No. 19-963

In the Supreme Court of the United States

HENRY SCHEIN, INC., PETITIONER

v.

ARCHER AND WHITE SALES, INC.

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

Petitioner wishes to present a question about delegation, but the arbitration agreement at issue here does not mention delegation at all. The only language that petitioner believes even *indirectly* creates delegation expressly carves out certain disputes, including "actions seeking injunctive relief," which this case does. And even ignoring those initial defects, petitioner is not a signatory to any agreement with respondent, much less an *arbitration* agreement; the only signatory to the arbitration agreement that petitioner (as a nonsignatory) seeks to enforce *settled* during briefing on petition's stay application, and is no longer a party to this case.

The question presented in the main petition therefore is:

Whether an arbitration agreement that makes no mention of delegation "clearly and unmistakably" delegates arbitrability with respect to actions that the agreement expressly carves out from both arbitration and any arguable delegation.

While that question is unworthy of review, the Court should also decide the following two predicate questions (as described more fully in respondent's concurrently filed conditional cross-petition) if it decides to take up this case at all:

1. Whether an arbitration agreement that identifies a set of arbitration rules to apply *if* there is arbitration clearly and unmistakably delegates to the arbitrator disputes about *whether* the parties agreed to arbitrate in the first place.

2. Whether an arbitrator or a court decides whether a nonsignatory to an arbitration agreement can enforce the arbitration agreement through equitable estoppel.

PARTIES TO THE PROCEEDING BELOW AND RULE 29.6 STATEMENT

Petitioner is Henry Schein, Inc., an appellant below and a defendant in the district court.

Respondent is Archer and White Sales, Inc., the appellee below and plaintiff in the district court. Archer and White Sales, Inc., has no parent corporation, and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

Page

Introduction 1

Statement 4

Argument 9

A. There is no conflict on any significant question of federal law 10

B. This case is a poor vehicle for deciding the question presented 18

C. The decision below was correct 24

Conclusion 31

TABLE OF AUTHORITIES

Cases:

Ally Align Health, Inc. v. *Signature Advantage, LLC*, 574 S.W.3d 753 (Ky. 2019) 12, 13

Am. Bankers Ins. Grp. v. *Long*, 453 F.3d 623 (4th Cir. 2006) 22

Arthur Andersen LLP v. *Carlisle*, 556 U.S. 624 (2009) 21

AT&T Techs., Inc. v. *Commc'ns Workers*, 475 U.S. 643 (1986) 24, 29

Certain Underwriters at Lloyd's London v. *Hogan*, 556 S.E.2d 662 (N.C. Ct. App. 2001) 29

Contec Corp. v. *Remote Solution Co.*, 398 F.3d 205 (2d Cir. 2005) 22

Dean Witter Reynolds Inc. v. *Byrd*, 470 U.S. 213 (1985) 17

First Options of Chi., Inc. v. *Kaplan*, 514 U.S. 938 (1995) ..... *passim*

Hendricks v. *UBS Financial Services, Inc.*, 546 F. App'x 514 (5th Cir. 2013) 14

Page

Cases—continued:

Henry Schein, Inc. v. *Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019) ..... *passim*
Howsam v. *Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002) 24, 29
James & Jackson, LLC v. *Willie Gary*, 906 A.2d 76 (Del. 2006) 14
Johnston Cty v. *R.N. Rouse & Co.*, 414 S.E.2d 30 (N.C. 1992) 29
Kai Peng v. *Uber Techs., Inc.*, 237 F. Supp. 3d 36 (S.D.N.Y. 2017) 14
Mastrobuono v. *Shearson Lehman Hutton*, 514 U.S. 52 (1995) 26, 28
Mohamed v. *Uber Technologies, Inc.*, 848 F.3d 1201 (9th Cir. 2016) 11, 12
NASDAQ OMX Group, Inc. v. *UBS Securities, LLC*, 770 F.3d 1010 (2d Cir. 2014) 13, 14
Oracle America, Inc. v. *Myriad Group A.G.*, 724 F.3d 1069 (9th Cir. 2013) ..... *passim*
Redeemer Comm. of the Highland Crusader Fund v. *Highland Cap. Mgmt., L.P.*, No. 12533-VCG, 2017 Del. Ch. LEXIS 30 (Feb. 23, 2017) 14
Rent-A-Center, West, Inc. v. *Jackson*, 561 U.S. 63 (2010) 25, 27
Root v. *Allstate Ins. Co.*, 158 S.E.2d 829 (N.C. 1968) 29
Stolt-Nielsen S.A. v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010) 26
Wood-Hopkins Contracting Co. v. *N.C. State Ports Auth.*, 202 S.E.2d 473 (N.C. 1974) 30

Page

Miscellaneous:

ALI Restatement of the U.S. Law of International Commercial and Investor-State Arbitration, Restatement (Tentative Draft No. 4, 2015) 19, 20
Christopher R. Drahozal & Erin O'Hara O'Connor, *Unbundling Procedure: Carve-Outs from Arbitration Clauses*, 66 Fla. L. Rev. 1945 (2014) 30

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BRIEF FOR THE RESPONDENT IN OPPOSITION

INTRODUCTION

This case is an exceedingly poor vehicle for review, made more so by respondent's recent settlement with the only other signatory to the arbitration agreement at issue. As presently postured, petitioner seeks to enforce an arbitration agreement that it never signed, in a forum (North Carolina) having no relevant connection to the relationship of these parties, and based upon a legal theory (equitable estoppel) that neither the district court nor the court of appeals has ever addressed. The procedural setting of this case is most unusual. Indeed, while petitioner purports to rely upon an arbitration agreement between respondent and a dental manufacturer (Pelton), it ignores that respondent has express *non*-arbitration agreements with other manufacturers, and no written agreement at all with others still. Petitioner previously focused on the

Pelton agreement because Pelton was a party, but that is no longer true; there now is especially no reason that the Pelton agreement should override respondent's agreements *not* to arbitrate with other manufacturers.

The Court might choose to overlook these defects if there were a clear split of authority warranting review, but no such split exists. Petitioner's attempt to manufacture a split relies on cases that reached different results *because they construed different contractual language*. No two courts have reached different outcomes based on a comparable carve-out, but each court agrees on the controlling principle: the question requires a clear and unmistakable showing based on the case-specific language and syntax of the arbitration clause at issue.

