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

REPLY BRIEF FOR PETITIONER

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The courts of appeals are divided about the circumstances under which a court, rather than an arbitrator, should decide the "gateway" issue of arbitrability: In particular, when the parties have signed a contract that includes a clause delegating to an arbitrator the question whether a controversy between the parties is subject to arbitration, does that clause oust the court's authority to resolve whether a particular dispute before it is arbitrable, even if there is no connection between that dispute and the parties' agreement? The courts of appeals have given divergent answers to that question. Reflecting this division, there are currently pending before this Court *three* petitions for certiorari raising that same question. *See Henry Schein, Inc.* v. *Archer & White Sales, Inc.*, No. 17-1272; *Simply Wireless, Inc.* v. *T-Mobile US, Inc.*, No. 17-1423.

This Court should grant review and make clear that the mere presence of a clause in a contract between the parties delegating the gateway question of arbitrability to the arbitrator does not eliminate the courts' authority to decide that a dispute between the contracting parties is not arbitrable because it is unconnected to the subject matter of the agreement containing the delegation clause.

In this case, even though the parties expressly *excluded* the subject of this dispute from their arbitration agreement, the lower courts nonetheless referred the matter for resolution to the arbitrator, on the view that respondent's argument that the dispute was arbitrable was not "wholly groundless." That toothless review is inconsistent with the "fundamental principle that arbitration is a matter of contract." *Rent-A-Center, West, Inc.* v. *Jackson*, 561 U.S. 63, 67 (2010). As this Court has consistently recognized, just as the parties are bound by arbitration agreements to which they have

consented, they are also not obligated to arbitrate a dispute that they never agreed should be subject to arbitration in the first place. *AT&T Techs., Inc.* v. *Communications Workers*, 475 U.S. 643, 648-649 (1986).[1]

I. THE COURTS OF APPEALS ARE DIVIDED ABOUT WHEN COURTS SHOULD DECIDE THE GATEWAY ISSUE OF ARBITRABILITY

As the petition explains (at 13-19), the courts of appeals have reached differing conclusions about the courts' authority to decide the gateway issue of arbitrability. Respondent argues (Opp. 14-16) that the circuit conflict is insubstantial, but that is incorrect. The courts of appeals follow at least three, and possibly four, different approaches to the issue presented.

The Tenth and Eleventh Circuits have concluded that the existence of a "delegation" clause authorizing the arbitrator to decide threshold issues of arbitrability extinguishes all judicial authority to decide that gateway issue, even when there is no apparent connection between the parties' dispute and the subject of the contract containing the arbitration clause. In *Belnap* v. *Iasis Healthcare*, 844 F.3d 1272 (10th Cir. 2017), the Tenth Circuit held that, once a court is satisfied that there is clear and unmistakable evidence that that parties intended to send the question of arbitrability to an arbitrator in any matter, the court "must compel the arbitration of arbitrability issues in *all* instances in order to effectuate the parties' intent regarding arbitration." *Id.* at 1286. The Eleventh Circuit takes the same

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[1] Should the Court decide to grant review in either *Henry Schein* or *Simply Wireless* instead of this case, it should hold this petition pending its disposition of the case in which review is granted.

approach. *Jones* v. *Waffle House, Inc.*, 866 F.3d 1257, 1268-1269 (11th Cir. 2017).

Other circuits have rejected that absolute rule, but they nonetheless diverge over the circumstances in which a court should decide the gateway issue of arbitrability. The Sixth Circuit envisions a substantial role for the court in determining whether the parties' dispute is connected to the arbitration agreement. In *Turi* v. *Main Street Adoption Services, LLP*, the Sixth Circuit held that, "even where the parties expressly delegate to the arbitrator the authority to decide the arbitrability of the claims related to the parties' arbitration agreement, this delegation applies only to claims that are at least *arguably* covered by the agreement." 633 F.3d 496, 511 (6th Cir. 2011). The court made clear that, "notwithstanding the general presumption of arbitrability" when the parties have entered into an arbitration agreement, "courts may not override the clear intent of the parties, or reach a result inconsistent with the plain text of the contract, simply because the policy favoring arbitration is implicated." *Id.* at 509 (internal quotation marks omitted). And in that case, the Sixth Circuit rejected the argument for arbitration, holding that the dispute did not fall within the delegation clause. *Id.* at 511.

