No. 19-1080

In the Supreme Court of the United States

ARCHER AND WHITE SALES, INC., CROSS-PETITIONER

v.

HENRY SCHEIN, INC.

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

BRIEF FOR THE CROSS-RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the incorporation in an arbitration agreement of arbitration rules that permit the arbitrator to resolve questions of arbitrability constitutes a clear and unmistakable delegation of those questions to the arbitrator.

2. Whether an arbitration agreement that delegates questions of arbitrability to an arbitrator requires that the arbitrator decide the question whether a non-signatory to the agreement can compel arbitration.

CORPORATE DISCLOSURE STATEMENT

Cross-respondent Henry Schein, Inc., has no parent corporation, and no publicly held company holds 10% or more of its stock.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 935 F.3d 274.[1] The district court's opinion denying cross-respondent's motion to compel arbitration (Pet. App. 17a-36a) is unreported. A prior opinion of this Court is reported at 139 S. Ct. 524, and a prior opinion of the court of appeals is reported at 878 F.3d 488.

JURISDICTION

The judgment of the court of appeals was entered on August 14, 2019. A petition for rehearing was denied on December 6, 2019 (Pet. App. 42a-43a). The petition for a writ of certiorari in No. 19-963 was filed on January 31,

[1] All appendix references are to the appendix to cross-respondent's petition for a writ of certiorari in No. 19-963 (filed Jan. 31, 2020).

2020, and this conditional cross-petition was filed on March 2, 2020 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The facts and procedural history of this case are set out in the statement of cross-respondent's petition for a writ of certiorari (19-963 Pet. 4-11), which presents the question whether a provision in an arbitration agreement that exempts certain claims from arbitration negates an otherwise clear and unmistakable delegation of questions of arbitrability to an arbitrator. This statement provides additional facts relevant to the questions presented by the conditional cross-petition.

1. This case arises from a complaint filed by cross-petitioner in federal district court against cross-respondent and other parties, alleging violations of federal and state antitrust law. 17-1272 J.A. 43-48. Cross-respondent and the other defendants moved to compel arbitration based on cross-petitioner's distribution agreements with certain manufacturing companies. *Id.* at 12-13. As is relevant here, the agreements defined how the parties were to resolve any disputes as follows:

> Any 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 [the manufacturing company]) shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association.

Id. at 58. The rules of the American Arbitration Association (AAA) provide that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity

of the arbitration agreement or to the arbitrability of any claim or counterclaim." American Arbitration Association, Commercial Arbitration Rules and Mediation Procedures R-7(a) (2013) <adr.org/commercial> (AAA Commercial Rules).

Cross-petitioner opposed the motions to compel arbitration. Cross-petitioner primarily claimed that a boilerplate request for injunctive relief in its complaint rendered the entire dispute triable to a jury rather than an arbitrator. Cross-petitioner also argued that cross-respondent, a non-signatory to the arbitration agreement, could not rely on principles of equitable estoppel to invoke the agreement. A magistrate judge ruled in favor of cross-respondent, rejecting cross-petitioner's arguments and compelling arbitration. Pet. App. 37a-41a.

The district court vacated the magistrate judge's order. Pet. App. 36a. While noting that the incorporation of the AAA rules can give rise to a valid delegation of questions of arbitrability to the arbitrator, the court held that there was no clear and unmistakable evidence of the parties' intent to arbitrate the question of arbitrability here in light of the carve-out for actions seeking injunctive relief. *Id.* at 30a-32a. The court also held, in the alternative, that any contrary reading of the agreements' arbitration provision would be "wholly groundless." *Id.* at 33a-35a. Because the court concluded that the dispute at issue was not arbitrable, it declined to address the question whether cross-respondent was entitled to invoke the arbitration provision under the doctrine of equitable estoppel. *Id.* at 36a.