Ironically, the parties (and the courts in the alleged split) now *agree* on the answer to petitioner's question presented. After submitting its stay application, petitioner apparently jettisoned the categorical theory it has advanced since 2012 (and on which it bases its asserted split): parties must delegate either all arbitrability disputes or no arbitrability disputes. As respondent pointed out in its stay response, that position is incompatible with longstanding jurisprudence that arbitration is a matter of contract, and parties are free to arbitrate all, none, or only some disputes.

Instead, petitioner now admits that "[t]o be sure, an arbitration agreement could, in theory, clearly and unmistakably delegate the question of arbitrability to an arbitrator for certain claims while exempting"—carving out—"others from the delegation." Pet. 21. In other words, everyone agrees that courts *must* take carve-outs into account when deciding whether parties clearly and unmistakably delegated *this* dispute to arbitration. There is no "pure question of law" here. The answer depends on

applying traditional rules of contract interpretation to the specific language at hand.

In place of those traditional rules and the longstanding presumption that courts decide arbitrability disputes, however, petitioner proposed in its stay reply a "more modest" presumption-shifting scheme *that it never presented below and that no court anywhere has ever addressed, much less adopted*. This Court should not be the first to evaluate petitioner's new proposal.

Moreover, this Court's decision on the question presented is unlikely to have any practical effect. There are a number of reasons that this antitrust dispute between two competitors without any contractual relationship should not be resolved in arbitration in North Carolina, including that the agreement says nothing about delegation, this action falls within a carve-out to both delegation and arbitration, and the party demanding arbitration is not even a party to the agreement. Even if petitioner prevails here, it will simply lose again on remand. If the question presented warrants review at all, this Court can always take it up in a future case where it is outcome-determinative.

At bottom, petitioner must string together one untenable presumption and inference upon another, and even if petitioner wins across the board, it would yield the bizarre result that respondent is forced to arbitrate with a party with whom it has no agreement at all; in a forum bearing no relevant connection to the parties' dealings; respecting claims relating to manufacturers with whom respondent either had no arbitration agreement at all or expressly agreed to litigate in court; pursuant to an equitable estoppel theory that the courts below have not addressed; and all this because respondent *and another party* (but not one still a party to the case) agreed to arbitrate, where appropriate, under the AAA Rules—without explicitly saying a word about delegation.

This case has dragged on for nearly eight years, with the parties twice on the courthouse steps, ready to try their case and resolve their dispute. But petitioner persists in trying to invoke an arbitration clause to which it is not a party and under an ever-changing legal theory that sub silentio asks this Court to reverse its longstanding presumption in favor of the court deciding the gateway issue of arbitrability. This Court should not reward petitioner's attempt to delay any longer. Because there is no need to decide a marginal question in a vehicle plagued with serious defects, the petition should be denied.

STATEMENT

1. Respondent is a small, family-owned distributor that sells dental products to dentists. It obtains access to those products through agreements with dental-product manufacturers. Some agreements are written and contain arbitration clauses, such as respondent's agreement with Pelton (previously a defendant in the district court). Some agreements are written and affirmatively require that any dispute be resolved in court, not arbitration, such as respondent's agreement with Kavo (also previously a defendant). D. Ct. Dkt. 24-4, at 18 (requiring disputes be brought in court in County of Lake, Illinois). And some agreements are oral and do not specify how the parties must resolve any dispute, such as respondent's agreement with Instrumentarium (also previously a defendant).

Petitioner is another dental-products distributor and one of respondent's competitors. Petitioner and respondent do not have any contractual relationship. No arbitration agreement exists between them.

2. In 2012, respondent sued petitioner and several dental-equipment manufacturers, including Pelton. Pet. App. 3a. Respondent alleged that petitioner conspired with other large dental distributors to maintain

supracompetitive margins by threatening to stop buying from manufacturers (such as Pelton) who sold to low-margin dental distributors such as respondent, thereby bringing manufacturers into the conspiracy. See *ibid.* These actions resulted in the conspirators boycotting low-margin distributors like respondent. *Ibid.* To redress these antitrust violations, respondent's pending suit demands damages and "injunctive relief," because "[t]he violations * * * are continuing and will continue unless injunctive relief is granted." C.A. App. 35.

3. a. After respondent filed its original complaint, defendant Pelton moved to compel arbitration based on its distribution agreement with respondent:

> 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 Pelton & Crane) shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association.

Pet. App. 3a (emphasis added). Even though the other defendants were not parties to the arbitration agreement (and some even had agreements requiring that disputes be resolved in court), they joined Pelton's motion.

Petitioner filed its own motion to compel arbitration, arguing that under equitable estoppel, respondent had to arbitrate with petitioner, even though the parties lacked any contractual relationship whatsoever—much less an arbitration agreement.

b. Pelton[1] recently settled, eliminating from the case the only defendant with an arbitration agreement. See D. Ct. Dkt. 497.

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[1] Pelton was a part of a group of manufacturers owned by Danaher Corporation, all of whom settled.

4. The magistrate judge ordered arbitration, but the district court vacated the order and denied the motions to compel arbitration. The district court ruled that the parties had not clearly and unmistakably agreed to delegate arbitrability. It observed that "[t]here is no express delegation clause in the [A]greement." Pet. App. 31a. And in light of the carve-out for actions seeking injunctive relief, the court found no reason to believe that the parties' adoption of the AAA Rules expressed an intent to delegate the arbitrability of those actions. *Id.* at 32a. "[T]he present action falls squarely within the terms of an express carve-out," the court explained, and "it would be senseless to have the AAA rules apply to proceedings that are not subject to arbitration." *Ibid.* The court also held that even if the agreement delegated arbitrability disputes, the defendants' arbitrability argument was "wholly groundless." *Id.* at 35a.

5. On appeal, respondent urged affirmance both because "[t]he parties did not delegate the question of arbitrability to the arbitrator" and because, even if they had, the defendants' "arbitrability argument is 'wholly groundless.'" C.A. Br. 17, 26.

The Fifth Circuit affirmed. With respect to delegation, the court said: "It is not the case that any mention in the parties' contract of the AAA Rules trumps all other contract language." 878 F.3d 488, 494 (5th Cir. 2017). Rather, "the interaction between the AAA Rules and the carve-out is at best ambiguous." *Id.* at 494-495. It therefore concluded that "[t]here is a strong argument that the Dealer Agreement's invocation of the AAA rules does not apply to cases that fall within the carve-out" for "actions seeking injunctive relief." *Id.* at 494. The court did not decide the delegation issue, however, because it affirmed on the alternative ground that the defendants' arbitrability argument was wholly groundless. *Id.* at 495.

