No. 17-986

IN THE

Supreme Court of the United States

IQ PRODUCTS COMPANY,

Petitioner,

v.

WD-40 COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

This Court has held that a court must refer gateway questions of arbitrability to the arbitrator if there is clear and unmistakable evidence that the parties agreed to arbitrate arbitrability. The Fifth Circuit agrees and requires courts to enforce a clause delegating arbitrability questions to the arbitrator unless the arbitrability argument is "wholly groundless."

Petitioner IQ Products Company (IQ) asserts that "four circuit courts have adopted some version of the 'wholly groundless' test, while two other circuits have rejected it." Pet. i. Based on this asserted conflict among the circuit courts, IQ argues that this case presents the question whether a "court should deny the motion [to compel arbitration of the gateway question of arbitrability] where the arbitrability argument is 'wholly groundless.'" *Id.*

Accordingly, the questions presented are:

1. Whether IQ may obtain review of the Fifth Circuit's decision to adopt—rather than reject—the "wholly groundless" exception, given that IQ agrees with the Fifth Circuit's decision to adopt the "wholly groundless" exception and does not seek reversal on this ground.

2. Whether IQ has waived review of the issue that it briefs but does not include in its question presented: whether the Fifth Circuit incorrectly applied the "wholly groundless" exception to the specific facts of this case in light of California law governing contract interpretation. *See* S. Ct. R. 14.1(a).

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Respondent WD-40 Company (WD-40) is a publicly traded company. BlackRock, Inc. owns more than 10% of WD-40's shares through its various managed funds.

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INTRODUCTION

Under the Fifth Circuit's precedent, applied by the courts below, a court will refer gateway questions of arbitrability to the arbitrator if (1) the parties clearly and unmistakably evinced an intent to arbitrate arbitrability questions, and (2) the argument for arbitrability is not wholly groundless. IQ conceded the first prong of this test in the courts below and thus does not challenge that issue here. Instead, IQ contends that the circuits are split on the propriety of the second prong: that is, whether a court faced with a clear and unmistakable intent to delegate gateway arbitrability questions to the arbitrator must compel arbitration of those issues under the first prong, or whether the court can nevertheless refuse to compel arbitration under the "exception" in the second prong if it concludes the arbitrability argument is wholly groundless.

This case presents a poor vehicle for addressing this question, as neither party is properly postured to litigate it. The Fifth Circuit has adopted the "wholly groundless" exception and applied it in this case. IQ, therefore, does not actually seek review of the Fifth Circuit's decision to adopt, rather than reject, the "wholly groundless" exception, nor does it assert that the court is on the wrong side of the purported circuit split. For its part, WD-40 has had little motivation to litigate the propriety of the "wholly groundless" exception, because WD-40 readily prevails whether or not it applies. Indeed, the judges and arbitrators below have concluded on seven separate occasions that there is a more-than-plausible argument for arbitrability on the specific facts of this case. Thus, review of the putative conflict would not change the outcome of this case: if this Court concludes that the Fifth Circuit should not have adopted the "wholly groundless" exception, the

Fifth Circuit's conclusion that arbitration of arbitrability was proper would still stand, because IQ does not dispute that the parties clearly and unmistakably agreed to arbitrate arbitrability.

Furthermore, review of this issue is premature, given that only six circuits have considered the issue; at least one of those circuits has questioned whether there is, in fact, a genuine conflict among the circuits at all; the putative conflict has surfaced only within the last year; the courts adopting the "wholly groundless" exception have offered little analysis to support it; and the advent of contrary authority has already prompted at least one of the courts to signal openness to reconsidering its prior decision adopting the "wholly groundless" exception. Waiting to review the putative conflict would allow this Court the benefit of further percolation of the issue in the lower courts.

Ultimately, IQ briefs a different issue not included in its question presented: IQ argues that although the Fifth Circuit has properly adopted the "wholly groundless" exception, the court misapplied it here, and should have found the arbitrability argument to be wholly groundless given the specific factual circumstances of this case. IQ is simply wrong on this point. Even if it were right, the question turns on a fact-bound determination under California law, is unlikely to have ramifications beyond this case, and involves no actual circuit split.

The petition should be denied.

