No. 19-1080

In the Supreme Court of the United States

ARCHER AND WHITE SALES, INC., CROSS-PETITIONER

v.

HENRY SCHEIN, INC.

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

REPLY BRIEF FOR THE CROSS-PETITIONER

DANIEL L. GEYSER
GEYSER P.C.
One Energy Square
4925 Greenville Ave., Ste. 200
Dallas, TX 75206

LEWIS T. LECLAIR
Counsel of Record
GARY CRUCIANI
MCKOOL SMITH, P.C.
300 Crescent Court, Suite 1500
Dallas, TX 75201
(214) 978-4984
lleclair@mckoolsmith.com

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INTRODUCTION

If cross-respondent's original petition had merit, this cross-petition would present a compelling case for further review.

The AAA-incorporation question is plainly certworthy. Cross-respondent does not dispute that the question has great legal and practical importance, that it arises constantly in courts nationwide, or that this is an ideal vehicle for resolving the question. Nor does cross-respondent really dispute that the issue has divided courts and experts.

Cross-respondent instead focuses on the absence of a clear circuit-level conflict. But this is the rare case where a grant is warranted *despite* the lack of a clear split: the majority position is profoundly flawed and barely reasoned; the circuit tally is now so lopsided that it is unlikely *any* circuit will go the other way—despite the obvious flaws in the majority position; and there are conflicting decisions among state courts and lower courts showing the issue continues to generate controversy and confusion nationwide—at an alarming clip.

This ubiquitous legal question should have a clear answer, and this Court has not yet addressed it. If the Court reviews the carve-out issue, it should finally resolve this significant antecedent question.

2. The estoppel question also presents an obvious case for further review. Cross-respondent does not challenge that the question is both important and recurring, as it plainly is. It quibbles with the depth of the split, but concedes the question has divided the circuits, with at least two circuits departing from the "majority" position. And while cross-respondent emphasizes the question was not formally resolved below, it admits that binding Fifth Circuit law would *require* resolving this pure legal question

against cross-petitioner; there is no point in remanding for the other shoe to drop.

A. The AAA-Incorporation Question Warrants This Court's Review

The incorporation question raises an important issue of federal law that has generated substantial controversy and confusion. The question has been percolating in the lower courts for decades, and there is no obvious end in sight. Indeed, even in the short time since this cross-petition's filing, multiple courts have again grappled with the issue, including a Florida appellate court that soundly rejected the majority position—in an opinion with greater depth than any circuit-level authority that cross-respondent cited. *Doe* v. *Natt*, No. 19-1383, 2020 WL 1486926, at *6-*9 (Fla. App. Ct. Mar. 25, 2020); *e.g.*, *HealthplanCRM, LLC* v. *AvMed, Inc.*, No. 19-1357, 2020 WL 2028261, at *11 (W.D. Pa. Apr. 28, 2020); *Aguilera* v. *Matco Tools Corp.*, No. 19-1576, 2020 WL 1188142 (S.D. Cal. Mar. 12, 2020).

This persistent confusion continues despite the "consensus" view for good reason: that view has company in numbers, but it lacks an analytical foundation. Courts have called its rationale "absurd," and litigants will continue to challenge it for that reason. *E.g.*, *Ashworth* v. *Five Guys Operations, LLC*, No. 16-6646, 2016 WL 7422679, at *3 (S.D. W.Va. Dec. 22, 2016). As cross-respondent acknowledged, "this Court routinely grants certiorari" on arbitration issues "even where a circuit conflict is shallow (or non-existent)." 19-963 Pet. 25. This issue will continue consuming time and resources until this Court intervenes.

1. a. Even without a circuit-level split (Opp. 7[1]), this is the unusual circumstance where a lopsided consensus is a reason to *grant* review, not deny it.