6. This Court granted certiorari to decide the viability of the "wholly groundless" exception, held that the exception was inconsistent with the Federal Arbitration Act, and vacated the Fifth Circuit's decision. *Henry Schein, Inc.* v. *Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019). But it "express[ed] no view about whether the contract at issue in this case in fact delegated the arbitrability question to an arbitrator." *Id.* at 531. Instead, this Court remanded with instructions for the Fifth Circuit to "address that issue in the first instance," with a reminder that "courts 'should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so.'" *Ibid.* (quoting *First Options of Chi., Inc.* v. *Kaplan*, 514 U.S. 938, 944 (1995)).

7. In August 2019, after supplemental briefing and oral argument, the Fifth Circuit issued its decision on remand. The court recognized that arbitration is a matter of contract formation and interpretation. Pet. App. 5a-6a. It therefore reviewed the specific language of the arbitration clause at issue and concluded that "the placement of the carve-out here is dispositive." *Id.* at 11a. "We cannot rewrite the words of the contract," the court explained, and "[t]he most natural reading of the arbitration clause at issue here states that any dispute, except actions seeking injunctive relief, shall be resolved in arbitration in accordance with the AAA rules." *Ibid.* Accordingly, "[t]he plain language incorporates the AAA rules—and therefore delegates arbitrability—for all disputes except those under the carve-out." *Ibid.* "Given that carve-out," the court concluded, "we cannot say that the Dealer Agreement evinces a 'clear and unmistakable' intent to delegate arbitrability." *Ibid.*

The Fifth Circuit noted that it was "mindful of th[is] Court's reminder that '[w]hen the parties' contract delegates the arbitrability question to an arbitrator, the

courts must respect the parties' decision as embodied in the contract.'" Pet. App. 11a (quoting *Henry Schein*, 139 S. Ct. at 531). But it also needed to "heed [this Court's] warning that 'courts "should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so."'" *Id.* at 11a-12a (quoting *Henry Schein*, 139 S. Ct. at 531). "The parties could have unambiguously delegated this question," the Fifth Circuit explained, "but they did not, and we are not empowered to re-write their agreement." *Id.* at 12a.

The Fifth Circuit then determined that this action is not arbitrable because it falls outside the scope of the arbitration clause. Pet. App. 14a-15a. Accordingly, it affirmed the district court's decision.

8. The defendants sought rehearing en banc in August 2019, which the Fifth Circuit denied on December 6, 2019; no judge requested a vote on the petition. Pet. App. 42a.

On January 8, 2020, petitioner filed a stay application with this Court to avoid the upcoming trial. On January 17, 2020, respondent and Pelton (and related manufacturers owned by Danaher Corporation) announced they had settled all pending claims and the district court stayed all deadlines applicable to them. See D. Ct. Dkt. 497, 501.[2] On January 24, 2020, this Court granted the stay application pending the filing and disposition of the pending petition.

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[2] Also on January 17, 2020, respondent and Patterson Companies, Inc. (a defendant and respondent's competitor) announced they had settled all pending claims. See D. Ct. Dkt. 498, 502. There are only two remaining defendants, petitioner and Benco Dental Supply Co.; the latter, another of respondent's competitors, did not seek a stay and did not join in the petition. At the time the Court issued its stay, respondent was engaged in active settlement discussions with both petitioner and Benco.

ARGUMENT

Petitioner poses a question that has not divided the courts or even the parties. Everyone agrees that a carve-out can exempt certain disputes from a delegation clause in appropriate circumstances. Courts have reached different conclusions in different cases because they were evaluating different contractual language. As petitioner now acknowledges, parties may delegate some, but not all, arbitrability disputes, so courts must give meaning to carve-out language by interpreting the text. Whether the court below correctly read this "unique" clause is a case-specific, fact-bound question of no general importance.

Nor is this case a suitable vehicle. This arbitration agreement says nothing about delegation; petitioner is not even a signatory; the only signatory has since settled, dropping entirely out of the case; and the remaining two defendants (respondents' competitors) have no agreement with respondent at all, much less an arbitration agreement. Petitioner is building a house of cards based on unresolved predicate questions, and doing so for an obvious reason: to delay the trial that will ultimately decide this case. There is no reason for the Court to resolve petitioner's weak question presented at all, much less without first resolving the predicate questions that undergird petitioner's arbitration quest.

Compounding these defects, petitioner has repeatedly changed its own position. When confronted in the stay opposition with the obvious shortcoming in petitioner's "all-or-nothing" delegation theory, petitioner has now retreated to a novel legal theory that was not presented to the court below, has not been adopted by *any* lower court, and would impliedly overrule this Court's own long-standing decisions.

Finally, the decision below was correct. In the very sentence petitioner claims (silently) constitutes a

delegation, the signatories carved out "actions seeking injunctive relief." This is indisputably an action seeking injunctive relief. Arbitration is a matter of contract, and giving effect to that carve-out is the only way to respect the signatories' intent as reflected in the agreement's unambiguous text. The FAA places arbitration clauses on equal footing with other contracts; it does not permit arbitration where the parties excepted a dispute from arbitration.

In short, petitioner failed to identify *any* conflict, let alone a conflict on an issue of substantial importance, and this case is an unsuitable vehicle for further review. The petition should be denied.

A. There Is No Conflict On Any Significant Question Of Federal Law

Petitioner maintains that the courts are divided on the question presented, but petitioner is wrong. Each case stands for the unremarkable proposition that courts must examine the particular contractual language at issue and determine whether that language "clearly and unmistakably" delegates arbitrability questions to the arbitrator. That different cases reached different outcomes is not evidence of a split; it is evidence that different parties agreed to different words in different contracts, leading to different meanings.

1. In *Oracle America, Inc.* v. *Myriad Group A.G.*, 724 F.3d 1069 (9th Cir. 2013), the Ninth Circuit found that the parties had delegated arbitrability of the dispute at issue despite the existence of a carve-out. But rather than drawing the bright-line rule that petitioner ascribes to it—that interpreting the scope of a carve-out is *per se* impermissible—the Ninth Circuit analyzed the specific language of the clause at issue and limited its holding to that case-specific language.

