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

REPLY BRIEF FOR THE PETITIONER

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This case presents an entrenched and acknowledged conflict on the vitally important question whether a carve-out provision in an arbitration agreement negates an otherwise clear and unmistakable delegation of arbitrability to an arbitrator. The court of appeals' resolution of that question defies the law as well as common sense, flouting the presumption in favor of arbitration and rendering the delegation a self-defeating nullity. It is thus no surprise that the Court issued a stay pending the disposition of this petition—reflecting an assessment of the likelihood both that certiorari will be granted and that the judgment below will be reversed.

In its brief in opposition, respondent kicks up a cloud of dust. And if the Court has a feeling of déjà vu, it is for good reason. The purported vehicle problems respondent

identifies are materially identical to those it raised in unsuccessfully opposing petitioner's earlier petition for certiorari in this case. As was true then, the presence of other questions in the case is no basis for denying review on the question that the court of appeals actually addressed and that the petition presents. And as to the conflict on that question, respondent merely rehashes the arguments it made in unsuccessfully opposing petitioner's stay application, seeking to reframe the question so as to eliminate the central legal issue in dispute.

Betraying a hostility to arbitration, the court of appeals has now twice refused to give effect to the obvious intent behind the agreements: to have the arbitrator decide disputes over arbitrability. On the last occasion, the Court granted certiorari and unanimously vacated the court of appeals' decision. The same outcome is warranted on this occasion. The petition for a writ of certiorari should be granted.

A. The Decision Below Deepens A Conflict Among The Federal And State Appellate Courts

Respondent first contends (Br. in Opp. 10-18) that there is no conflict on the question presented. That is a fanciful contention, given that the lower courts have expressly acknowledged the conflict. Respondent can wish away the conflict only by rewriting the question presented and then ignoring what the cases actually say. There can be no serious dispute that this case presents a conflict that warrants the Court's review.

1. Respondent reformulates the question presented as follows: "[w]hether 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." Br. in Opp. i. Respondent

thereby strips the legal substance from the question presented in the petition. That question concerns the effect of a carve-out provision (*i.e.*, a provision allowing the parties to litigate certain claims in court) on the determination of whether the parties agreed to arbitrate questions of arbitrability, including the question whether a dispute involves a claim subject to arbitration. See Pet. i. That question is entirely legal in nature.

In reformulating the question presented, however, respondent simply injects its preferred legal answer: that the carve-out in the agreements negates any delegation. Indeed, respondent appears to assume that no valid delegation is present at all (as respondent contends in its cross-petition). Effectively, then, respondent reframes the question presented as whether, *under respondent's view of the law*, the particular agreements at issue require the arbitrator to resolve the parties' dispute over arbitrability.

2. Only by excising the legal question from the case can respondent argue that "[c]ourts have reached different conclusions in different cases because they were evaluating different contractual language." Br. in Opp. 9. Respondent made a materially identical argument in unsuccessfully opposing petitioner's application for a stay. See 19A766 Opp. 11-16. But on the question actually presented in the petition, the federal and state appellate courts are sharply and intractably divided.

a. Respondent does not dispute that the Delaware and Kentucky Supreme Courts have adopted conflicting legal rules concerning the effect of a carve-out provision on an otherwise clear and unmistakable delegation. See Br. in Opp. 12-13, 14. In *James & Jackson, LLC* v. *Willie Gary, LLC*, 906 A.2d 76, 81 (2006), the Delaware Supreme Court held that, where an arbitration agreement does not

"generally refer all controversies to arbitration," the agreement does not clearly and unmistakably delegate questions of arbitrability to an arbitrator. But in *Ally Align Health, Inc.* v. *Signature Advantage, LLC*, 574 S.W.3d 753, 757-758 (2019), the Kentucky Supreme Court held that "[a] carve-out provision * * * does not negate [a] clear and unmistakable [delegation]," and it criticized the Delaware Supreme Court for "ma[king] the mistake of conflating the questions" of "what claims get arbitrated" and "who decides what claims get arbitrated."