Similarly, in *Qualcomm Inc.* v. *Nokia Corp.*, 466 F.3d 1366 (Fed. Cir. 2006), the Federal Circuit, heeding this Court's admonition that courts should decide the gateway issue of arbitrability unless the parties "clearly and unmistakably intend[ed] to delegate the power to decide arbitrability to an arbitrator," *id.* at 1371, concluded that, even when parties have entered into an arbitration agreement that delegates the issue of arbitrability to the arbitrator, the court must "perform a second, more limited inquiry to determine whether the

assertion of arbitrability is 'wholly groundless.'" *Id.* The Federal Circuit made clear that this inquiry is to be a real and substantial one, and it remanded the case to the district court, instructing it to "look to the scope of the arbitration clause and the precise issues that the moving party asserts are subject to arbitration." *Id.* at 1374.[2]

The Fourth and Fifth Circuits have not adopted the Tenth and Eleventh Circuit's absolute rule that the courts have no authority to decide the gateway issue, but their articulation of the court's role makes clear that they envision it to be far narrower than do the Sixth and Federal Circuits. The Fourth Circuit, though using the same "wholly groundless" language that the Federal Circuit employs, concluded that a court should not decide the gateway issue unless the argument in favor of arbitrability is "frivolous or otherwise illegitimate"—essentially adopting the standard of Rule 11. *See Simply Wireless, Inc.* v. *T-Mobile US, Inc.*, 877 F.3d 522, 529 (4th Cir. 2017), *petition for cert. pending*, No. 17-1423. Similarly, in the decision below, the Fifth Circuit, although employing the same "wholly groundless" locution, emphasized that "cases in which an as-

[2] Respondent suggests that the Federal Circuit expressed interest in "reconsider[ing] whether the [wholly groundless] test 'permits too much judicial inquiry' if the issue had been properly raised." Opp. 14 (quoting *Evans* v. *Building Materials Corp.*, 858 F.3d 1377, 1380 n.1 (Fed. Cir. 2017)). Respondent stretches the footnote in *Evans* too far. In that footnote, the Federal Circuit merely noted that because the defendant had "made no argument that the *Qualcomm* standard authorizes more inquiry into the issue of arbitrability than is legally proper" and "expressly accepted the *Qualcomm* standard" at oral argument, any arguments about the applicability of the *Qualcomm* standard were "waived." *Id.* at 1380 n.1. There is no indication that the Federal Circuit is moving away from the *Qualcomm* standard.

sertion of arbitrability is wholly groundless are rare," Pet. App. 11a, and as demonstrated by this case, found that the "wholly groundless" standard did not permit the court to determine arbitrability even when the parties expressly excluded the subject of their dispute from the contract containing the arbitration clause and agreed that they could modify or extend their contract only in writing, which was never done. Indeed, as respondent acknowledges, the Fifth Circuit's test is so "narrow" that judicial review of arbitrability is available only in "'exceptional' circumstances." Opp. 4 (quoting *Kubala* v. *Supreme Prod. Servs., Inc.*, 830 F.3d 199, 202 & n.1 (5th Cir. 2016)).

Contrary to respondent's argument (Opp. 15), no further percolation is necessary for the issue to be ready for this Court's review. At least four circuits have expressly adopted a rule that authorizes courts, at least in some circumstances, to decide whether a particular dispute falls within the scope of a delegation provision, but they diverge over what those circumstances are. By contrast, two circuits believe that, if the parties have agreed to a delegation provision, the court has no role to play in deciding any threshold question of arbitrability. Given these differing views, this Court's guidance is needed and warranted.

II. THIS CASE IS AN APPROPRIATE VEHICLE FOR THIS COURT TO DECIDE THE QUESTION PRESENTED

This case squarely presents the question that has divided the courts of appeals; indeed, it presents the question in stark terms. Here, the parties expressly *excluded* the subject of this dispute from their arbitration agreement, and yet the court of appeals ruled that the dispute—including the delegation question—was for an arbitrator to decide because respondent's argu-

ment that the dispute was arbitrable was not "wholly groundless."[3] Resolving the question presented on the clear facts of this case would provide the lower courts with the guidance they need to address an important issue that recurs routinely following this Court's decision in *Rent-A-Center*.

Respondent's vehicle arguments are meritless. Respondent first contends (at 2, 11-14) that the Court ought not address the question presented in this case because resolution of that issue would not make a difference here. Respondent notes that the Fifth Circuit applied what it called a "wholly groundless" test to this case but nonetheless ruled for respondent. According to respondent, if this Court were also to adopt a "wholly groundless" test, then it would also be compelled to rule in respondent's favor.