The parties had agreed to arbitrate "any claim arising out of the Source License" while also carving out disputes

relating to "Intellectual Property Rights or with respect to [Myriad's] compliance with the TCK license." 724 F.3d at 1071. But the arbitration agreement and the carve-out were circular. As the Ninth Circuit explained, "[e]nforcement of Myriad's intellectual property rights is restricted by the Source License. And the TCK License is part of the Source License." *Id.* at 1076. So "by definition, the claims excepted from arbitration by the carve-out clause are claims 'arising out of or relating to' the Source License," *i.e.*, arbitrable claims. *Ibid.* In those circumstances, the court explained, "Oracle's argument conflate[d] the scope of the arbitration clause, *i.e.*, which claims fall within the carve-out provision, with the question of who decides arbitrability." *Ibid.*[3]

Petitioner takes *Oracle*'s language far beyond its natural meaning to suggest the Ninth Circuit established a bright-line rule that courts may *never* interpret the scope of a carve-out. But read in context, *Oracle* said only that determining arbitrability in the context of *that* circular contractual language conflated scope and delegation. See 724 F.3d at 1076 ("*Here*, the excepted claims are by definition related to arbitrable claims because they all relate to the Source License." (emphasis added)).

Petitioner ignores subsequent decisions disproving the claim that *Oracle* endorsed a categorical rule. For example, in *Mohamed* v. *Uber Technologies, Inc.*, 848 F.3d 1201 (9th Cir. 2016), the court held that the delegation provisions at issue "clearly and unmistakably delegated the question of arbitrability to the arbitrator for all claims

[3] See also Pet. App. 10a n.30 ("The [*Oracle*] court noted that the issue with Oracle's carve-out argument was that the two categories of exempted claims by definition were claims arising out of or relating to the Source License, which were explicitly subject to arbitration. No such circularity exists in the contract at issue here." (citation omitted)).

except challenges to the class, collective, and representative actions waivers," *i.e.*, the carve-out in that case. *Id.* at 1209. If petitioner were correct that *Oracle* stands for the proposition that delegation is all-or-nothing—that carve-outs have no bearing on delegation—then the court in *Mohamed* (decided three years after *Oracle*) would have ordered arbitration for the arbitrator to decide the import of the carve-out language. Instead, the court decided the arbitrability question itself.[4]

Petitioner also claims the decision below conflicts with *Ally Align Health, Inc.* v. *Signature Advantage, LLC*, 574 S.W.3d 753 (Ky. 2019), which relied heavily on *Oracle*. But in that case, the arbitration and delegation clause and the carve-out were located in different sections of the agreement. *Id.* at 756. As the Fifth Circuit explained, "the placement of the carve-out" is "dispositive" in determining the parties' intent. Pet. App. 11a. Where the delegation clause and the carve-out are in separate sections of the agreement—as in *Ally Align*—there is no reason to believe the carve-out applies to delegation. But where, as here, the delegation provision and the carve-out are in the same sentence, "[t]he most natural reading" of that language is that the carve-out applies to delegation. *Ibid.*[5] *Ally Align* merely confirms that the determination is a

[4] Petitioner cannot explain away *Mohamed* on the ground that "the carve-out operated *directly on the delegation*, as opposed to broader agreement to arbitrate certain claims." Pet. Stay Reply 11. That is exactly the point the Fifth Circuit made in declaring the placement of the carve-out "dispositive." Pet. App. 11a. In this case, the parenthetical carve-out appears in the very sentence that petitioner claims creates the delegation, meaning that this carve-out operates on delegation, just as in *Mohamed*.

[5] See *Han* v. *Synergy Homecare Franchising, LLC*, 2017 U.S. Dist. LEXIS 15021, at *15-*16 (N.D. Cal. Feb. 2, 2017) (distinguishing *Oracle* because the carve-out and delegation appeared in separate sentences).

matter of contract interpretation, not wooden, bright-line rules.[6]

2. *Oracle* and *Ally Align* are also consistent with case law in the Second Circuit and the State of Delaware; these courts confirm that the question of *who* decides arbitrability consists of nothing more than the court applying ordinary rules of contract interpretation to all the terms of the arbitration agreement, including any carve-out language.

In *NASDAQ OMX Group, Inc.* v. *UBS Securities, LLC*, 770 F.3d 1010 (2d Cir. 2014), the Second Circuit concluded that the contract at issue did not reflect a clear and unmistakable intent to delegate arbitrability. "[W]here a broad arbitration clause is subject to a qualifying provision that at least arguably covers the present dispute," the court explained, "we have identified ambiguity as to the parties' intent to have questions of arbitrability—which would include whether a dispute falls within or outside the scope of the qualifier—decided by an arbitrator." *Id.* at 1031. The agreement did "not clearly and unmistakably direct that questions of arbitrability be decided by AAA rules," the court said; "rather, it provides for AAA rules to apply to such arbitrations as may arise under the Agreement." *Id.* at 1032. Because the dispute at issue fell within the scope of the carve-out, there was no arbitration arising under the agreement to which the AAA rules would apply, and thus no delegation. See *ibid.* Again, the

[6] Respondent does not intend to suggest that whether the carve-out is located in the same sentence as the delegation language is dispositive; rather, the point is that courts, including the courts below, have considered the placement of the carve-out language in applying the traditional tools of contract construction to ascertain the parties' intent. The location of the delegation clause, like any other case-specific feature of any contract, is simply one factor a court may take into account in construing a contract.

court's interpretation turned on the specific language of the contract at issue.[7]

The Delaware Supreme Court in *James & Jackson, LLC* v. *Willie Gary*, 906 A.2d 76, 81 (Del. 2006), similarly examined the language of the specific agreement at issue and determined there was no clear and unmistakable evidence of delegation.[8] Subsequent cases in Delaware have emphasized "[t]he contextual nature of the inquiry." *Redeemer Comm. of the Highland Crusader Fund* v. *Highland Cap. Mgmt., L.P.*, No. 12533-VCG, 2017 Del. Ch. LEXIS 30, at *17-*18 (Feb. 23, 2017). These cases all turn on the same unremarkable principle: Arbitration is a matter of contract. *First Options*, 514 U.S. at 943.

3. Ironically, some of the very cases that petitioner relied on below also prove that no court has adopted the "all-or-nothing" delegation rule that (according to petitioner) gave rise to a split. For example, petitioner argued below that *Hendricks* v. *UBS Financial Services, Inc.*, 546 F. App'x 514 (5th Cir. 2013) (per curiam), in which the court had found clear and unmistakable delegation despite the presence of a carve-out, demonstrated that the Fifth

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[7] As with *Oracle*, subsequent decisions of courts in the Second Circuit show that *NASDAQ* does not stand for any bright-line rule but is instead a context and language-based inquiry. See, *e.g.*, *Kai Peng* v. *Uber Techs., Inc.*, 237 F. Supp. 3d 36, 53-54 & n.15 (S.D.N.Y. 2017) (distinguishing *NASDAQ* and finding that the particular carve-out in that case did "not negate a finding of clear and unmistakable delegation to the arbitrator").