STATEMENT OF THE CASE

I. Legal Background

The Federal Arbitration Act (FAA) was enacted in 1925 as a response to judicial hostility to arbitration. *See CompuCredit Corp.* v. *Greenwood*, 565 U.S. 95, 97 (2012). It is "a congressional declaration of a liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). Section 2 provides that a "written provision in . . . a contract . . . to settle by arbitration a controversy thereafter arising out of such contract . . . shall be 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. The FAA therefore reflects the fundamental principle that arbitration is a matter of contract and that arbitration agreements must be enforced according to their terms. *See Rent-a-Center, West, Inc.* v. *Jackson*, 561 U.S. 63, 67 (2010). Parties can agree to arbitrate not only the merits of their disputes, but also "'gateway' questions of 'arbitrability,' such as . . . whether their agreement covers a particular controversy." *Id.* at 68–69. The question whether the parties agreed to arbitrate arbitrability must be decided by the court, not the arbitrator, unless there is "clear and unmistakable evidence" that they agreed to arbitrate arbitrability. *Rent-a-Center*, 561 U.S. at 70 n.1.

IQ notably does not challenge in this Court—and expressly waived the argument in the district court and Fifth Circuit below—that the incorporation of the American Arbitration Association (AAA) rules into the parties' agreement constitutes "clear and unmistakable evidence" that the parties intended to delegate the gateway question of arbitrability to the arbitra-

tors.[1] Pet. App. 9a, 25a. IQ concedes that circuits considering the issue have concluded that a contract's incorporation of AAA or similar rules that grant the arbitrators the power to rule on their own jurisdiction constitutes clear and unmistakable evidence that the parties intended the arbitrators to decide arbitrability. *See* Pet. 14–15.

Instead, IQ argues that arbitration should not have been compelled based on the Fifth Circuit's "wholly groundless" exception to this Court's "clear and unmistakable" standard. Under this exception, even if the parties clearly and unmistakably evinced an intent to delegate gateway questions of arbitrability to the arbitrator, a court will nevertheless refuse to enforce a delegation clause if the argument for arbitrability of the merits is "wholly groundless." *See Douglas* v. *Regions Bank*, 757 F.3d 460, 463 (5th Cir. 2014). The Fifth Circuit has emphasized that this exception is a "narrow" one that applies only in "exceptional" cases. *Kubala* v. *Supreme Prod. Servs., Inc.*, 830 F.3d 199, 202 n.1 (5th Cir. 2016). The exception "is not a license for the court to prejudge arbitrability disputes more properly left to the arbitrator pursuant to a valid delegation clause." *Id. Cf. AT&T Tech., Inc.* v. *Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986) ("[I]n deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is

[1] IQ's characterization of the provision incorporating AAA Rules as an "implicit" delegation clause is a misnomer. It ignores that this clause is, in fact, an *explicit* incorporation of *explicit* rules that grant an arbitrator "'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.'" *See Petrofac, Inc.* v. *DynMcDermott Petroleum Operations Co.*, 687 F.3d 671, 675 (5th Cir. 2012) (quoting the AAA Rules).

not to rule on the potential merits[.]"). "[S]o long as there is a 'plausible' argument that the arbitration agreement requires the merits of the claim to be arbitrated, a delegation clause is effective to divest the court of its ordinary power to decide arbitrability." *Kubala*, 830 F.3d at 202 n.1. "Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 945 (1995) (quotations omitted).

II. Factual Background

WD-40 produces a lubricant concentrate and utilizes third-party packagers, such as IQ, to blend the concentrate with other materials and place the product into various containers—most often aerosol cans that contain a propellant to spray the lubricant on the desired surface. In 1996, WD-40 converted from using a propane/butane propellant to carbon dioxide ("CO_2"). Pet. App. 2a, 32a.

Around the same time, WD-40 and IQ were in negotiations to sign an agreement, the Manufacturing License and Product Purchase Agreement (the "1996 Agreement" or "Agreement"), which the parties ultimately signed on April 10, 1996. Pet. App. 3a. At the time the 1996 Agreement was signed, WD-40 had not yet converted to the CO_2 propellant, although IQ understood the conversion would soon take place. Pet. App. 2a–3a

Furthermore, the 1996 Agreement required IQ to purchase from WD-40 "certain materials," including the "basic Product" in concentrate form, that were included with a price list in Exhibit A to the Agreement. Pet. App. 71a. The Agreement also required WD-40 to purchase the finished goods from IQ at the prices listed on Exhibit B to the contract. Pet. App. 71a–72a.

The 1996 Agreement required the parties to use purchase orders and invoices for these transactions. *Id*.