The "overwhelming" consensus has not resolved the confusion. The majority position has been rejected by state courts and lower courts. *Doe*, 2020 WL 1486926, at *6-*9; *Taylor* v. *Samsung Elecs. Am., Inc.*, No. 19-4526, 2020 WL 1248655, at *4 (N.D. Ill. Mar. 16, 2020); *In re Little*, 610 B.R. 558, 568 (Bankr. D.S.C. Jan. 3, 2020); *Allstate Ins. Co.* v. *Toll Bros., Inc.*, 171 F. Supp. 3d 417, 429 (E.D. Pa. 2016); *Ajamian* v. *CantorCO2e, L.P.*, 203 Cal. App. 4th 771, 789-790 (Ct. App. 2012). It has been refuted by authoritative commentators and treatises. Restatement of the U.S. Law of Int'l Commercial & Investor-State Arbitration § 2.8, reporter's note b(iii) (Tentative Draft No. 4) (Apr. 17, 2015) (citing sources). These sources identify the obvious flaws in the majority view that remain unanswered. This all leads to uncertainty on a critical issue that is ubiquitous in arbitration disputes. Jonathan R. Engel, *Court Enforces Arbitration Clause in Email*, ABA Litigation (Mar. 3, 2020) <https://tinyurl.com/aba-arbitration> ("[t]he law is still unsettled").

Yet the circuit tally is so lopsided that it is unlikely any circuit (much less *all* circuits) will correct the problem. *Doe*, 2020 1486926, at *9; *Ashworth*, 2016 WL 7422679, at *3. Only this Court can reverse course—or at least end the persistent confusion on this issue.

Nor is this a situation where parties can be expected to rely on circuit authority. The entire point of this Court's "clear-and-unmistakable" standard is that *most parties*

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[1] Cross-respondent overlooks that multiple circuits recognized a past conflict with the Tenth Circuit, which later walked-back its own precedent. *Belnap* v. *Iasis Healthcare*, 844 F.3d 1272, 1284 (10th Cir. 2017); *Oracle Am., Inc.* v. *Myriad Group A.G.*, 724 F.3d 1069, 1074 (9th Cir. 2013) ("Only one circuit has concluded otherwise.").

never contemplate gateway questions of arbitrability. *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 944 (1995). The issue is "arcane"; "[a] party often might not focus upon that question." *Id.* at 945. A party unaware of an issue does not research that issue, and there is no reason an average party encountering a simple clause incorporating AAA rules will immediately think to scour the F.3d to see whether agreeing to follow certain procedures for arbitration *also agrees to bargain away a judicial determination* of arbitrability. *E.g.*, *Allstate*, 171 F. Supp. 3d at 429; cf. *Awuah* v. *Coverall N. Am., Inc.*, 554 F.3d 7, 12 (1st Cir. 2009) ("It is doubtful that many people read the small print in form contracts, let alone the small print in arbitration rules that are cross-referenced by such contracts, however explicit the cross-reference.").

Perhaps because the issue catches so many by surprise, the issue is repeatedly litigated in lower courts. Indeed, in the months since this cross-petition was filed, the issue has generated at least a dozen new decisions nationwide. It is time for this Court to put the question to rest.

b. Cross-respondent responds that any disagreement is "thin." Opp. 10. Yet even cross-respondent admits that a split exists with one state supreme court (*Flandreau Pub. Sch. Dist. No. 50-3* v. *G.A. Johnson Const., Inc.*, 701 N.W.2d 430 (S.D. 2005)), and its attempt to sidestep other authority falls short. For one, cross-respondent ignores the wealth of lower-court decisions rejecting the "consensus" view. *E.g.*, *Taylor*, 2020 1248655, at *4; *Stone* v. *Wells Fargo Bank, N.A.*, 361 F. Supp. 3d 539, 555 (D. Md. 2019); *Ajamian*, 203 Cal. App. 4th at 789-790. Nor does cross-respondent seriously dispute that experts and treatises

adopt the opposite position. *E.g.*, Bermann Amicus Br. 9-10.[2]