[8] To be sure, *Oracle* disagreed with *James & Jackson* regarding the breadth of the carve-out in that case. *Oracle*, 724 F.3d at 1076 (disagreeing with the Delaware court, writing, "[i]n fact, the parties' agreement in *James & Jackson* did generally refer all controversies to arbitration"). But two courts' disagreement about the breadth of the carve-out language in a particular agreement is not the type of question that merits this Court's attention, particularly when the disputed language is distinguishable from the language in this case.

Circuit's position was that "carve-outs from arbitration clauses do not narrow otherwise-valid delegation clauses." Pet. Supp. C.A. Br. 14. That was proven false by the panel in this very case. Instead, *Hendricks* provides more evidence that the Fifth Circuit, like every other court, bases its decision on the specific language at issue, nothing more.

In short, there is no genuine conflict. No courts have come to different conclusions about whether the same language delegates arbitrability. Rather, courts have come to different conclusions on differing language. That is not creating or deepening a split; that is applying this Court's instruction to examine the parties' particular agreement to determine whether clear and unmistakable evidence of delegation exists.

4. Petitioner has inadvertently demonstrated that there is no disagreement over the question presented: "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." Pet. i. According to each of the courts discussed above, the answer is "sometimes"; it depends on the contractual language at issue.

Remarkably, even petitioner and respondent now agree on the answer to the question presented. Since 2012, petitioner had advocated for a bright-line rule in which the mere incorporation of the AAA rules coupled with an arbitration carve-out *always* required the arbitrator to decide arbitrability. "Whether or not an arbitration clause containing a valid delegation provision 'carves out' certain claims, the delegation provision still mandates that the arbitrator—not the court—decide the arbitrability of the allegedly carved-out claims." Pet. C.A. Br. 22; see also Pet. Supp. C.A. Br. 14 (arguing that "carve-outs from arbitration clauses do not narrow otherwise-valid

delegation clauses," with no caveats). That is the same argument petitioner made in its stay application. See Stay App. 2 ("[B]ecause the question of scope [of a carve-out provision] is itself a question of arbitrability, the arbitrator must decide that question if there is a clear and unmistakable delegation.").

After respondent pointed out that petitioner's "all-or-nothing" rule conflicts with the long-standing principle that parties can structure their arbitration agreements as they wish, however, see Stay Opp. 24-25, petitioner shifted to a "more modest" position for the first time in the case. Stay Reply 9. It admitted that a carve-out *can* defeat a clear and unmistakable delegation in some circumstances, but proposed a novel presumption-shifting framework. See *id.* at 11.

Petitioner's position continued to evolve in its petition. Its question presented and the bulk of its presentation again assume that carve-outs have no bearing on delegation. But late in its petition (at 21), petitioner abruptly pivots and falls back on the "more modest" presumption-shifting rule announced in the stay reply: "*[t]o be sure, an arbitration agreement could, in theory, clearly and unmistakably delegate the question of arbitrability to an arbitrator for certain claims while exempting others from the delegation*." That single sentence undermines the entire premise of petitioner's case. It eliminates the viability of the alleged split and concedes away petitioner's proposed bright-line rule of all-or-nothing delegation (which it had been promoting for the previous 21 pages). Petitioner admits the obvious: a court must *always* consider the full language of the arbitration agreement, including any carve-out, in making a delegation determination. The only dispute is how that test applies to the particular, "unique" contractual language at issue in this case.

In short, the import of petitioner's new admission is profound: there is no bright-line rule, which means there is no split of authority, which means the Fifth Circuit did not err in taking the carve-out language into consideration when making its delegation decision. This Court should not be the very first to consider if petitioner's novel presumption-shifting framework has any merit.

5. The current petition stands in stark contrast to the last time this case was before the Court. In its last trip, the question presented was a pure question of law: whether the "wholly groundless" exception is consistent with the Federal Arbitration Act. *Henry Schein*, 139 S. Ct. at 528-529. Unlike the "wholly groundless" issue, the present issue does not present any important, recurring questions about arbitration writ large. Whether the particular language in this "unique" contract clearly and unmistakably delegates arbitrability is of little importance outside of this specific case; it can lead to no broader, meaningful standard, and parties are always free to contract around it. Petitioner makes much of the importance of arbitration generally and this Court's previous grants of certiorari in arbitration cases. But previous cases presented legal questions with widespread effect, not questions turning on the particular syntax of a single arbitration agreement.

Moreover, petitioner's concerns about efficiency and "ignoring" arbitration agreements ring hollow. Many of those arguments assume the parties agreed to arbitrate, which is hotly disputed here. And efficiency concerns cannot overcome the parties' intent. *Dean Witter Reynolds Inc.* v. *Byrd*, 470 U.S. 213, 221 (1985) (holding that courts must enforce arbitration agreements as written, even if the result is inefficient). While petitioner protests that "a court could preclude arbitration whenever it concludes, based on its own parsing of the arbitration agreement,

that the parties' dispute falls outside the scope of the delegation provision," Pet. 24, that is exactly what courts are required to do: determine what the parties intended. See *First Options*, 514 U.S. at 943 ("[T]he question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about that matter."). If the dispute falls outside the scope of the delegation provision—*i.e.*, the parties did not agree to delegate this kind of dispute—the court *should* preclude arbitration.

B. This Case Is A Poor Vehicle For Deciding The Question Presented

This case is an exceedingly poor vehicle for deciding the question presented. To reach the result that it seeks—arbitration—petitioner must stack assumption upon assumption and strained legal doctrine upon strained legal doctrine. Petitioner is not a party to the arbitration agreement at issue. Nor does it have any connection to that agreement. As such, petitioner relies solely on an equitable estoppel theory that neither the district court nor the Fifth Circuit have addressed. And the arbitration agreement itself says nothing about delegation; it merely sets out the rules for *arbitrable* disputes. What is more, petitioner's position requires the Court to ignore other relevant agreements that affirmatively *do not* permit arbitration. The anomalous result under petitioner's theory is an arbitration between parties who never agreed to arbitrate, in a State (North Carolina) with no relevant connection to the dispute, and involving claims in which respondent had agreements not to arbitrate. This case does not merit review.