b. While respondent attempts to recharacterize the other cases in the conflict, they too have adopted irreconcilable legal rules. Both the Fifth Circuit below and the Second Circuit in *NASDAQ OMX Group, Inc.* v. *UBS Securities, LLC*, 770 F.3d 1010 (2014), held that a court must determine whether a claim falls within a carve-out provision, despite an agreement's incorporation of arbitration rules delegating questions of arbitrability to the arbitrator, on the theory that the rules apply only to claims outside the carve-out. See Pet. App. 11a; *NASDAQ OMX Group*, 770 F.3d at 1032. That is just another way of saying that a carve-out provision negates an otherwise enforceable delegation.

By contrast, in *Oracle America, Inc.* v. *Myriad Group A.G.*, 724 F.3d 1069 (2013), the Ninth Circuit announced a contrary legal rule, concluding that, "when a tribunal decides that a claim falls within the scope of a carve-out provision, it necessarily decides arbitrability." *Id.* at 1076. And in refusing to follow the Delaware Supreme Court, the Ninth Circuit did not simply disagree about the "breadth of the carve-out" at issue, as respondent asserts (Br. in Opp. 14 n.8); it rejected the Delaware Supreme Court's analysis altogether. See 724 F.3d at 1076-1077.

Respondent suggests (Br. in Opp. 11) that the Ninth Circuit's reasoning turned on the "circular" nature of the carve-out provision at issue. But the same could be said about the provision here or any other carve-out provision: only claims that otherwise fall within the scope of an arbitration agreement can be carved out. For that reason, the Ninth Circuit's key insight in *Oracle*—that a contrary rule like respondent's "conflates the *scope* of the arbitration clause, *i.e.*, which claims fall within the carve-out provision, with the question of *who* decides arbitrability," 724 F.3d at 1076—applies well beyond the facts of that case. The resulting conflict warrants the Court's review.

3. Respondent alternatively contends that, in light of petitioner's position on the merits, "there is no disagreement over the question presented" in the petition. Br. in Opp. 15. That is a perplexing claim.

a. Petitioner's position on the merits is straightforward and rooted in the rule that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (citation omitted). As petitioner has explained, parties who have adopted a delegation provision will only rarely intend to exempt claims from the delegation. An exemption of the same claims both from the delegation and from the underlying obligation to arbitrate would defeat the very point of the delegation: to allow the arbitrator, not the court, to determine whether a particular claim is subject to arbitration in the first place. Accordingly, where the parties have validly delegated questions of arbitrability to an arbitrator, limitations on the scope of an arbitration agreement do not act on the delegation absent a clear indication to that effect. See Pet. 20-22.

Application of petitioner's proposed legal rule to the facts here illustrates the disagreement between the parties. The arbitration provision at issue provides that "[a]ny dispute arising under or related to this [a]greement (except for actions seeking injunctive relief * * *) shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association." 17-1272 J.A. 58.

Petitioner contends that, because the carve-out provision does not expressly state that it operates on the delegation, the general presumption in favor of arbitration applies and the delegation should be given plenary effect. Respondent, by contrast, contends that "[p]etitioner has not carried th[e] burden" of showing that the delegation applies because, in its view, the carve-out provision exempts actions seeking injunctive relief *both* from the obligation to arbitrate *and* from the delegation. Br. in Opp. 24. The choice of the legal rule regarding the effect of a carve-out provision is thus outcome-dispositive here.

b. The best evidence that the parties are in disagreement over the actual question presented? Respondent devotes pages and pages of its brief to defending the court of appeals' decision and criticizing petitioner's proposed legal rule. See Br. in Opp. 15-17, 24-30. Respondent's various arguments lack merit.

i. Respondent derides petitioner's proposed rule on the ground that no lower court has adopted it. See Br. in Opp. 28. Of course, this Court would not be limited at the merits stage to choosing solely between the positions adopted by the lower courts. But even if it were, respondent is mistaken: the Ninth Circuit has taken petitioner's proposed approach, as illustrated by its recent decision in *Mohamed* v. *Uber Technologies, Inc.*, 848 F.3d 1201 (2016).