2. The court of appeals affirmed. See 878 F.3d 488 (5th Cir. 2017). Citing prior circuit precedent, the court began from the proposition that "[a]n arbitration agreement that expressly incorporates the AAA Rules 'presents clear and unmistakable evidence that the parties

agreed to arbitrate arbitrability.'" *Id.* at 493 (citation omitted). The court nevertheless held that it need not send the question of arbitrability to the arbitrator because the argument in favor of arbitrability was "wholly groundless." See *id.* at 495-497. The court did not resolve the separate questions whether the arbitration provision contained clear and unmistakable evidence of the parties' intent to arbitrate the question of arbitrability, or whether cross-respondent was entitled to invoke the arbitration provision under the doctrine of equitable estoppel. See *id.* at 495, 497-498.

3. Cross-respondent and the other defendants sought certiorari on the question whether the "wholly groundless" exception conflicted with the Federal Arbitration Act. See 17-1272 Pet. i. In opposing the petition, cross-petitioner contended that the case was a poor vehicle for review on the grounds, *inter alia*, that the asserted delegation of arbitrability issues rested on the incorporation of the AAA rules and that the lower courts had not addressed the question of equitable estoppel. See 17-1272 Br. in Opp. 22, 24 n.17.

The Court granted certiorari and unanimously vacated the court of appeals' judgment. 139 S. Ct. 524 (2019). The Court held that "the 'wholly groundless' exception" applied by the court of appeals "is inconsistent with the text of the [Federal Arbitration] Act and with [the Court's] precedent." *Id.* at 529. The Court then noted that the court of appeals had not decided whether the parties had delegated the arbitrability question to the arbitrator, and it therefore remanded for further proceedings. See *id.* at 531.

4. On remand, the court of appeals once again affirmed the district court's denial of the motions to compel arbitration. Pet. App. 1a-16a. In a footnote in its supplemental brief, cross-petitioner suggested for the first time

that, as a general matter, the incorporation of the AAA rules cannot suffice to delegate questions of arbitrability to the arbitrator. See Cross-Pet. C.A. Supp. Br. 14 n.6. Again relying on its prior precedent, however, the court of appeals reiterated that the incorporation of the AAA rules in the agreements at issue "presents clear and unmistakable evidence that the parties agreed to arbitrate arbitrability." Pet. App. 7a (citation omitted). The court thus concluded that the agreements "delegat[ed] the threshold arbitrability inquiry to the arbitrator for at least some category of cases." *Id.* at 8a.

Nevertheless, the court of appeals determined that it must proceed to interpret the scope of the agreements for itself. Pet. App. 11a-12a. The court reasoned that "[t]he plain language incorporates the AAA rules—and therefore delegates arbitrability—for all disputes *except* those under the carve-out" for actions seeking injunctive relief. *Id.* at 11a. The court of appeals then turned to the merits of the arbitrability question and determined, based on its interpretation of the carve-out provision, that the action was one "seeking injunctive relief" and was thus exempt from arbitration. *Id.* at 12a-16a. As in its prior opinion, the court of appeals did not address the question of equitable estoppel. *Id.* at 16a.

ARGUMENT

Cross-petitioner contends (Pet. 7-27) that, if the Court grants cross-respondent's underlying petition for a writ of certiorari, it should also grant review on two additional questions concerning the allocation of responsibility between courts and arbitrators for determining whether the parties agreed to arbitrate a particular dispute. But the Court need not resolve either of those questions in order to resolve the question presented in the underlying petition. And neither of those questions warrants the Court's

review at this time. If the Court grants the underlying petition, therefore, it should deny this conditional cross-petition.

A. The First Question Presented Does Not Warrant The Court's Review

The first question presented by the cross-petition is whether the incorporation in an arbitration agreement of arbitration rules that permit the arbitrator to resolve questions of arbitrability constitutes a clear and unmistakable delegation of those questions to the arbitrator. See Pet. 9-18. Even if that question were the appropriate subject of a cross-petition, it does not merit the Court's review.