1. First, petitioner's question presented requires the Court to assume that the arbitration clause delegates arbitrability in the first place. See Pet. i (assuming "an otherwise clear and unmistakable delegation of questions of arbitrability"). But the arbitration clause at issue says

nothing about delegation. Instead, petitioner hangs its hat on a provision stating that if the parties do indeed arbitrate a dispute, the arbitration generally will be governed by AAA Rules. Because a single provision of those Rules (out of dozens) happens to give arbitrators authority to decide their own jurisdiction, petitioner says respondent and Pelton impliedly delegated the gateway issue "*clearly and unmistakably*" to the arbitrator.

While this Court has never addressed the validity of implied delegation, it is perplexing to think that merely incorporating the AAA Rules is itself sufficient to show a clear and unmistakable delegation. Many courts—including the court below—recognize the concept, but their reasoning is sparse, other courts disagree, and the authoritative ALI Restatement of the U.S. Law of International Commercial and Investor-State Arbitration examined those decisions and declared them misguided. Restatement § 2-8 reporter's note b(iii) (Tentative Draft No. 4, 2015).[9]

To begin, it makes little sense to think that parties who actually *contemplated* the delegation issue would decide to resolve it in a manner as oblique as this. The AAA Rules span dozens of pages and include a multitude of provisions; those Rules play a role in arbitrations generally, and parties thus have every reason for invoking the AAA Rules even if they did not give one whit of thought to delegating arbitrability—indeed, even if they presumed, as most parties do, that *courts* would retain the gatekeeping role to decide whether a dispute is arbitrable in the first place. See *First Options*, 514 U.S. at 945 (confirming that presumption). This is exactly the kind of "arcane" issue that "[a] party might not focus upon," and therefore "might too often force unwilling parties to arbitrate a

[9] Approved, http://2015annualmeeting.org/actions-taken.

matter they reasonably would have thought a judge, not an arbitrator, would decide." *Ibid.* A generic, indiscriminate reference to *all* the AAA Rules is a far cry from specifically invoking the single provision that happens to say anything about arbitrating arbitrability.

But even if the parties had randomly plucked out that single AAA provision in advance, nothing on its face suggests that parties are giving away their right for a court to make the threshold determination. The relevant AAA rule, at most, gives the arbitrator the *competence* to make a decision; that means the parties are not forced to return to court in the event that a dispute arises over arbitrability. But nothing in any AAA rule gives the arbitrator the *exclusive* right to determine his or her own jurisdiction. See Restatement § 2-8 reporter's note b(iii) (Tentative Draft No. 4, 2015). Saying that *either* tribunal may determine arbitrability necessarily does not say that courts may not, and it assuredly does not convey a "clear and unmistakable" message to that effect. Incorporating the ground rules for arbitration, in short, does not suggest that arbitrators alone may decide arbitrability.

Finally, most sets of arbitration rules (such as the AAA Rules) give arbitrators authority to decide their own jurisdiction, and most arbitration agreements choose a set of arbitration rules to govern their disputes. It may be one thing if those rules were useful only regarding arbitrability, but parties have every reason to select those rules for a different reason—providing the ground rules, in advance, for disputes that *actually belong in arbitration*. Holding that mere mention of a set of arbitration rules in an arbitration agreement demonstrates clear and unmistakable evidence of delegation would flip this Court's longstanding presumption against delegation on its head.

At bottom, implied delegation contravenes this Court's repeated holdings that courts alone are presumed

to decide arbitrability. See generally Prof. Berman Amicus Br., *Henry Schein, Inc.* v. *Archer & White Sales, Inc.*, No. 17-1272 (filed Sept. 25, 2018). The fact that petitioner's entire argument hinges on an invalid premise is reason alone to deny review. But if the Court wishes to consider the case at all, it should also grant review over the implied-delegation question.

2. Even if petitioner is somehow correct that contracting parties may delegate arbitrability merely by choosing the rules for any arbitration, petitioner still must deal with *this* agreement's express carve-out. And it makes little sense to say that respondent intended the AAA Rules to apply to a dispute that is expressly *excluded* from arbitration (and with a non-signatory, to boot).

3. Assuming there was delegation of this dispute at all, petitioner next must face the fact that it is not a signatory to the arbitration agreement at issue. Indeed, petitioner is not even *related* to a signatory (*e.g.*, an agent or any privy), the normal circumstances under which a non-signatory invokes someone else's arbitration agreement. And, of course, the only signatory (besides respondent) to the arbitration agreement has now settled and is no longer even a participant in this lawsuit.

In theory, a non-signatory may perhaps be able to enforce an arbitration agreement against a signatory if state law allows it. See *Arthur Andersen LLP* v. *Carlisle*, 556 U.S. 624 (2009). But that is an open question in this case. Under North Carolina law,[10] "equitable estoppel applies when the signatory to a written agreement containing an arbitration clause must rely on the terms of the agreement in asserting its claims against the nonsignatory." *Am. Bankers Ins. Grp.* v. *Long*, 453 F.3d 623, 627 (4th Cir.

[10] The agreement containing the arbitration clause also contains a North Carolina choice-of-law clause.

2006) (alterations and citation omitted). It is hardly a foregone conclusion that this standard has been met.

Moreover, not all nonsignatories are created equal. Even if a nonsignatory is allowed to enforce an arbitration agreement, it usually involves some sort of privity with a signatory. See, *e.g.*, *Contec Corp.* v. *Remote Solution Co.*, 398 F.3d 205, 208-209 (2d Cir. 2005) (signatory Contec L.P. reorganized to be Contec Corp., which was the nonsignatory invoking arbitration). Here, however, petitioner is a complete stranger to the arbitration agreement. Petitioner cannot and does not claim that it or respondent ever remotely contemplated, let alone intended, that any dispute between these two *competitors* would be resolved in arbitration.

Allowing petitioner to invoke the agreement would be even more unusual in this scenario because the agreement requires arbitration to take place in North Carolina (Pelton's headquarters). The dispute between petitioner and respondent has no relevant connection to North Carolina. Petitioner is headquartered in New York and incorporated in Delaware. Respondent is based in Texas. Pelton is no longer a party to this litigation and will not be a party to any ensuing arbitration. Yet petitioner wishes the court to order the parties to arbitration in a distant State based on *an absent party's* principal place of business. There is nothing "equitable" about applying equitable estoppel in that way.