As explained above, in *Oracle*, the Ninth Circuit considered an arbitration agreement that contained a valid delegation in addition to a carve-out provision exempting certain claims from arbitration. See p. 4. In *Mohamed*, the agreement likewise contained a valid delegation; critically, it also contained a carve-out provision specifically requiring a court to determine the validity of the agreement's class-action waiver. See 848 F.3d at 1208-1209. The Ninth Circuit decided for itself whether the class-action waiver was valid. See *id.* at 1212-1214.

The Ninth Circuit's decisions in *Oracle* and *Mohamed* demonstrate the application of petitioner's proposed rule. In both cases, the arbitration agreements contained sufficient evidence of a valid delegation. A carve-out provision that merely permits the parties to litigate *the merits of a particular claim* in court—as in *Oracle*—does not clearly evince an intent to have the court decide the question whether such a claim is present. By contrast, a provision exempting a particular *question of arbitrability* from arbitration—as in *Mohamed*—necessarily acts on the delegation. Between *Oracle* and *Mohamed*, therefore, the Ninth Circuit has adopted the position that a carve-out provision must clearly operate on the delegation in order to negate it.

ii. Respondent also contends that petitioner presented its proposed legal rule "for the first time" during briefing in this Court on petitioner's stay motion. See Br. in Opp. 16. Even if that somehow mattered, respondent's assertion is plainly wrong: in fact, petitioner espoused the same approach when this case was previously before the Court. In its briefing, petitioner recognized that, "[i]n theory if not in practice, parties could choose to craft an arbitration provision that divides responsibility for arbitrability between the arbitrator and the court." 17-1272

Reply Br. 13 n.2. And at oral argument, counsel for petitioner contended that the "interpretive rule that requires clear and unmistakable evidence" of a delegation "falls out of the equation" "once you have that evidence." 17-1272 Tr. 18. Petitioner's proposed rule has thus been consistent; respondent simply does not agree with it.

iii. Respondent additionally offers a variety of substantive criticisms of petitioner's proposed rule. See Br. in Opp. 28-30. But each of those criticisms has a simple response. Petitioner is not seeking to "upend" the test requiring clear and unmistakable evidence of a delegation, as its question presented is premised on satisfaction of that test, see *id.* at 28-29; petitioner's proposed rule is consistent with this Court's interpretation of arbitration agreements, including the interpretive presumptions the Court has adopted, see *id.* at 29; and the question of the existence of a delegation is antecedent to the question of the effect of a carve-out provision, because parties ordinarily adopt delegation provisions precisely to allow arbitrators to decide whether a claim falls inside or outside the scope of an arbitration agreement, see *id.* at 29-30.

In all events, what matters for present purposes is that respondent obviously intends to join battle with petitioner on the merits if the Court grants certiorari—giving the lie to the notion that this case does not present a question warranting plenary review. In light of the substantial conflict in the lower courts on the question presented, the petition for certiorari should be granted.

B. The Question Presented Is An Important And Recurring One That Warrants The Court's Review In This Case

1. Respondent does not dispute that the question presented is frequently recurring or that questions involving

commercial arbitration are of substantial legal and practical importance. See Pet. 23-26. Instead, respondent argues that this case does not present a "legal question[]" because it involves the interpretation of a particular arbitration agreement. Br. in Opp. 17. As discussed above, however, that attempt to explain away the question presented is simply unavailing. See pp. 2-3.

2. In the alternative, respondent contends (Br. in Opp. 18-23) that this case is a poor vehicle in which to decide the question presented. But the answer to that question was the sole ground for the court of appeals' decision, and a contrary answer would require vacatur.