1. As a preliminary matter, the filing of a conditional cross-petition to present the incorporation question was unnecessary and improper. In the judgment below, the court of appeals affirmed the district court's order denying cross-respondent's motion to compel arbitration. See Pet. App. 16a. In so doing, the court of appeals first held that, because the agreements at issue contained a carve-out provision, the parties had not clearly delegated questions of arbitrability to an arbitrator. See *id.* at 5a-12a. Addressing the question of arbitrability itself, the court of appeals then determined that cross-petitioner's claims were not arbitrable. See *id.* at 14a-16a.

The incorporation question thus presents an additional ground for affirmance: an answer to that question in cross-petitioner's favor would simply supply an additional reason why the court of appeals was correct in deciding that cross-petitioner's claims were not arbitrable (even if it might also preclude the arbitration of other, as-yet-hypothetical claims, see Pet. 5 n.2). Where a prevailing party is not seeking to enlarge on the rights estab-

lished by the judgment below, no cross-petition for certiorari is needed. See, *e.g.*, *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 39 (1989).

2. There is no valid reason for the Court to give plenary consideration to the incorporation question—whether by granting the cross-petition or by adding a question in granting the underlying petition. To begin with, as cross-petitioner has previously acknowledged, "[t]his Court need not reach" the incorporation question in order to resolve the question presented by the underlying petition. 19A766 Opp. 22 n.8. That petition proceeds on the assumption that the agreements at issue contain valid delegations of arbitrability, see 19-963 Pet. i—just like the petition the Court previously granted in this case regarding the "wholly groundless" exception to the enforcement of delegation provisions. See 139 S. Ct. 524 (2019). That assumption was no impediment to review then, and it is no impediment now.

More broadly, the incorporation question does not warrant the Court's review. Eleven courts of appeals have addressed the issue, and all of them have held that the incorporation of arbitration rules that permit the arbitrator to resolve questions of arbitrability is sufficient to delegate those questions to the arbitrator. See *Awuah* v. *Coverall North America, Inc.*, 554 F.3d 7, 11 (1st Cir. 2009); *Contec Corp.* v. *Remote Solution, Co.*, 398 F.3d 205, 208, 211 (2d Cir. 2005); *Simply Wireless, Inc.* v. *T-Mobile US, Inc*, 877 F.3d 522, 527-528 (4th Cir. 2017), cert. denied, 139 S. Ct. 915 (2019); *Petrofac, Inc.* v. *DynMcDermott Petroleum Operations Co.*, 687 F.3d 671, 675 (5th Cir. 2012); *McGee* v. *Armstrong*, 941 F.3d 859, 865-867 (6th Cir. 2019); *Fallo* v. *High-Tech Institute*, 559 F.3d 874, 878 (8th Cir. 2009); *Brennan* v. *Opus Bank*, 796 F.3d 1125, 1130 (9th Cir. 2015); *Belnap* v. *Iasis Healthcare*, 844 F.3d 1272, 1283-1284 (10th Cir. 2017); *Terminix International*

Co. v. *Palmer Ranch LP*, 432 F.3d 1327, 1332 (11th Cir. 2005); *Chevron Corp.* v. *Ecuador*, 795 F.3d 200, 207 (D.C. Cir. 2015), cert. denied, 136 S. Ct. 2410 (2016); *Qualcomm Inc.* v. *Nokia Corp.*, 466 F.3d 1366, 1373 (Fed. Cir. 2006); cf. *Chesapeake Appalachia, LLC* v. *Scout Petroleum, LLC*, 809 F.3d 746, 763 (3d Cir.) (recognizing the general rule but concluding that it did not apply to an alleged delegation of class arbitrability), cert. denied, 137 S. Ct. 40 (2016); *Commonwealth Edison Co.* v. *Gulf Oil Corp.*, 541 F.2d 1263, 1272 (7th Cir. 1976) (holding that the selection of AAA rules in an arbitration agreement incorporated those rules into the agreement).