4. And that still is not all. Petitioner's attempt to take advantage of Pelton's arbitration agreement is even more strained because it ignores that respondent's agreements with seven other conspiring manufacturers either did not require arbitration at all or even precluded arbitration. At the time the stay was entered, respondent was asserting claims relating to the terminations or refusals to deal of eight different manufacturers, and Pelton was the only

manufacturer who had an arbitration agreement with respondent. See, *e.g.*, D. Ct. Dkt. 513 (statement from pretrial hearing on Jan. 24, 2020). The other seven manufacturers either had agreements with respondent requiring any disputes to be resolved *in court* or had no written agreement at all with respondent.[11] Neither law nor logic supports petitioner's contention that equitable estoppel would elevate the Pelton arbitration agreement above the other seven or trump respondent's right to litigate in court against manufacturers whose contracts mandate *judicial* dispute-resolution. Whatever importance Pelton's agreement may have had when Pelton was a party, it stands on equal footing with the other agreements now.

It is thus one thing for petitioner to argue the benefit of Pelton's arbitration agreement under equitable-estoppel principles, but it is quite another to make the bootstrap argument that equitable estoppel somehow applies to the claims related to every other manufacturer when there is no underlying arbitration agreement or even express non-arbitration agreements. Because no arbitration agreement exists *at all* with respect to those manufacturers, claims arising from their boycott of respondent necessarily would not be arbitrable by them or, by extension, petitioner. Respondent is unaware of any court anywhere that has ever ordered a party to arbitrate claims when that party has an express agreement to litigate its claims in court. This might be the first.

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[11] Respondent's distribution agreement with Kavo required that any action be brought "in a court of competent jurisdiction in the County of Lake, Illinois," D. Ct. Dkt. 24-4, at 18, and its agreement with Aribex required that any litigation be prosecuted "in the state or federal courts of Utah in Salt Lake County or Utah County." (Although the Aribex contract does not appear in the record, its contents are undisputed and respondent will immediately lodge a copy with the Clerk's Office if the Court would find that useful.)

C. The Decision Below Was Correct

1. Review is also unwarranted because the decision below was correct. Unlike an agreement to arbitrate the merits of a dispute, "[c]ourts 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)). "The question whether parties have submitted a particular dispute to arbitration, i.e., the question of arbitrability, is an issue for judicial determination unless the parties clearly and unmistakably provide otherwise." *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002). There is a "strong pro-court presumption as to the parties' likely intent." *Id.* at 86. A party seeking to compel arbitration can overcome that presumption only with "clear[] and unmistakabl[e]" evidence. *AT&T Techs.*, 475 U.S. at 649. Requiring the proponent of arbitration to identify such evidence is important, because the issue of who should decide arbitrability is "rather arcane," and failure to meet that standard "might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide." *First Options*, 514 U.S. at 945.

Petitioner has not carried that burden here.

2. The agreement at issue does not expressly delegate arbitrability. It is far different from other agreements that this Court has found sufficient to delegate arbitrability. For example, the arbitration agreement in *Rent-A-Center* stated: "The Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this [Arbitration] Agreement including, but not limited to any claim that all or any part of this [Arbitration] Agreement is void." *Rent-*

A-Center, West, Inc. v. *Jackson*, 561 U.S. 63, 66 (2010). This Court determined that such language delegated arbitrability. See *id.* at 67.

Here, by contrast, the Agreement says nothing about who decides arbitrability. The Agreement does not state that the arbitrators will have authority to resolve arbitrability disputes, much less that they will have the exclusive authority to do so. Instead, petitioner's argument rests solely on a provision stating that any arbitration between the parties will be governed by AAA rules, and AAA rules give the arbitrators authority to decide their own jurisdiction—"implied delegation."[12] The agreement does not incorporate AAA rules for all purposes, however. In the same sentence that petitioner says delegates arbitrability, the agreement carves out "actions seeking injunctive relief and disputes relating to trademarks, trade secrets or other intellectual property of Pelton & Crane." C.A. App. 92. The structure and language of the carve-out removes such disputes not only from arbitration, but also from the AAA incorporation:

> 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 Pelton & Crane) shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association.

Pet. App. 3a (emphasis added).

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[12] As explained in respondent's concurrently filed conditional cross-petition, there is no basis for concluding that incorporation of AAA Rules alone is sufficient to show a clear and unmistakable delegation. If the Court grants the petition for a writ of certiorari on petitioner's question presented, it should also grant the conditional cross-petition on that question, as this petition is predicated on that assumption.

As the Fifth Circuit explained, "[t]he most natural reading of the arbitration clause at issue here states that any dispute, except actions seeking injunctive relief, shall be resolved in arbitration in accordance with the AAA rules." Pet. App. 9a. By placing the carve-out and the "delegation language" in the same sentence, the parties applied the carve-out to delegation. Accordingly, "[t]he plain language incorporates the AAA rules—and therefore delegates arbitrability—for all disputes except those under the carve-out." *Id.* at 9a-10a. "The parties could have unambiguously delegated this question," the Fifth Circuit explained, "but they did not, and we are not empowered to re-write their agreement." *Id.* at 10a.

3. If petitioner retains its past position that a carve-out never has an effect on delegation—*i.e.*, that the answer to the question presented is always "no"—that position clearly conflicts with settled arbitration jurisprudence. Because arbitration is a creature of contract, the parties can agree to delegate all, none, or only some disputes. The parties chose only some here. "[P]arties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate, so too may they specify by contract the rules under which that arbitration will be conducted." *Mastrobuono* v. *Shearson Lehman Hutton*, 514 U.S. 52, 57 (1995) (citations omitted); see also *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662, 683 (2010) (explaining that parties may agree to limit the issues they arbitrate, rules under which any arbitration will proceed, who will resolve specific disputes, and with whom they will arbitrate). And so too can they limit the arbitrability disputes they want to delegate.

Adopting a rule that carve-outs have no bearing on delegation would disrespect the parties' intent and limit parties' ability to structure their arbitration agreements

as they wish. If a court cannot consider a carve-out in assessing whether there is clear and unmistakable evidence of delegation, parties could delegate only all or none of their arbitrability disputes, no matter how clear the carve-out might be.