The 1996 Agreement established a procedure by which WD-40 could modify the product that IQ was required to produce without having to formally amend the contract. The Agreement gave WD-40 the right to "provide [IQ] with packaging specifications." Pet. App. 70a. It also expressly authorized WD-40 to change the "certain materials" that IQ was required to purchase, by giving 30-days' notice to IQ. Pet. App. 71a. Finally, the Agreement allowed WD-40 to designate approved suppliers from which IQ was required to purchase certain necessary materials that were unavailable from WD-40. Pet. App. 71a. For its part, IQ also could adjust the prices it would charge WD-40 for the finished goods with 30-days' written notice to WD-40. Pet. App. 71a-72a. No signed amendment or modification to the 1996 Agreement was required for such changes. *Id*.

Before signing the 1996 Agreement, IQ informed WD-40 in a letter that it was not agreeing to package CO_2-propelled products "at present," because the new CO_2 specifications had not been finalized. Pet. App. 3a; ROA.1063–65. That letter, however, did not state that IQ would forever package only propane/butane-propelled products under the 1996 Agreement and would never package CO_2-propelled products—or, for that matter, other WD-40 products that did not contain any propellant. Rather, the letter simply stated that the contract would not apply to CO_2 products "at present" until the new specifications were developed, and prices were set. *Id*.

Consistent with this letter, the contractual recital in the 1996 Agreement on which IQ heavily relies

states the nature of the business in which WD-40 was engaged at the time the Agreement was executed:

> A. WD-40 is engaged in the marketing and sale of a penetrating, lubricating spray product identified and labeled "WD-40" (the "Product") which utilizes a proprietary formula technology developed by WD-40.

Pet. App. 69a. Following the reference in the recital to a "penetrating, lubricating spray product identified and labeled 'WD-40,'" a handwritten insertion between the lines of printed text states, "based on propane/butane propelled formulation and specifications." *Id.*; *see also* ROA.400 (copy of actual handwritten interlineation). This recital accurately stated that, at the time the 1996 Agreement was executed, WD-40 "is" using a propane/butane propellant; WD-40 did not switch to a CO_2 propellant until a few months later, in approximately July 1996. Pet. App. 18a. On its face, this interlineation does not forever limit the 1996 Agreement to WD-40 products that use propane/butane as a propellant or "exclude" CO_2 products from ever being brought within the Agreement's ambit.

In fact, such an interpretation would conflict with other provisions of the Agreement, which contemplate that the "Product" is defined without reference to the propellant. For example, the 1996 Agreement required IQ to purchase from WD-40 the "basic Product in concentrate form." Pet. App. 71a. This provision contemplates that the "Product" is the concentrate IQ was required to purchase from WD-40, without regard to the nature of the propellant. When they signed the 1996 Agreement, WD-40 and IQ expected that the new CO_2-propelled products, once tested, would be packaged by IQ. Accordingly, at the end of April 1996,

WD-40, consistent with the 1996 Agreement's provisions allowing WD-40 to provide specifications and change "all required components and materials" on 30-days' notice, provided CO_2 specifications to IQ for conversion on July 1, 1996. ROA.738, 744–82; Pet. App. 4a, 70a–71a. IQ then began packaging WD-40 products using the new CO_2 propellant. Pet. App. 4a, 13a.

IQ does not dispute that it packaged WD-40 products with CO_2 propellant from mid-1996 to 2012. Pet. App. 13a. Furthermore, the parties engaged in other conduct consistent with an extension of the 1996 Agreement to cover CO_2-propelled products. After the CO_2 conversion, WD-40 continued to send lists of approved suppliers from whom IQ was required, under the 1996 Agreement, to buy certain materials unavailable from WD-40. Pet. App. 71a; ROA.738, 741–43. IQ also concedes the parties used invoices and purchase orders for IQ to buy components and materials, including the basic Product in concentrate form, from WD-40 and for WD-40 to buy the finished goods from IQ. Pet. 9. Contrary to IQ's assertion, this was consistent with the continued application of the 1996 Agreement after the CO_2 conversion; indeed, the 1996 Agreement required the use of invoices and purchase orders. Pet. App. 71a–72a. It was also consistent with the 1996 Agreement's term, which expressly made the contract "ongoing" unless terminated pursuant to its provisions. Pet. App. 70a. It would make no sense for the parties to draft, negotiate, and sign a new agreement that modernized WD-40's packaging operations if the contract was forever limited to a single product (propane/butane-propelled lubricant) that the parties knew would be discontinued a few months after execution.