In addition, numerous state courts of last resort have adopted the same rule. See *HPD, LLC* v. *TETRA Technologies, Inc.*, 424 S.W.3d 304, 310-311 (Ark. 2012); *Eickhoff Corp.* v. *Warrior Met Coal, LLC*, 265 So. 3d 216, 222 (Ala. 2018); *James & Jackson, LLC* v. *Willie Gary, LLC*, 906 A.2d 76, 80 (Del. 2006); *Ally Align Health, Inc.* v. *Signature Advantage, LLC*, 574 S.W.3d 753, 756 (Ky. 2019); *State ex rel. Pinkerton* v. *Fahnestock*, 531 S.W.3d 36, 43-46 (Mo. 2017); *West Virginia CVS Pharmacy, LLC* v. *McDowell Pharmacy, Inc.*, 796 S.E.2d 574, 588 (W. Va. 2017); *Garthon Business Inc.* v. *Stein*, 86 N.E.3d 514, 514 (N.Y. 2017); *Kramlich* v. *Hale*, 901 N.W.2d 72, 78 (N.D. 2017). Not surprisingly, given that formidable phalanx of authority, this Court has repeatedly declined to grant review on the incorporation question. See *Simply Wireless, Inc.* v. *T-Mobile US, Inc*, 139 S. Ct. 915 (2019); *Limited Liability Co.* v. *Doe*, 569 U.S. 1029 (2013); *Dunn* v. *Nitro Distributing, Inc.*, 549 U.S. 1077 (2006); see also *Spirit Airlines, Inc.* v. *Maizes*, 139 S. Ct. 1322 (2019) (denying review on a similar question concerning class arbitrability).

3. Cross-petitioner does not contend that there is a conflict on the incorporation question, but instead merely

contends that there is "confusion and disagreement" in the lower courts. See Pet. 9-12. Cross-petitioner is mistaken.

a. Cross-petitioner asserts (Pet. 10) that there is "potential disagreement" among the federal courts of appeals in one respect: *viz.*, whether the consensus view that incorporations of arbitration rules are sufficient applies to all arbitration agreements, or only to those between "sophisticated parties." Yet the cases that cross-petitioner cites reveal no actual disagreement: in each of those cases, the parties were in fact sophisticated, and the court simply noted that it was not deciding whether an incorporation could be insufficient when unsophisticated parties are involved. See *ibid.* (collecting cases). Notably, cross-petitioner does not contend that this case presents any occasion to resolve *that* question, because cross-petitioner (a dental-equipment company) wisely does not contend it is an unsophisticated party. See Pet. App. 3a.

b. Cross-petitioner also suggests (Pet. 11-12) that three state courts of last resort have held that the incorporation of arbitration rules that permit the arbitrator to resolve questions of arbitrability is insufficient to delegate those questions to the arbitrator. Yet two of the cited decisions do not stand for that proposition. In one, the Montana Supreme Court (after recognizing that one of the parties was unsophisticated) refused to send the question of arbitrability to the arbitrator because the record did not contain a copy of the incorporated arbitration rules. See *Global Client Solutions, LLC* v. *Ossello*, 367 P.3d 361, 369 (2016); see *id.* at 375-376 (McKinnon, J., dissenting). And in the other, the New Jersey Supreme Court refused to enforce the delegation provision because it did not clearly state that the arbitration agreement waived the "right to seek relief in [the] court system" (a rule of dubi-

ous vitality in the wake of *Kindred Nursing Centers Limited Partnership* v. *Clark*, 137 S. Ct. 1421 (2017)). See *Morgan* v. *Sanford Brown Institute*, 137 A.3d 1168, 1179 (N.J. 2016).