That contention misconstrues petitioner's argument. If this Court were to adopt the approach of the Sixth and Federal Circuits, which envisions a more robust role for the court in determining whether a particular dispute falls within the scope of a delegation clause, petitioner should prevail; at a minimum petitioner would be entitled to a remand to the court of appeals to apply the proper test, and not the feeble version of the "wholly groundless" test that the Fifth Circuit applied in this case. That would be true whether this Court endorsed the "wholly groundless" locution but made clear that it requires greater scrutiny than the Fifth Circuit employed, or whether this Court adopted different lan-

[3] As it did before the court of appeals, Respondent attempts to manufacture factual issues regarding the terms of the parties' agreements by pointing to evidence outside the record that was before the district court. *See* Opp. 8-9. The Fifth Circuit rejected respondent's improper submission (*see* Pet. App. 14a n.2); this Court should do the same.

guage altogether. What is important is the substance of the inquiry, not the particular label that the lower court placed on it. Here, the scope of the Fifth Circuit's review was far narrower than either the Sixth or Federal Circuit would have required, even if the courts might have used similar labels.

Respondent is therefore incorrect in arguing that petitioner is "not in a position to complain about the alleged circuit split" because petitioner "would be asking this Court to *affirm* the Fifth Circuit's adoption of the 'wholly groundless' exception." Opp. 11-12. Respondent misapprehends both what the question presented in the petition asks and what the body of the petition argues.[4] Petitioner asks this Court to determine if the

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[4] Respondent's argument that "IQ brief[ed] a different issue not included in its question presented" (Opp. 2) is incorrect. Petitioner has asked this Court to decide if a motion to compel arbitration should be granted "even where a contract containing an arbitration clause is unrelated to the parties' instant dispute, *or* whether the court should deny the motion where the arbitrability argument is 'wholly groundless.'" Pet. i (emphasis added). Petitioner's question presented is not limited to the "wholly groundless" formulation, and it challenges the court of appeals' conclusion that arbitration was proper where, as in this case, the parties expressly excluded the subject of their dispute from their arbitration agreement. The body of the petition makes clear that petitioner has challenged the Fifth Circuit's decision as incorrect, without regard to the particular locution that the court of appeals used. *See* Pet. 19 (arguing that the Fifth Circuit "improperly applied a weakened version of the wholly groundless test"), 20-21. The petition therefore calls upon the Court to adopt a more searching standard than was applied by the Fifth Circuit, whether denominated "wholly groundless" or otherwise. *See Yee* v. *City of Escondido, Cal.*, 503 U.S. 519, 535 (1992) ("[B]y and large it is petitioner himself who controls the scope of the question presented. The petitioner can generally frame the question as broadly or as narrowly as he sees fit."); *see also* Opp. 12 n.2 (acknowledging that re-

gateway question of arbitrability must be submitted to an arbitrator "even where a contract containing an arbitration clause is unrelated to the parties' instant dispute." Pet. i. There are several ways this Court could resolve that question. The Court could affirm the Fifth Circuit's approach, but it could also require a more searching inquiry, as the Sixth and Federal Circuits have mandated.

Second, respondent argues that the Court should deny review because petitioner presents a "fact-specific, state-law-dependent challenge." Opp. 16-19. The contention that the petition is dependent upon resolution of state law is meritless. The question presented involves the respective roles of the court and the arbitrator in deciding gateway issues of arbitrability and thus requires the interpretation of the Federal Arbitration Act—just as did this Court's decisions in *Rent-A-Center* and *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938 (1993), which involved closely related questions. This Court has routinely granted petitions presenting such questions for review, even where underlying state-law questions of contract interpretation inform the analysis. *See, e.g.*, *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333 (2011).[5]

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spondent opened the door to arguments about the validity of the "wholly groundless" standard before the Fifth Circuit).

[5] Notably, the delegation clause at issue here (Pet. App. 78a-79a) is materially identical to the standard clause promulgated by the American Arbitration Association and to clauses interpreted by numerous courts of appeals considering the precise question presented here. *See, e.g.*, *Qualcomm*, 466 F.3d at 1372-1373 ("The 2001 Agreement incorporates the AAA Rules as follows: 'Any dispute, claim or controversy arising out of or relating to this Agreement, or the breach or validity thereof, shall be settled by arbitration in accordance with the arbitration rules of the American Arbitration Association (the AAA Rules).'").

This Court should clarify that, even when the parties enter into an arbitration agreement that delegates the authority to decide gateway questions of arbitrability to the arbitrator, the courts retain the authority to decide whether a particular dispute falls within the scope of that delegation clause. Where, as here, the parties have gone to pains to make clear that the subject of their dispute does *not* fall within the reach of the contract containing that delegation clause, and where they also make clear that that contract cannot be modified or extended except in writing, the courts could and should rule that the arbitrability of the controversy before it is a matter for the courts, not the arbitrator, to decide.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 2018