In 2011, WD-40 issued a Request for Proposal (RFP) to restructure its supply-chain business model, asking its packagers, such as IQ, to bid. Pet. App. 4a. WD-40 selected IQ's bid for the new supply-chain architecture and in July 2011, started the process of "renegotiating the terms and conditions" of the 1996 Agreement, using the notice provisions of paragraph 13 therein. Pet. App. 13a–14a; ROA.733–34. As the Fifth Circuit observed, there is no evidence that IQ objected to the ongoing validity of the 1996 Agreement at that time, despite WD-40 having specifically referenced its intent to terminate and renegotiate that contract. Pet. App. 14a; ROA.734.

In early 2012, however, before the renegotiation of the 1996 Agreement could be completed, IQ began complaining about the expense entailed in meeting the quality-control requirements in the RFP and insisted on a price increase. Pet. App. 5a. IQ also criticized the packaging specifications, despite having packaged WD-40's CO_2 products since mid-1996. Pet. App. 4a–5a. WD-40 did not agree to IQ's price-increase demand and eventually terminated the relationship after the parties reached an impasse. Pet. App. 5a.

III. Proceedings Below

IQ sued WD-40 on May 31, 2012 in the United States District Court for the Southern District of Texas. IQ also reported an alleged defect in one of the components used in WD-40's CO_2-propelled products to the U.S. Department of Transportation (DOT) in December 2012. ROA.914. In its Petition, IQ asserts that WD-40's products exhibited deformation in the cans and that any deformation renders the product unsafe and unfit for transportation under federal safety regulations. Pet. 9. However, the DOT, at IQ's insistence, investigated IQ's allegations and

concluded—after the matter had been referred to arbitration and on more than one occasion—that WD-40's products complied with federal regulations. ROA.1914–15, 1917–20, 1160–63; *see also* ROA.1922–23. These were simply spurious claims asserted by IQ in an attempt to bolster its federal complaint against WD-40 alleging a wrongful termination of the business relationship.

In the lawsuit, WD-40 moved to compel arbitration based on the arbitration clause in the 1996 Agreement, which provides:

> Any controversy or claim arising out of, or related to this Agreement, or any modification or extension thereof, shall be settled by arbitration in accordance with the Arbitration Rules of the American Arbitration Association . . . .

Pet. App. 78a. The argument for arbitrability has been judicially determined to be "not wholly groundless" five times in this case—once by the magistrate judge and once by the district court before the arbitration, once by the magistrate judge and once by the district court after the arbitration, and once by the Fifth Circuit. *See* Pet. App. 15a, 16a–17a, 28a, 40a–41a, 43a, 57a. Furthermore, the claims in this case have been found to be arbitrable by four arbitrators—first by a single arbitrator agreed upon by the parties to decide that issue and, again, by the three-arbitrator panel assigned to hear the merits. Pet. App. 5a–6a; ROA.1314–15, 1129–30, 1142–51, 1188.

REASONS FOR DENYING THE PETITION

IQ's Petition should be denied for four reasons: (1) this case provides a poor vehicle for considering the putative circuit split concerning the adoption of the "wholly groundless" exception because neither IQ nor

WD-40 has a need to litigate its adoption here; (2) the putative conflict—assuming it *is* a conflict—has only recently arisen and should be allowed to percolate before this Court considers it; (3) IQ's actual complaint that the Fifth Circuit misapplied the "wholly groundless" exception in this case is waived, and in any event is a fact-bound inquiry governed by California law that provides no basis for review; and (4) the Fifth Circuit properly applied the "wholly groundless" exception to the facts of this case.

I. This Case Provides a Poor Vehicle for Considering the Putative Circuit Split as to the Adoption of the "Wholly Groundless" Exception

This case is not the right vehicle for considering the issue that IQ poses in its question presented: whether a court should refuse to compel arbitration of gateway questions of arbitrability "where the arbitrability argument is 'wholly groundless.'" Pet. i. IQ contends that the circuits have split on this issue: it asserts that four circuits (Fourth, Fifth, Sixth, and Federal) have adopted the "wholly groundless" exception, while two circuits (Tenth and Eleventh) have rejected it, holding instead that the gateway question of arbitrability must be referred to the arbitrator whenever the parties have evinced a "clear and unmistakable" intent to arbitrate arbitrability. Pet. i. Thus, IQ seeks review based on the putative circuit split as to whether the "wholly groundless" exception should be accepted or rejected. *See id.* For several reasons, this case does not squarely present this question, and the parties are not correctly postured to litigate it vigorously.