Parties forced to arbitrate "a matter they reasonably would have thought a judge, not an arbitrator, would decide" (*First Options*, 514 U.S. at 945) look to these sources in deciding whether to litigate or give up. And these sources expose the "consensus" as baseless: "none of [the majority's] cases have ever examined how or why the mere 'incorporation' of an arbitration rule" "satisfies the heightened standard" in *First Options*; "[m]ost of the opinions have simply stated the proposition as having been established with citations to prior decisions that did the same." *Doe*, 2020 1486926, at *9. This shallow foundation leaves parties with every reason to press the issue, generating "prolonged litigation." Engel, *supra*.

c. Cross-respondent acknowledges that courts have questioned applying the majority view to unsophisticated parties, but says the point is irrelevant because cross-petitioner "does not contend" it is "unsophisticated." Opp. 9. Not so. The point was not argued *either way* below because cross-petitioner was bound by circuit authority. But cross-petitioner is a small, family-owned business (with no

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[2] Cross-respondent discounts the Restatement in a footnote because it critiqued the majority approach in a tentative draft, not the final version. Opp. 13 n.2. Yet the Restatement's *conclusion* was the same: parties must make "a clear and unmistakable agreement to delegate *exclusively* to arbitrators," and arbitration rules "*do not expressly give the tribunal exclusive authority over these issues*." Restatement of U.S. Law of Int'l Commercial & Investor-State Arbitration § 2.8, cmt. b (proposed final draft Apr. 24, 2019; approved May 20, 2019); *id.* reporter's note b(iii) ("*[e]ven if* incorporation of arbitral rules containing a competence-competence clause *were* generally capable of constituting 'clear and unmistakable evidence'"—*framed as a counterfactual*). As Professor Bermann (the Restatement's "chief reporter") confirms, the Restatement rejects the "consensus" view. Bermann Br. 1-2.

lawyers), not a major corporation with in-house counsel. It had no deep knowledge of the intricacies of federal arbitration law at the circuit level—much less to even *think* of asking who decides arbitrability. *E.g.*, *Aguilera*, 2020 WL 1188142, at *6; *Little*, 610 B.R. at 568. There is no indication cross-petitioner understood it was doing anything besides what the contract said on its face—agreeing to arbitrate (*where arbitration is appropriate*) under AAA rules.

In reality, when ordinary parties (sophisticated or otherwise) actually contemplate a delegation clause, *they expressly include a delegation clause*. *Hoyle, Tanner & Assocs., Inc.* v. *150 Realty, LLC*, 172 N.H. 455, 464 (2019). No rational person thinking about that "arcane" issue relies on a single, unspecified, oblique provision tucked away in a copious set of rules primarily incorporated for an entirely different purpose (read: setting the ground rules for any arbitration). *Ashworth*, 2016 WL 7422679, at *3. It is a mystery how this constitutes "clear and unmistakable" evidence on the gateway issue. *Little*, 610 B.R. at 568; *Ajamian*, 203 Cal. App. 4th at 789-790.

While mere incorporation alone should thus fall short for all parties, the Court can remand for lower courts to decide whether cross-petitioner is "sophisticated" if it deems that fact relevant under a proper analysis.

2. As previously established (19-963 Opp. 18-21; Pet. 14-18), the mere incorporation of AAA rules is insufficient to show a "clear and unmistakable" intent to arbitrate arbitrability. That standard is "an 'interpretive rule,' based on an assumption about the parties' expectations." *Rent-A-Center, West, Inc.* v. *Jackson*, 561 U.S. 63, 70 n.1 (2010). Anyone thinking about delegation will address it expressly—not by indirectly identifying an entire body of rules (spanning dozens of pages) and assuming both parties are silently thinking the same thing. That type of

"broad, nonspecific, and cursory" reference (*Doe*, 2020 WL 1486926, at *7) does not reflect any obvious awareness of the arbitrability issue. *Global Client Solutions, LLC* v. *Ossello*, 382 Mont. 345, 344-345 (2016).