That leaves only a single decision that is arguably to the contrary. In *Flandreau Public School District No. 50-3* v. *G.A. Johnson Construction, Inc.*, 701 N.W.2d 430 (2005), the South Dakota Supreme Court held that an arbitration agreement that incorporated rules permitting the arbitrator to determine questions of arbitrability did not clearly and unmistakably delegate questions of arbitrability to the arbitrator. See *id.* at 436-437. The court reached that conclusion primarily by comparing the parties' agreement to an agreement in a federal district-court decision cited by the defendant. See *ibid.* The court addressed the incorporation question only in a footnote, stating that the district-court decision "d[id] not support a per se finding of intent to arbitrate arbitrability based solely upon the incorporation" of the applicable rules. *Id.* at 437 n.6. No subsequent decisions in South Dakota appear to rely on the footnote, and the overwhelming consensus on the incorporation question mostly postdates the South Dakota Supreme Court's decision. See pp. 7-8, *supra*. Any thin thread of a disagreement does not warrant the Court's review.

4. The consensus view on the incorporation question is in all events plainly correct.

a. The incorporation question arises when an arbitration agreement expressly provides that a set of arbitration rules will govern arbitrations under the agreement. "[A]rbitration is simply a matter of contract," *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 943 (1995), and it is black-letter contract law that a document incorporated by reference into a contract "shall be taken as part of" the contract, as if the referenced document were

"set out at length therein," *Schenkel & Shultz, Inc.* v. *Hermon F. Fox & Associates, P.C.*, 658 S.E.2d 918, 921-922 (N.C. 2008) (citation omitted); see generally 11 Richard A. Lord, *Williston on Contracts* § 30:25, at 304-306 (4th ed. 2012) (*Williston*). Accordingly, when parties incorporate arbitration rules in an arbitration agreement, "the two form a single instrument" and should be interpreted as such. 11 *Williston* § 30:25, at 304; see *id.* at 306. This Court has resolved a number of arbitration cases that turned in part on the incorporation of arbitration rules into an arbitration agreement, and it has never expressed doubt that those rules are fully binding on the parties. See, *e.g.*, *Preston* v. *Ferrer*, 552 U.S. 346, 361-362 (2008); *C&L Enterprises, Inc.* v. *Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418-419 (2001); *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 60-61 (1995).

In the specific context of whether parties have agreed to have an arbitrator decide the question of arbitrability, this Court has made clear that there must be "clear and unmistakable evidence" of the parties' intent to do so. *Henry Schein, Inc.* v. *Archer & White Sales, Inc.*, 139 S. Ct. 524, 531 (2019) (citation omitted). But here, the agreements at issue unambiguously state that disputes "arising under or related to" the agreements "shall be resolved by binding arbitration in accordance with" the AAA rules, 17-1272 J.A. 58, and those rules unambiguously provide that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim," AAA Commercial Rule R-7(a). That is "about as 'clear and unmistakable' as language can get." *Awuah*, 554 F.3d at 11; see, *e.g.*, *Brennan*, 796 F.3d at 1130-1131 (collecting cases); cf. *C&L Enterprises*, 532

U.S. at 418-419, 423 (relying in part on the incorporation of the AAA rules in an arbitration agreement to conclude that an Indian tribe "clearly" waived its sovereign immunity).

b. Cross-petitioner's contrary arguments (Pet. 14-18) are unpersuasive. At bottom, cross-petitioner mostly objects to the principle that a document incorporated in a contract by reference is binding on the parties. See, *e.g.*, Pet. 14-16 (objecting that many parties do not read incorporated arbitration rules). But that principle is a broader (and venerable) principle of state contract law. See pp. 10-11, *supra*. And to the extent that cross-petitioner is suggesting that federal law somehow displaces state law governing contract interpretation in this context, that argument runs headlong into the rule that "the interpretation of a contract is ordinarily a matter of state law to which [the Court] defer[s]." *DIRECTV, Inc.* v. *Imburgia*, 136 S. Ct. 463, 468 (2015).

