SUMMARY OF ARGUMENT

The decision of the court below, based on a selective and contorted reading of the arbitration agreement, negates the overriding federal policy of encouraging arbitration and enforcing arbitration agreements according to the intent of the parties. It does not heed this Court's recent teaching on the enforceability of arbitration agreements that "the overarching purpose of the Federal ("FAA" or "Act") is to ensure the enforcement of arbitration agreements according to their terms" and to "facilitate streamlined proceedings." *AT&T Mobility LLC v. Concepcion,*563 U.S. 333, 344 (2011).

The court below refused to enforce the arbitration agreement according to its terms, and instead adopted an exception that negates the parties' choice to have the arbitrator decide all issues, including the "gateway" issue of arbitrability. The court of appeals' holding that "[i]f an 'assertion of arbitrability [is] wholly groundless,' the court need not submit the issue of arbitrability

to the arbitrator," Pet. App. 12a, notwithstanding the language of the arbitration agreement and the incorporated rules of the arbitral tribunal[2]) misapplies federal arbitration law and exemplifies the very "judicial hostility towards arbitration," which the FAA was intended to foreclose. *Nitro-Lift Techs., L.L.C. v. Howard*, 133 S. Ct. 500, 503 (2012) (*per curiam*); *Concepcion*, 563 U.S. at 339; *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991).

The "wholly groundless" doctrine creates a sweeping exception to the overriding federal policy of encouraging arbitration and enforcing arbitration agreements according to the intent of the parties. It threatens to swallow the rule

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[2] The court of appeals recognized that "[a] contract need not contain an express delegation clause to meet this standard. An arbitration agreement that expressly incorporates the AAA Rules [for example] presents clear and unmistakable evidence that the parties agreed to arbitrate arbitrability." Pet. App. 7a. (Citations and internal quotation marks omitted.) Under AAA Rule 7(a), "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."

The Dealer Agreement provides that "[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 [the predecessor]), shall be resolved by binding arbitration *in accordance with the arbitration rules of the American Arbitration Association*." Pet. App. 6a-7a.

established by this Court's recent teaching on the enforceability of arbitration agreements that the overarching purpose of the FAA is to ensure the enforcement of arbitration agreements "according to their terms" and to facilitate streamlined proceedings and creates a scheme inconsistent with the FAA.

This Court should reverse the judgment below.

ARGUMENT

THE FIFTH CIRCUIT'S DECISION IS INCONSISTENT WITH THE FEDERAL AND THIS COURT'S TEACHING WITH RESPECT TO THE ENFORCEABILITY OF ARBITRATION AGREEMENTS

Amicus urges the Court to reverse the Fifth Circuit's decision and to confirm its holdings in *Concepcion*, *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662 (2010) and other cases which recognize the overriding Congressional policy of encouraging arbitration. This Court should make it clear that there is no "wholly groundless" exception to that overriding policy simply based on the court's evaluation of the persuasiveness of each side's arguments regarding the arbitrability of a dispute. If the parties have explicitly or implicitly by adopting certain arbitration protocols assigned the decision as to arbitrability to the arbitrator[s] in a facially valid agreement, that should end the judicial inquiry. arbitration relative to the potential recovery in individual arbitration.

This Court has repeatedly held that the "fundamental principle [is] that arbitration is a matter of contract," *Concepcion*, 563 U.S. at 339 (quoting *Rent-A-Center, West, Inc. v. Jackson,* 561 U.S. 63, 67 (2010)); *see also Stolt-Nielsen,* 559 U.S. 662, 681 (2010); *Volt Information Sciences, Inc. v. Board of Trs. of Leland Stanford Jr. Univ.,* 489 U.S. 468, 479 (1989), and that courts must enforce arbitration agreements according to their terms, *Volt,* 489 U.S. at 478; *Stolt-Nielsen*, 559 U.S. at 682; and "courts must 'rigorously enforce' arbitration agreements according to their terms. . . ." *American Express Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304, 2309 (2013); *see also Stolt-Nielsen,* 559 U.S. at 683. The court of appeal's decision frustrates these principles and this Court's teaching that the FAA "embodies . . . [a] national policy favoring arbitration," *Buckeye Check Cashing Inc. v. Cardegna*, 546 U.S. 440, 443 (2006); *see also*, *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

"[A]s a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration," *Moses H. Cone*, 460 U.S. at 24-25 & n.32; *see also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 626 (1985).

Arbitration permits parties to design "efficient, streamlined procedures tailored to the type of dispute" at issue. *Concepcion*, 563 U.S. 333, 344 (2011); it produces "expeditious results." *Mitsubishi Motors Corp. v. Soler Chrysler-*

Plymouth, Inc., 473 U.S. 614, 633 (1985); and it "reduc[es] the cost" of dispute resolution. *Concepcion*, 563 U.S. at 345.