First, IQ is not in a position to complain about the alleged circuit split. IQ agrees with the Fifth Circuit's decision to adopt the "wholly groundless" exception. If

this Court were to grant review, IQ as petitioner would be asking this Court to *affirm* the Fifth Circuit's adoption of the "wholly groundless" exception. IQ's invocation of the "circuit split" as to the applicability of the "wholly groundless" exception is therefore inapt: IQ does not (and cannot) contend that the Fifth Circuit erred in adopting the "wholly groundless" exception that supposedly puts that court at odds with the Tenth and Eleventh Circuits. Accordingly, IQ is not positioned to litigate the circuit split it purports to have identified. Instead, IQ seeks reversal only on the alleged ground that the court below *misapplied* the exception to the specific facts of this case—a fact-specific, state-law-dependent issue that does not warrant review by this Court. *See* pp. 16–22, *infra*.

Second, WD-40 is likewise not positioned to litigate the question that IQ purports to present. Because the plausibility of arbitrability is so clear, and having already repeatedly defeated IQ's argument that arbitrability was wholly groundless, WD-40 has had little motivation—either in this Court or in the proceedings below—to argue that the "wholly groundless" exception should be rejected.[2]

But even if this Court granted the petition and decided that the Fifth Circuit's adoption of the "wholly

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[2] Although WD-40 did note in the Fifth Circuit that the "viability" of the "wholly groundless" exception was subject to "doubt," WD-40 focused its arguments on why the argument for arbitrability was not "wholly groundless," given long-standing Fifth Circuit precedent adopting the test and the strong arguments that WD-40's arbitrability argument was not wholly groundless. Nevertheless, the "wholly groundless" exception does not square with this Court's admonition that "in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits[.]" *AT&T Tech*, 475 U.S. at 649.

groundless" exception was error, the outcome in this case would not change. In that event, the question whether arbitrability should be determined by the arbitrator would turn solely on whether the parties evinced a "clear and unmistakable" intent to delegate gateway arbitrability issues to the arbitrator. But IQ does not challenge here that the parties evinced such a "clear and unmistakable" intent. This is no oversight: IQ expressly waived this argument below. *See* Pet. App. 9a, 25a. IQ not only told the district court that "IQ does not challenge that aspect of the decision," ROA.1382; it also affirmatively conceded that, "[s]ince there was a clear delegation of the arbitrability determination in *Douglas*, *as there is here, the outcome turned on the second step in the Douglas analysis*"—the "wholly groundless" exception. ROA.1975 (emphasis added). Pet. App. 25a. Because IQ does not raise (and indeed, has waived) any argument that IQ did not clearly and unmistakably intend to delegate arbitrability issues to the arbitrator (and because that intent was manifested by the parties' agreement to incorporate the AAA rules), a ruling by this Court rejecting the "wholly groundless" exception would not change the outcome of this case.

Simply put, this case presents a poor vehicle for taking up the putative circuit split as to whether the Fifth Circuit's "wholly groundless" exception should be adopted. If the Court wishes to review the issue, it should do so in a case in which the decision whether to adopt or reject the "wholly groundless" exception is outcome determinative and the opposing parties are positioned to advocate strongly for and against the exception. This is not that case. *Cf.* Petition for a Writ of Certiorari, *Henry Schein, Inc.* v. *Archer & White Sales, Inc.*, 2018 WL 1304871 (No. 17-1272), in the

Supreme Court of the United States (filed 3/9/2018) (party whose argument for arbitrability was rejected by the Fifth Circuit as wholly groundless seeks certiorari on the question whether the Fifth Circuit erred in adopting "wholly groundless" exception).[3]

II. The Purported "Conflict" Is Nascent, Questionable, and Shallow at Most

There is, moreover, no circuit split that is appropriately poised for this Court's review. The purported conflict, if any, is nascent, and the law on the issue is still in flux. IQ concedes that the alleged conflict is a "*recent* burgeoning" split that "has developed" "*within the past year*." Pet. 1, 19 (emphasis added). Only six circuits have addressed the issue, and of those circuits, IQ admits that "the Fourth Circuit's position [is] now unclear." Pet. 2. Similarly, the Federal Circuit, which first adopted the "wholly groundless" exception in *Qualcomm Inc.* v. *Nokia Corp.*, 466 F.3d 1366 (Fed. Cir. 2006), recently suggested it might have reconsidered whether the test "permits too much judicial inquiry" if the issue had been properly raised. *Evans* v. *Bldg. Materials Corp.*, 858 F.3d 1377, 1380 n.1 (Fed. Cir. 2017). The circuits are not entrenched in their positions.