Cross-petitioner further contends that arbitration rules empowering arbitrators to resolve questions of arbitrability "do not give arbitrators the *exclusive* right to determine their own jurisdiction." Pet. 16; see Bermann Br. 13-21. But if that were true, such rules would serve little purpose. After all, such rules become relevant only when the parties *disagree* that the arbitrator can resolve questions of arbitrability; otherwise, the parties could simply consent to the arbitrator's determination, rules or no rules. See, *e.g.*, *William Charles Construction Co.* v. *Teamsters*, 827 F.3d 672, 681 (7th Cir. 2016).

Under cross-petitioner's interpretation, where a disagreement does arise, the party seeking to avoid arbitration could simply run to court to obtain a binding judicial determination on the question of arbitrability. That would effectively render superfluous any rule permitting the ar-

bitrator to decide arbitrability, thereby violating a "cardinal principle of contract construction." *Mastrobuono*, 514 U.S. at 63. And a similar problem would arise if, as cross-petitioner suggests, incorporated rules apply only when a dispute is in fact arbitrable. See Pet. 15; 19-963 Br. in Opp. 25-26.[2]

* * * * *

There is no good reason for the Court to consider the incorporation question in this case. Resolution of that question is unnecessary to resolve the question presented in the underlying petition, and the lower courts have overwhelmingly reached the same (correct) answer. Whether on the cross-petition or as an additional question on the underlying petition, the incorporation question does not warrant the Court's plenary review.

B. The Second Question Presented Does Not Warrant The Court's Review

The second question presented by the cross-petition is whether an arbitration agreement that delegates questions of arbitrability to an arbitrator requires that the arbitrator decide the question whether a non-signatory to the agreement can compel arbitration. See Pet. 18-27. That question, however, presupposes an answer to the

[2] Cross-petitioner also relies on the reporter's note in a tentative draft of the Restatement of the U.S. Law of International Commercial and Investor-State Arbitration, which, it claims, "reject[ed] the majority line of cases [on the incorporation question] as based on a misinterpretation of the institutional rules being applied." Pet. 11 (citation omitted); see Pet. 13, 16, 17. But the reporter's note in the final Restatement omitted that entire discussion, including the statement that the consensus view was incorrect. See Restatement of the U.S. Law of International Commercial and Investor-State Arbitration § 2.8, reporter's note b(iii), at 207-209 (proposed final draft Apr. 24, 2019; approved May 20, 2019).

question presented in the underlying petition; it comes into play only if there has been a determination that the arbitration agreement validly delegates questions of arbitrability to the arbitrator. The court of appeals has twice reserved the non-signatory question, and cross-petitioner offers no colorable reason for this Court to decide it in the first instance. That question, too, does not merit the Court's review at this time.

1. Neither the district court nor the court of appeals reached the non-signatory question in this case. Both before and after this Court's remand, the court of appeals reserved the non-signatory question after holding that a court, and not the arbitrator, should decide whether cross-petitioner's claims were subject to arbitration. See Pet. App. 16a, 36a; 878 F.3d at 497-498. When this Court "reverse[s] on a threshold question," it typically "remand[s] for resolution of any claims the lower courts' error prevented them from addressing." *Zivotofsky* v. *Clinton*, 566 U.S. 189, 201 (2012). Accordingly, if the Court grants the underlying petition and ultimately reverses, the ordinary course would be for the Court to remand for the court of appeals to consider the non-signatory question in the first instance. (Of course, if the Court affirms, the non-signatory question would be moot.)

There is no reason for the Court to deviate from its ordinary practice. Contrary to cross-petitioner's suggestion, the second question presented is in no way "tied up" in the dispute regarding delegation, nor is it a "threshold" question. Pet. 5, 8. Quite to the contrary, as the cross-petitioner simultaneously recognizes, the second question presented "assum[es]" that "delegation exists." Pet. 5; see Pet. 19. In other words, the non-signatory question becomes relevant *only if* the answer to the question presented in the underlying petition is that the agreement

clearly and unmistakably delegates arbitrability to an arbitrator. Consideration of the non-signatory question was unnecessary the last time the Court granted review in this case, and it is still unnecessary now.