The FAA was enacted to "reverse the longstanding judicial hostility to arbitration agreements." *Gilmer*, 500 U.S. 20, 24 (1991) and reflects "a liberal federal policy favoring arbitration." *Concepcion*, 563 U.S. at 339 (internal quotation marks and citation omitted).

The court of appeals' decision in this case is not a faithful application of federal arbitration law and exhibits the continued "judicial hostility towards arbitration" that the FAA was intended to foreclose, *Nitro-Lift Technologies L.L.C. v. Howard,* 568 U. S. 17 (2012) (*per curiam*), quoting *Concepcion*, 131 S. Ct. at 1745, 1747, 1757; *see also Gilmer*, 500 U.S. 20, 24 (1991).

FAA § 2, the "primary substantive provision of the Act," *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983), provides that arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. "That provision creates substantive federal law regarding the enforceability of arbitration agreements," requiring courts "to place such agreements upon the same footing as other contracts." *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630 (2009) (internal quotations omitted); *see also Preston v. Ferrer*, 552 U.S. 346, 349 (2008). The last clause of § 2 preserves the ability of States to apply "'generally applicable contract defenses,

such as fraud, duress, or unconscionability,'" to the enforcement of arbitration agreements, but it precludes application of any state-law "defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 131 S. Ct. at 1746 (quoting *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)).

FAA sections 3 and 4 implement the substantive pro-arbitration policy of section 2. Section 3 requires courts to stay litigation of arbitrable claims so that arbitration may proceed "in accordance with the terms of the [arbitration] agreement." 9 U.S.C. § 3. Section 4 provides that "the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement" unless "the making of the agreement for arbitration or the failure to comply therewith" are called into question. *Id.* § 4.

Under the FAA, "parties are generally free to structure their arbitration agreements as they see fit." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995) (internal quotations omitted). "[T]he FAA lets parties tailor ... many features of arbitration by contract, including the way arbitrators are chosen, what their qualifications should be, which issues are arbitrable, along with procedure and choice of substantive law." *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 586 (2008).

Parties that choose an arbitral forum do so principally to "trade[] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Mitsubishi*, 473 U.S. at 628. The parties' freedom to fashion their own arbitration agreements includes not only the ability to define "by contract the issues which they will arbitrate," but also the right to delineate the procedural "rules under which that arbitration will be conducted." *Volt*, 489 U.S. at 479; see also *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 269 (2009) (informality of arbitral proceedings is "not a basis for finding the forum somehow inadequate").

FAA's mandate that courts enforce arbitration agreements according to their terms applies in disputes over "gateway" issues of arbitrability, including whether a particular claim falls within the scope of the arbitration provision. See *id*. at 69. And it applies in disputes over the antecedent question of who decides such gateway issues: the court or the arbitrator. See *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943-944 (1995).

Although there is a presumption that courts resolve gateway disputes of arbitrability, the presumption will be overridden if the parties "clearly and unmistakab[ly]" agree to "arbitrate arbitrability." *First Options*, 514 U.S. at 944.This "delegation provision" is treated as an "additional, antecedent agreement the party seeking arbitration asks the federal court to enforce," and

the FAA "operates on this additional agreement just as it does on any other." *Rent-A-Center*, 561 U.S. at 70. The delegation applies to virtually all gateway disputes, including disputes over whether the arbitration agreement covers a particular dispute. *Id.* at 68-69.

The "federal substantive law of arbitrability," is the "body of federal substantive law" interpreting and effectuating FAA § 2, the statute's "primary substantive provision" and nothing in that body of law suggests that it is appropriate for courts to create exceptions to the FAA based on their view of the policy of other federal laws. *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24, nor does the federal substantive law of arbitrability allow courts to promulgate judge-made rules that frustrate the FAA's purposes, on the theory that doing so might advance the purpose of some other law. *See Concepcion*, 131 S. Ct. at 1748. On the contrary, just as *Concepcion* held that the FAA preempts state-law rules that insist on class arbitration as a condition of enforcement, the judicially crafted "wholly groundless" rule likewise is contrary to the federal substantive law of arbitrability.

The Seventh Circuit in *Douglas*, 757 F.3d 460, the source of the "wholly groundless" rule, acknowledged that the rule "necessarily requires us to examine and, to a limited extent, construe, the underlying agreement." *Id.* at 463. But this Court in *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643 (1986), instructed that, when "deciding whether the

parties have agreed to submit a particular grievance to arbitration," a court "ha[s] no business weighing the merits of the grievance," because "[t]he agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious." *Id.* at 650; see also *Steelworkers v. American Manufacturing Co.*, 363 U.S. 564, 568 (1960) and the court "is not to rule on the potential merits of the underlying claims." *Concepcion* at 649. The merits of a claim have no bearing on the enforceability of the arbitration agreement, because when the parties agree to arbitrate disputes they vest the authority to decide the merits in the arbitrator, not in the courts.