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[3] *Henry Schein, Inc*. involved an arbitration clause that expressly excluded injunction and intellectual-property claims from the arbitration agreement. *Archer and White Sales, Inc.* v. *Henry Schein, Inc*., 878 F.3d 488, 491 (5th Cir. 2017). Based on this express carve-out, the court concluded that the assertion that injunction claims were nonetheless arbitrable was "wholly groundless." *Id*. at 496-98. Thus, the outcome of that case will hinge on whether the "wholly groundless" exception remains valid. In contrast, the present case does not depend on the resolution of that question, as WD-40 would prevail regardless of the exception's validity.

The Federal Circuit's apparent willingness to reexamine the issue likely stems from a recognition that courts have adopted the "wholly groundless" exception with little analysis. The other circuits that have adopted the "wholly groundless" exception have largely cited the Federal Circuit's *Qualcomm* opinion and other cases without further analyzing the issue. *See, e.g.*, *Agere Sys., Inc.* v. *Samsung Elecs. Co.*, 560 F.3d 337, 340 (5th Cir. 2009); *Simply Wireless, Inc.* v. *T-Mobile US, Inc.*, 877 F.3d 522, 528 & n.5 (4th Cir. 2017). For its part, *Qualcomm* simply copied the "wholly groundless" exception from a California state-court opinion and suggested that § 3 of the FAA supported its adoption. *See* 466 F.3d at 1371 (quoting *Dream Theater, Inc.* v. *Dream Theater,* 21 Cal. Rptr. 3d 322, 326 (Ct. App. 2004)). As the Fifth Circuit recently acknowledged, "*Douglas* is a recent case, [and the] contours of the 'wholly groundless' exception [are] not yet fully developed." *Archer and White Sales, Inc.* v. *Henry Schein, Inc.*, 878 F.3d 488, 497 (5th Cir. 2017). Waiting to take up this issue would give this Court the benefit of "the experience of . . . thoughtful colleagues on the district and circuit benches, [which] could yield insights (or reveal pitfalls)" on the question presented, allowing this court to "bless the best of it." *Maslenjak* v. *United States*, 137 S. Ct. 1918, 1931 (2017) (Gorsuch, J., concurring in part and concurring in the judgment).

Second, as the Tenth Circuit observed, a conflict may not even exist on this issue. Citing the Fifth Circuit's opinion in *Douglas* and the Tenth Circuit's opinion in *Belnap* v. *Iasis Healthcare*, 844 F.3d 1272 (10th Cir. 2017), the Federal Circuit suggested that—but declined to decide whether—"such differences reflect case-specific differences in contract language or differences in legal standards." *Evans*, 858 F.3d at

1380 n.1. Again, prudence dictates that the Court allow the issue to percolate in the lower courts; ultimately, IQ's claimed conflict may be a non-issue.

Finally, even if the Fifth Circuit's decision in this case and the Tenth Circuit's decision in *Belnap* could be viewed as creating a conflict, any conflict would be narrow at best. The Fifth Circuit has made clear that cases in which the application of the "wholly groundless" exception will result in a denial of a motion to compel arbitration of the gateway question of arbitrability are "exceptional" and that "[i]f there is a delegation clause, the motion to compel arbitration should be granted in *almost all* cases." *Kubala*, 830 F.3d at 202 & n.1 (emphasis added). In other words, the application of the "wholly groundless" exception should only rarely result in a different outcome and does not justify the grant of certiorari.

III. The Complaint That IQ Actually Briefs Is a Fact-Specific, State-Law-Dependent Challenge to the Fifth Circuit's Application of the "Wholly Groundless" Exception

In the body of its Petition, IQ recognizes that its true complaint in this proceeding is not that the Fifth Circuit failed to reject the "wholly groundless" exception, thereby creating a conflict with the Tenth and Eleventh Circuits. Instead, IQ argues that, although the Fifth Circuit correctly adopted the "wholly groundless" exception, it misapplied the exception to the specific facts of this case. *See* Pet. 21–22 ("[T]he 'wholly groundless' test should have compelled the conclusion that this case did not belong in arbitration."). This argument was not included in IQ's question presented and is therefore waived. S. Ct. R. 14.1(a). Furthermore, IQ's request for fact-bound error correction does not support the grant of its

petition. *Cf. First Options*, 514 U.S. at 948 (holding question whether the "Court of Appeals erred in its ultimate conclusion that the merits of the Kaplan/ First Options dispute were not arbitrable" was a "factbound issue" beyond the scope of the questions the Court had agreed to review).