Indeed, cross-petitioner emphasized in its briefing below that the court of appeals "should not reach estoppel" because it could affirm the district court's judgment on the ground that the arbitration provision was inapplicable. Cross-Pet. C.A. Supp. Br. 21; see Cross-Pet. C.A. Br. 40. Having urged the court of appeals not to reach the non-signatory issue, cross-petitioner offers no compelling reason why this Court should reach it and resolve it in the first instance.

Finally on this point, even if the Court were to decide the non-signatory question in cross-petitioner's favor—and thus hold that a court must decide whether a non-signatory can compel arbitration—a remand would *still* be necessary for the lower courts to consider whether cross-respondent can invoke the agreements at issue under the principle of equitable estoppel. There is thus little efficiency to be gained from reviewing cross-petitioner's second question presented at this stage, as opposed to remanding for the lower courts to have a first crack at the question.

2. What is more, the non-signatory question does not implicate an entrenched conflict among lower courts that warrants the Court's immediate review. Cross-petitioner contends (Pet. 18-20) that five appellate courts have held that, even in the face of a valid delegation of questions of arbitrability to an arbitrator, a court must decide whether a non-signatory can compel arbitration. In fact, three of those courts either did not address that question or have

reached conflicting results in different opinions.[3] Only two appellate courts have seemingly rejected the majority rule that a delegation requires the arbitrator to decide whether a non-signatory can compel arbitration. See *Kramer* v. *Toyota Motor Corp.*, 705 F.3d 1122, 1127 (9th Cir.), cert. denied, 571 U.S. 818 (2013); *Jody James Farms, JV* v. *Altman Group, Inc.*, 547 S.W.3d 624, 629 (Tex. 2018). Any conflict is therefore substantially less developed than cross-petitioner suggests.

3. The real reason cross-petitioner asks the Court to consider the non-signatory question, as it all but admits (Pet. 23-24), is that the Fifth Circuit recently adopted the majority rule that a delegation requires the arbitrator to decide whether a non-signatory can compel arbitration. See *Brittania-U Nigeria, Ltd.* v. *Chevron USA, Inc.*, 866 F.3d 709, 715 (5th Cir. 2017). On remand from this Court, cross-respondent cited that decision in arguing that the Fifth Circuit should send to the arbitrator the question whether cross-respondent can invoke the agreements at issue. See Cross-Resp. C.A. Supp. Br. 9 n.1.

If the Court grants the underlying petition and ultimately reverses, the Fifth Circuit may well rely on that recent decision and rule in cross-respondent's favor on the non-signatory question. But there is little reason for the

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[3] See *Belnap*, 844 F.3d at 1293 n.16 (declining to address an argument raised in the reply brief that it was for the arbitrator to decide whether a non-signatory can compel arbitration); *Microchip Technology Inc.* v. *U.S. Philips Corp.*, 367 F.3d 1350, 1353, 1358-1359 (Fed. Cir. 2004) (considering whether a signatory could compel arbitration with a non-signatory and providing no discussion of whether the agreement clearly and unmistakably delegated questions of arbitrability to the arbitrator); compare *Contec*, 398 F.3d at 209-211 (holding that the arbitrator must decide whether a non-signatory can compel arbitration), with *Republic of Iraq* v. *BNP Paribas USA*, 472 Fed. Appx. 11, 13 (2d Cir. 2012) (holding that the court must decide that question).

Court to short-circuit the ordinary process and to deny the Fifth Circuit the opportunity to decide that question in the first instance. Like the incorporation question, the non-signatory question does not warrant the Court's review here. If the Court grants the underlying petition, therefore, it should deny this conditional cross-petition.

CONCLUSION

The conditional cross-petition for a writ of certiorari should be denied.

Respectfully submitted.

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