Respondent's primary objection is that the case also presents two other questions on which it has cross-petitioned: namely, questions concerning the incorporation of arbitration rules and the doctrine of equitable estoppel. See Br. in Opp. 18-23; 19-1080 Pet. i. Respondent tried a virtually identical maneuver the last time petitioner sought certiorari in this case: it argued that the case was an "unsuitable vehicle" because of the presence of those questions. See 17-1272 Br. in Opp. 20-21, 24 n.17. But that was no impediment to the Court's review then, and it is no impediment now.

a. Respondent contends that petitioner's "entire argument hinges" on the resolution of the incorporation question presented in respondent's cross-petition. Br. in Opp. 21. Not so. The petition proceeds on the assumption that the agreements contain a valid delegation, see Pet. i, just like the petition the Court previously granted in this case. See 139 S. Ct. 524 (2019). In any event, respondent's argument that the express incorporation of arbitration rules does not amount to a clear and unmistakable delegation lacks merit. As explained in the response to respondent's cross-petition, the courts of appeals, including

the court below, have uniformly (and correctly) concluded just the opposite. See 19-1080 Br. in Opp. 7-13.

Respondent asserts that "it makes little sense to say that respondent intended the [incorporated] [r]ules to apply to a dispute that is expressly *excluded* from arbitration." Br. in Opp. 21. But that assertion answers the very arbitrability question that, in petitioner's view, the arbitrator should be permitted to decide: whether the dispute is excluded from arbitration. Respondent's assertion conflates the question presented (who gets to decide arbitrability) with the merits of the arbitrability inquiry (whether its claims are subject to arbitration).

b. Respondent next contends that, "[a]ssuming there was delegation," petitioner "must face" that it is a nonsignatory to the arbitration agreements at issue. Br. in Opp. 21. Respondent further suggests that petitioner cannot rely on the doctrine of equitable estoppel because respondent's *other* manufacturing agreements did not require arbitration. See *id.* at 22-23. But those issues are not new to the case. The court of appeals has twice declined to resolve the equitable-estoppel question, including most recently on remand from this Court. See 19-1080 Br. in Opp. 14-15. Although respondent insinuates (incorrectly) that the question is affected by its recent settlement with one of the other defendants, respondent seemingly concedes that the Court need not address the equitable-estoppel question now. See Br. in Opp. 3.[*] Consistent with its ordinary practice, the Court can instead

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[*] Petitioner has consistently argued that it can invoke the manufacturing agreements because respondent's claims rely on those agreements and because respondent alleges concerted conduct between petitioner and the signatory manufacturers. See, *e.g.*, Pet. C.A. Br. 35-38. Those arguments do not depend on a particular manufacturer being a party to the case.

leave that question for the court of appeals to address in the first instance in the event of further proceedings.

As with the incorporation question, moreover, respondent's real beef is with the law of the court of appeals. Despite conceding that "[i]n theory" a non-signatory may "be able to enforce an arbitration agreement," respondent portrays the non-signatory question as an "open" one and argues that petitioner is not entitled to invoke the agreement in this case. Br. in Opp. 21-22. But the court of appeals recently adopted the majority rule that a delegation of questions of arbitrability 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). That question does not independently warrant the Court's review, see 19-1080 Br. in Opp. 13-16, and respondent's disagreement with the court of appeals' apparent position on that question hardly renders this case an unsuitable vehicle in which to address the question that the court of appeals actually considered and decided.

In short, respondent fails to identify any valid obstacle to the Court's review. This case cleanly and squarely presents the question whether a carve-out provision in an arbitration agreement negates an otherwise clear and unmistakable delegation of arbitrability to an arbitrator. The court of appeals badly erred, and once again betrayed its hostility to arbitration, when it held that a carve-out provision defeated an otherwise valid delegation. The Court should not allow that decision, on such an important question of arbitration law, to stand. The Court should grant review and once again vacate the court of appeals' judgment refusing to compel arbitration.

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The petition for a writ of certiorari should be granted.

Respectfully submitted.

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