To generate a specter of conflict, IQ asserts that the Fifth Circuit's "wholly groundless" exception is "weakened" compared to the Federal Circuit's allegedly "robust version" and will result in a multitude of cases involving "implicit delegation" clauses being referred to arbitration. Pet. 18, 19, 22–23. This argument simply ignores Fifth Circuit jurisprudence. *See Archer & White Sales, Inc.* v. *Henry Schein, Inc.*, 878 F.3d 488, 497 (5th Cir. 2017) (concluding argument for arbitration was wholly groundless and affirming district court's order denying motion to compel arbitration). It also ignores the facts of this case, which amply support the decisions by the magistrate judge, district judge, court of appeals, and four arbitrators that a plausible argument for arbitrability exists in this case. *See* pp. 19–22, *infra*.

Even if true, IQ's argument that the Fifth Circuit is applying a weaker "wholly groundless" standard than the Federal Circuit's "wholly groundless" standard is nothing more than a complaint about minor variations in a single standard—a complaint that does not rise to the level of a conflict necessitating review.

In any event, IQ's assertion that the Fifth Circuit is applying a weaker standard is not accurate. The Federal and the Fifth Circuits apply the same "wholly groundless" standard, which they have both drawn from the Federal Circuit's opinion in *Qualcomm Inc.* v. *Nokia Corp.*, 466 F.3d 1366, 1371 (Fed. Cir. 2006). *See Evans* v. *Bldg. Materials Corp.*, 858 F.3d 1377, 1380 &

n.11 (Fed. Cir. 2017); *Agere Sys., Inc.* v. *Samsung Elecs. Co.*, 560 F.3d 337, 340 (5th Cir. 2009); *Douglas* v. *Regions Bank*, 757 F.3d 460, 463 (5th Cir. 2014) (all citing *Qualcomm)*. The author of the opinion in this case, Judge Higginson, was on the *Douglas* panel; any suggestion he was applying a different standard in this case than in *Douglas* or the Federal Circuit cases on which *Douglas* relies is without support.

Indeed, IQ makes no attempt to show how the standards that the Federal Circuit and the Fifth Circuit applied differed or that the purportedly different standards would result in a different outcome on the same facts. IQ merely observes that the Federal Circuit in *Evans* reached a different result—the denial of arbitration—than did the Fifth Circuit in this case. Pet. 18. But there is a simple reason that the *Evans* case came out differently than this case: it applied the same law, but to *different facts*. The *Evans* court held that the assertion of arbitrability was wholly groundless because the arbitration clause required arbitration of claims "arising under the agreement," which the court held turned on "whether the claims are related to the interpretation and performance of the contract itself." 858 F.3d at 1381. The *Evans* court held that "[s]uch 'arising under' language is narrower in scope than language, such as 'relating to,' under which a claim may be arbitrable if it has a 'significant relationship' to the contract[.]" *Id.* The arbitration clause in this case contains the broader "relating to" language specifically distinguished by the *Evans* case. *See* pp. 19–20, *infra*. That the *Evans* court reached a different result than the Fifth Circuit in this case stems not from any difference in the law being applied, but rather from a difference in the facts to which the law was being applied.

IV. The Fifth Circuit Correctly Concluded That the Argument for Arbitrability Was Not "Wholly Groundless" on the Facts of This Case and Under California Law

Finally, review of this case should be denied because the Fifth Circuit correctly concluded that the assertion of arbitrability was not wholly groundless in light of the specific facts of this case and California law governing contract interpretation, which the parties agree applies here.

Under Fifth Circuit precedent, an arbitrability argument is not wholly groundless and a delegation clause is enforceable "[s]o long as there is a 'plausible' argument that the arbitration agreement requires the merits of the claim to be arbitrated." Pet. App. 11a (quoting *Kubala*, 830 F.3d at 202 n.1). The "wholly groundless" exception applies only in "exceptional" cases and "is not a license for the court to prejudge arbitrability disputes[.]" *Kubala*, 830 F.3d at 202 n.1. Any attempt to prejudge arbitrability would violate this Court's admonition that "[i]n deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits[.]" *AT&T Tech.*, 475 U.S. at 650. "Moreover, the policy of the Arbitration Act requires a liberal reading of arbitration agreements." *Moses H. Cone*, 460 U.S. at 22 n.27.

Here, the Fifth Circuit properly concluded that the assertion of arbitrability was not wholly groundless. The arbitration clause in the 1996 Agreement provides:

> Any controversy or claim *arising out of, or related to this Agreement, or any modification or extension thereof,* shall be settled by arbi-

> tration in accordance with the Arbitration Rules of the American Arbitration Association . . . .