The same principle applies when the issue to be arbitrated concerns a gateway issue of arbitrability. When parties agree to delegate the authority to decide arbitrability to the arbitrator, the arbitrator is authorized to decide whether a particular dispute falls within the range of disputes that the parties agreed to arbitrate. See *Rent-A-Center*, 561 U.S. at 70. The merits of the claims do not factor into the analysis. See *AT&T Technologies*, 475 U.S. at 649-650.

The circuit court's reading of the FAA makes it likely that federal district courts will be the initial venue for what should be arbitration issues on the merits. This will greatly increase litigation costs and complexity because it effectively requires a judicial proceeding whenever a litigant can conjure a colorable reason the adversary's demand for arbitration is "wholly groundless." arbitration

agreement a federal law claim is asserted. The party seeking to arbitrate in accord with the arbitration agreement may be required to spend many times the cost of an arbitral proceeding and many months (or, as in this case, years) of court proceedings to enforce the arbitration clause. Courts will likely be drawn into inquiring into the merits of the claims and defenses, whether the claim is dismissible on such standard defenses as statute of limitations, laches or res judicata. The issues the trial court decides may create grounds for appeal, adding more expense and delay.

The switch from the arbitrator deciding if the dispute as a whole or particular claims are arbitrable to a court deciding "gateway issues" negates principal benefits of arbitration – informality, economy and expedition – and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." *Concepcion*, 131 S. Ct. at 1751. The "wholly groundless" doctrine effectively nullifies those advantages. Under the doctrine, a court can preclude arbitration whenever it concludes, based on its own interpretation of the arbitration agreement, that there is no "legitimate argument that [the agreement] covers the present dispute." Pet. App. 11a.

The court of appeals seemed to mollify this rule by adding that an assertion of arbitrability is not 'wholly groundless' if 'there is a legitimate argument that th[e] arbitration clause covers the present dispute, and, on the other hand, that it

does not'" and if a court can find "a 'plausible' argument that the arbitration agreement requires the merits of the claim to be arbitrated," the wholly groundless exception will not apply." Pet. App. 12a. These words would seem to have little effect in practice, for in this case the magistrate judge found that the gateway issue was arbitrable, meeting, we submit, the "plausible argument" threshold.

The "wholly groundless" doctrine creates an incentive for a party with even a colorable argument against arbitration to challenge the agreement in court, leading to protracted proceedings that could include motion practice, a "mini-trial" over arbitrability and appeals, as this case itself demonstrates. It would, in short, "breed[] litigation from a statute that seeks to avoid it." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 275 (1995).[3]

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[3] The concern that arbitrators may make mistakes in adjudicating the issue of arbitrability, see Br. in Opp. 2 n.1, applies to arbitrators' decisions on the merits as well as on "gateway" issues. It is a concern that the parties have, presumably, considered in deciding whether to enter into an arbitration agreement at all. It is a concern that can be ameliorated by the parties' choice of arbitrator[s]. In fact, many arbitrators are retired judges or accomplished lawyers, capable of deciding the most complex issues. Further, arbitrators are presumed to be competent and diligent. See *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 232 (1987); *Mitsubishi Motors*, 473 U.S. at 634.

Even if then arbitration agreement is enforced at the end of the judicial proceeding, the party seeking to arbitrate may have already spent many times the cost of an arbitral proceeding just enforcing the arbitration clause. The predictable result is that the decision below will render arbitration too expensive and too slow to serve any of the arbitration agreement's or the FAA's essential purposes. See *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer,* 515 U.S. 528, 533 (1995).

There is no valid basis for recognizing a "wholly groundless" exception to the FAA's mandate to "rigorously enforce arbitration agreements according to their terms." *Italian Colors*, 133 S. Ct. at 2309 (internal quotation marks and citation omitted).

When the parties agree to assign gateway issues of arbitrability to the arbitrator the FAA requires a court to "respect and enforce" that agreement. *Epic Systems*, 138 S. Ct. at 1621.

The "wholly groundless" doctrine does not promote the FAA's policy. The decision below undermines the key benefits of arbitration by turning the threshold arbitrability question into a detailed inquiry into the merits of the parties' claims and defenses. Judicial "screening" of arbitration cases defeats the FAA's core purpose of ensuring streamlined proceedings according to the parties' contractual intent and hints at the "judicial hostility to arbitration" that led Congress to enact the FAA early last a century. *Green Tree*

Financial Corp.-Alabama v. Randolph, 531 U.S. 79, 89 (2000); *Gilmer*, 500 U.S. 20, 24 (1991); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510-511 (1974).

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for further proceedings.

Respectfully submitted,

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