For example, suppose the arbitration agreement at issue read: "Archer and Pelton & Crane agree to arbitrate all disputes between them relating to or arising out of this agreement according to the AAA rules and expressly delegate to the arbitrator the decision whether any claim is arbitrable, provided, however, that the court shall have exclusive jurisdiction to decide whether an antitrust claim brought by either party against a non-signatory is arbitrable." Without question, this language is the polar opposite of a clear and unmistakable delegation to the arbitrator and indisputably carves-out for the court's consideration the very claim respondent asserts here: an antitrust claim against a non-signatory (petitioner). Yet, under petitioner's all-or-nothing approach, the court would be required to ignore the carve-out language and ship this dispute to the arbitrator to determine whether respondent's antitrust claim against the non-signatory (petitioner) belongs in arbitration.[13]

In short, petitioner's proposed bright-line rule is inconsistent with this Court's instruction that "parties are

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[13] Petitioner's worry that the Fifth Circuit's "reasoning renders even the clearest and most unmistakable delegation ineffective," Pet. 20, and attendant parade of horribles is misplaced. First, petitioner's argument ignores that it would render the "clearest and most unmistakable" *carve-out from delegation* ineffective. Second, parties could avoid disputes over delegation by, for example, including an express delegation clause with no carve-outs in that clause, such as the delegation provision in *Rent-A-Center*. The parties chose not to do so here.

generally free to structure their arbitration agreements as they see fit." *Mastrobuono*, 514 U.S. at 57.

4. Acknowledging respondent's argument, petitioner recently admitted, however, that "[t]o be sure, an arbitration agreement could, in theory," delegate only some arbitrability disputes. Pet. 21. So petitioner now proposes a novel presumption-shifting scheme. Petitioner's proposed new rule as first unveiled in its stay reply would replace this Court's "clear and unmistakable" test in which the *court* is presumed to decide arbitrability with a new test created out of whole cloth in which the *arbitrator* is presumed to decide arbitrability if the arbitration clause contains a carve-out for certain claims. According to petitioner's presumption-shifting rule, "once there is clear and unmistakable evidence of an intent to delegate questions of arbitrability to an arbitrator, courts should return to the general presumption in favor of arbitrability, and should compel arbitration of all issues of arbitrability except for those *clearly reserved* by the parties for a determination by the court." Stay Reply 11. In other words, if there is either an express or implied delegation of arbitrability of "some" issue, then according to petitioner, the court should indulge in the "usual presumption" that the carve-out from delegation is to be decided by the arbitrator. Pet. 21.

Petitioner has been forced to retreat to a convoluted structure where who decides arbitrability is answered with a multi-part test that requires both a court and sometimes an arbitrator to consider the same arbitration clause. There is nothing "usual" about such a presumption in this context. That rule would upend an unbroken line of decisions from this Court that the "usual presumption" is the court, not the arbitrator, decides whether claims should proceed in arbitration or in court. *First Options*,

514 U.S. at 944; *AT&T Techs.*, 475 U.S. at 649; *Howsam*, 537 U.S. at 83, 86.[14]

Additionally, the proposal is inconsistent with this Court's decisions requiring courts to interpret arbitration agreements as they would any other contract. By sequencing the test—requiring the court to first look for delegation, and only later look for carve-outs using a different standard—petitioner improperly asks the court to interpret the contract myopically. Contracts must be "interpreted in context and construed in a manner that gives proper meaning and effect" to all of the contract's terms. *Certain Underwriters at Lloyd's London* v. *Hogan*, 556 S.E.2d 662, 666 (N.C. Ct. App. 2001); see also *Johnston Cty* v. *R.N. Rouse & Co.*, 414 S.E.2d 30, 34 (N.C. 1992) (explaining that courts must construe a contract "in a manner that gives effect to all of its provisions"); *Root* v. *Allstate Ins. Co.*, 158 S.E.2d 829, 833 (N.C. 1968) (interpreting lease only after "examination of the entire written lease").

If sequencing is proper at all, petitioner does not explain why delegation should come first, especially where delegation is only implied. Where, as here, the parties explicitly excluded a particular dispute, that express language is better evidence of their intent than an implication drawn from choosing a set of arbitration rules. See *Wood-Hopkins Contracting Co.* v. *N.C. State Ports Auth.*, 202

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[14] In *Henry Schein*, this Court rejected any argument that the court must always resolve questions of arbitrability by stating "that ship has sailed." 139 S. Ct. at 530. But in the immediately following sentence the Court, citing *First Options*, reaffirmed that "[t]his Court has consistently held that parties may delegate threshold arbitrability questions to the arbitrator, so long as the parties' agreement does so by 'clear and unmistakable' evidence." *Ibid.* Thus, the ship has also sailed on any attempt to overturn or water down this Court's longstanding "clear and unmistakable" test.

S.E.2d 473, 476 (N.C. 1974) ("[W]hen general terms and specific statements are included in the same contract and there is a conflict, the general terms should give way to the specifics."). The parties' decision to expressly exclude certain disputes trumps any sub silentio delegation by implication.

5. Finally, even if the Court were to abandon its well-established "clear and unmistakable" test and replace it with petitioner's "presumption-shifting" test, that new test would be satisfied here. The same language that carves "actions for injunctive relief" out from arbitration also carves those actions out from delegation.[15] The carve-out is not limited to "claims" for injunctive relief, or actions seeking "only" injunctive relief. See Pet. App. 14a. Thus, even if one presumes the *arbitrator* decides the gateway issue of arbitrability *unless* the parties "clearly reserved" the arbitrability question for the court, here the parties did indeed *clearly reserve the arbitrability question for the court*. Petitioner may not like the contract's

[15] Petitioner criticizes this structure, claiming no party would ever intend to carve out the same claims from delegation as arbitrability. Pet. 21. To the contrary, doing so minimizes "bifurcation" cost—the cost of having the dispute split between two fora. Parties often prefer to seek injunctive relief in court. Christopher R. Drahozal & Erin O'Hara O'Connor, *Unbundling Procedure: Carve-Outs from Arbitration Clauses*, 66 Fla. L. Rev. 1945, 1958, 1967 (2014). They can minimize bifurcation costs by allowing the courts to decide both the merits of the dispute *and* injunctive relief. *Ibid.* But agreeing to delegate arbitrability of *all* disputes would force a needless detour to arbitration first for an arbitrability ruling. The parties can avoid that cost by agreeing to a carve-out from both the merits *and* delegation that encompasses the entire action, such as "actions seeking injunctive relief." *Id.* at 1998 ("[P]arties seemed to opt for court resolution of some claims in part to avoid having to shuffle back and forth between courts and arbitration when the claim is best enforced with injunctive relief."). In this way, the parties can keep their entire dispute in the courts, without redoing the same work twice in different tribunals.

language, but that will sometimes happen when parties are strangers to an agreement. Nevertheless, arbitration remains a matter of contract, and courts are not permitted "to rewrite" an "unambiguous" arbitration clause. *Id.* at 15a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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