Pet. App. 78a (emphasis added). The language in this clause has been consistently construed by the courts as the broadest possible arbitration clause. *See, e.g.*, *Pennzoil Expl. & Prod. Co.* v. *Ramco Energy*, 139 F.3d 1061, 1067 (5th Cir. 1998); *Berman* v. *Dean Witter & Co.*, 119 Cal. Rptr. 130, 133 (Ct. App. 1975). Such language is "capable of expansive reach," which is "not limited to claims that literally 'arise under the contract,' but rather embraces all disputes between the parties having a significant relationship to the contract regardless of the label attached to the dispute." *Pennzoil*, 139 F.3d at 1067 (citations omitted). The 1996 Agreement's broad arbitration clause applies to the parties' disputes in this case because they clearly have their "roots in the relationship between the parties" created by that contract. *Berman*, 119 Cal. Rptr. at 133. As noted, the arbitration clause expressly applies to the 1996 Agreement and "[a]ny controversy or claim arising out of, or related to this Agreement, or any modification or *extension* thereof." As the Fifth Circuit held, there is a more than plausible argument that the parties intended for the 1996 Agreement or an "extension" of it to cover CO_2 products after the conversion. Pet. 14a–15a. Furthermore, the disputes here arose because the parties could not agree on pricing and specifications relating to WD-40's 2011 RFP, which was designed to revise and replace the 1996 Agreement after the termination of its "ongoing" term. *See* p. 9, *supra*. Given that the parties never entered a new agreement, their dispute "arose out of and related to" the business relationship that was established under the 1996 Agreement.

IQ's contention that the handwritten interlineation in the recitals regarding "propane/butane propelled formulation and specifications" somehow excludes the possibility that the 1996 Agreement could *ever* cover CO_2-propelled products simply ignores the plain language of the Agreement. The 1996 Agreement by its express terms provides a procedure by which WD-40 could provide specifications to IQ, modify the products and product components on 30-days' notice, and change suppliers; in response, IQ could likewise demand an increase in price for the finished goods on 30-days' notice, without either party having to execute a formal amendment to the Agreement. *See* pp. 5–6, *supra*. The mere fact that IQ stated in a letter prior to entering the contract that "at present" it was not agreeing to package CO_2-propelled products until the new specifications were developed and prices were set does not support IQ's strained interpretation of the plain contractual language. Similarly, the truism reflected in the handwritten recital—that at the time of execution, WD-40 "is engaged" in the sale of a product based on propane/butane-propelled formulation and specifications—does not negate the contractual procedures that allowed the parties to later change those specifications and use a CO_2 propellant. *See Emeryville Redevelopment* v. *Harcros Pigments, Inc.*, 125 Cal. Rptr. 2d 12, 25 (Ct. App. 2002) ("The law has long distinguished between a 'covenant' which creates legal rights and obligations, and a 'mere recital' . . . . Recitals are given limited effect[.]"). Indeed, other provisions of the 1996 Agreement make clear that the parties understood the definition of "Product" related to the concentrate sold by WD-40 to IQ, without regard to the nature of the propellant IQ would later add to it. *See generally* pp. 7–8, *supra*.

Finally, the parties' subsequent course of conduct further confirms the plausibility of WD-40's interpretation. *See Sterling* v. *Taylor*, 152 P.3d 420, 429 (Cal. 2007) ("[T]he practical construction placed upon [a contract] by the parties before any controversy arises as to its meaning affords one of the most reliable means of determining the intent of the parties."). For example, shortly after the 1996 Agreement's execution, WD-40 provided CO_2 specifications to IQ pursuant to the procedures established in the 1996 Agreement; WD-40 regularly provided IQ with lists of approved suppliers as provided by the Agreement after the CO_2 conversion; IQ began packaging WD-40 products pursuant to those specifications and procedures; both parties admittedly used invoices and purchase orders for IQ to buy component materials from WD-40 and for WD-40 to buy the finished product from IQ, as required by the 1996 Agreement; and WD-40 and IQ embarked on a process to renegotiate the 1996 Agreement pursuant to its terms without objection by IQ to its ongoing validity. *See generally* p. 9, *supra*.

Here, the broad scope of the arbitration agreement, the 1996 Agreement as a whole, the circumstances surrounding the execution of the Agreement, and the parties' course of performance amply support the Fifth Circuit's conclusion that there is a plausible argument that the CO_2 product-related claims came within the arbitration agreement's scope.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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