Moreover, even had the parties specifically invoked Rule 7(a) (*out of 58 commercial rules*), the rule still does not mean what cross-respondent says: it does not say the arbitrator has *exclusive* authority to decide arbitrability; this classic "competence-competence" clause merely confirms the arbitrator's *authority* to resolve gateway issues. It does not remove the judiciary's independent authority to decide arbitrability. *E.g.*, *AvMed*, 2020 WL 2028261, at *11; *Doe*, 2020 WL 1486926, at *7; *In re Zetia (Ezetimibe) Antitrust Litig.*, No. 18-2836, 2018 WL 4677830, at *6 (E.D. Va. Sept. 6, 2018); *Ajamian*, 203 Cal. App. 4th at 790.

This Court has repeatedly stressed that delegation is not something parties usually consider. Simply put: "Incorporation by reference of an obscure body of rules to show a clear and unmistakable intent to adhere to one rule specifically is preposterous." *Ashworth*, 2016 WL 7422679, at *3; *Allstate*, 171 F. Supp. 3d at 429; *Ajamian*, 203 Cal. App. 4th at 790.

3. Cross-respondent's defense of the majority position only underscores the weakness of the prevailing rule—and the obvious need for this Court's review.

a. As its lead position, cross-respondent argues its position is supported by the "incorporated-by-reference" doctrine: the unadorned reference to AAA rules incorporates all 58 provisions directly into the agreement itself, including the provision granting the arbitrator "power to rule on his or her own jurisdiction." Opp. 10-11 (quoting Rule 7(a)). According to cross-respondent, "[t]hat is 'about as "clear and unmistakable" as language can get.'" *Ibid.*

Not true. "It is hard to see how an agreement's bare incorporation by reference of a completely separate set of rules that includes a statement that an arbitrator has authority to decide validity and arbitrability amounts to 'clear and unmistakable' evidence that the contracting parties agreed to delegate those issues to the arbitrator and preclude a court from answering them." *Taylor*, 2020 WL 1248655 at *4. "To the contrary, that seems anything but 'clear.'" *Ibid.* Nothing stops parties from including *express* language if they wish to arbitrate arbitrability. It blinks reality that anyone would notice a passing reference to AAA rules and immediately think "delegation." *E.g.*, *Chong* v. *7-Eleven, Inc.*, No. 18-1542, 2019 WL 1003135, at *10 (E.D. Pa. Feb. 28, 2019) ("There is certainly no reason to have any confidence that these parties actually addressed the question of arbitrability."); *Hoyle*, 172 N.H. at 464-465; *Doe*, 2020 WL 1486926, at *6-*9.

Cross-petitioner thus has no problem with the rule that "a document incorporated in a contract by reference is binding on the parties." Opp. 12. The problem is that the incorporating language *never references delegation* at all; the incorporated rules serve other obvious purposes (and parties would thus assume they are referenced *solely for those reasons*); the only *relevant* rule is buried among an extended series spanning dozens of pages; and that rule itself still does not answer the *relevant* question—since it does not grant *exclusive* authority to decide these questions. *E.g.*, *Aguilera*, 2020 WL 1188142, at *6.

In short, this issue turns on the parties' intent—and few parties would see the AAA reference and thumb through the rules or understand the purported significance of Rule 7(a). If there were a meeting of the minds on arbitrating arbitrability, it would be reflected on the face of the agreement.

b. Nor is cross-respondent correct that state-law incorporation principles override "federal law" in this context. Opp. 12. Indeed, quite the opposite: while courts "generally" "should apply ordinary state-law principles," this Court "added an important qualification": "Courts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so.'" *First Options*, 514 U.S. at 944 (quoting *AT&T Techs., Inc.* v. *Commc'ns Workers*, 475 U.S. 643, 649 (1986)). There accordingly is nothing wrong with presuming that documents can be incorporated into an agreement—but there *is* something wrong with relying on the fiction of incorporation without "clear and unmistakable" evidence that the parties *actually intended* to delegate the gateway issue.

c. Cross-respondent is wrong that Rule 7(a) must be read to grant the arbitrator "exclusive" authority to determine arbitrability to avoid rendering that rule "superfluous." Opp. 12. There is a reason these rules are known as *competence* clauses: an arbitrator's authority to rule on his or her own jurisdiction was not "taken for granted." Bermann Br. 15. Arbitrability decisions were traditionally made by courts, and arbitrators have an inherent conflict of interest in deciding whether to expand the scope of their own (paid) work. "Competence" rules confirm the arbitrator is empowered to act *where the parties so wish*; it is not "superfluous" to negate the presumption that courts alone are permitted to determine arbitrability.

In the end, it is telling that cross-respondent does not defend the "majority" view by citing the majority's rationale. Those courts have assumed incorporation is sufficient without any meaningful effort to engage the shortcomings of that position. Because simple head-counting is no substitute for "clear and unmistakable" evidence, further review is warranted.

4. a. Cross-respondent does not dispute that this is an appropriate vehicle for resolving this question. The issue was resolved below (Pet. App. 7a); it would be outcome-determinative here; and there is no conceivable obstacle to reaching it—indeed, it is the necessary predicate to the (insignificant, case-specific) question in cross-respondent's petition. Opp. 7.

It makes little sense to "proceed[] on the assumption" that this agreement "contain[s] valid delegations of arbitrability" (Opp. 7) when that "assumption" tests the most significant issue in the case. If the Court grants review at all, it should address the incorporation question.

b. Cross-respondent argues the conditional cross-petition was "unnecessary and improper" (Opp. 6), but fails to engage cross-petitioner's position. As previously explained (Pet. 5 n.2), while cross-petitions are usually reserved for situations where parties seek to alter the judgment, a cross-petition may be necessary if an argument's "logic would have led to the entry of a judgment that went further in [respondent's] direction." Stephen M. Shapiro et al., *Supreme Court Practice* § 6.35, at 493 (10th Ed. 2013).

Here, a favorable ruling on the AAA-incorporation issue would establish that *nothing* under the contract is subject to a delegation clause. Indeed, cross-respondent admits as much in its brief. Opp. 6. While a cross-petition was thus appropriate, the bottom line is the same either way: should the Court grant cross-respondent's (fact-bound) petition, it should also decide (in that case or this one) the antecedent questions raised here.

B. The Estoppel Question Warrants This Court's Review

The estoppel question presents an easy case for certiorari, and cross-respondent only confirms the need for review.

1. Cross-respondent concedes that a circuit conflict exists: "two appellate courts have seemingly rejected the majority rule that a delegation requires the arbitrator to decide whether a non-signatory can compel arbitration." Opp. 16. While cross-respondent quibbles whether three *additional* circuits have joined that conflict, the existence of a direct, acknowledged split is now undisputed between the parties. See Pet. 22.

2. Cross-respondent does not dispute this question is important and recurring, but instead argues it was not technically resolved below. Opp. 14-15. Yet this issue is a pure legal question, and the outcome is preordained under binding Fifth Circuit authority. Cross-respondent tacitly concedes the issue is factually presented and will be next in line for decision upon remand. There is no need to postpone the inevitable when there is only one possible outcome below.

CONCLUSION

Both petitions should be denied. But if the original petition is granted, this cross-petition should also be granted.

Respectfully submitted.

DANIEL L. GEYSER
GEYSER P.C.
One Energy Square
4925 Greenville Ave., Ste. 200
Dallas, TX 75206

LEWIS T. LECLAIR
Counsel of Record
GARY CRUCIANI
MCKOOL SMITH, P.C.
300 Crescent Court, Suite 1500
Dallas, TX 75201
(214) 978-4984
lleclair@mckoolsmith.com

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