No. 19-963

In the Supreme Court of the United States

HENRY SCHEIN, INC., PETITIONER

v.

ARCHER AND WHITE SALES, INC.

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

BRIEF FOR THE PETITIONER

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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.

CORPORATE DISCLOSURE STATEMENT

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

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OPINIONS BELOW

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

JURISDICTION

The judgment of the court of appeals was entered on August 14, 2019. A petition for rehearing was denied on December 6, 2019 (Pet. App. 42a-43a). The petition for a writ of certiorari was filed on January 31, 2020, and granted on June 15, 2020. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 2 of the Federal Arbitration Act, 9 U.S.C. 2, provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

STATEMENT

This case returns to the Court after the court of appeals refused to compel arbitration a second time. It now presents a question that the Court left open in its previous decision concerning the enforcement of arbitration agreements that delegate questions of arbitrability to an arbitrator.

In that decision, the Court confirmed that the Federal Arbitration Act allows parties to agree to arbitrate "threshold arbitrability questions"—that is, questions concerning whether the parties agreed to arbitrate a particular dispute—provided that the parties' agreement delegates those questions to an arbitrator by "clear and unmistakable evidence." 139 S. Ct. 524, 530 (2019) (internal quotation marks and citation omitted). A delegation that satisfies that requirement, the Court explained, "is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce," and the Arbitration Act "operates on this additional arbitration agreement just as it does on any other." *Id.* at 529 (internal quotation marks and citation omitted). Because such a

delegation provision is itself appropriately viewed as an antecedent arbitration agreement, the Court has interpreted and enforced such provisions using the normal federal-law rules that apply to arbitration agreements more generally. See *id.* at 528-530.

This case concerns how those rules apply to delegation provisions. In some arbitration agreements (including the one at issue here), parties will clearly agree to a delegation of arbitrability but will also include a "carve-out" provision exempting certain claims or actions from the scope of the agreement. The question presented in this case is whether, consistent with the Arbitration Act, a court may construe a carve-out provision as negating an otherwise clear and unmistakable delegation of arbitrability.

Petitioner and respondent are distributors of dental equipment. Respondent filed the underlying complaint against petitioner and certain other distributors and manufacturers of dental equipment in federal court, alleging that the defendants had violated federal and state antitrust laws by conspiring to terminate or restrict respondent's distributorship rights. Petitioner and the other defendants moved to stay the litigation and compel arbitration, invoking certain distributor agreements that required respondent to arbitrate disputes "arising under or related to" the agreements, including questions of arbitrability. The agreements contained a carve-out provision for "actions seeking injunctive relief."

A magistrate judge initially granted the defendants' motions, but the district court vacated the magistrate judge's order and denied the motions. The court of appeals affirmed. Invoking an unstated exception to the Arbitration Act, the court of appeals held that, even if the parties did clearly and unmistakably agree to a delegation

of arbitrability, the delegation would be unenforceable because defendants' argument in favor of arbitrability was "wholly groundless."

This Court granted certiorari and unanimously held that, under the Arbitration Act, a court may not decide questions of arbitrability if the parties clearly and unmistakably delegated those questions to an arbitrator, even if the court believed that the argument in favor of arbitrability was "wholly groundless." See 139 S. Ct. at 528. The Court then remanded the case for the court of appeals to determine in the first instance whether the parties' arbitration agreement included a clear and unmistakable delegation. See *id.* at 531.

On remand, the court of appeals once again refused to compel arbitration. Pet. App. 1a-16a. It conceded that the parties had clearly and unmistakably delegated at least some questions of arbitrability to the arbitrator. *Id.* at 8a. But it nonetheless decided that it must make the arbitrability determination itself, holding that the presence of a carve-out provision in the agreement negated the otherwise clear and unmistakable evidence of the parties' intent to delegate arbitrability. *Id.* at 11a. The court therefore concluded that it had to determine whether the claims at issue fell outside the scope of the arbitration agreement—a paradigmatic question of arbitrability—in order to determine whether the parties had agreed to have an arbitrator decide that very question in the first place. *Id.* at 10a-12a.

That decision defies common sense and conflicts with the Court's case law. Once a court finds clear and unmistakable evidence of a delegation, there is an antecedent arbitration agreement enforceable under the Arbitration Act. That agreement is subject to the normal rules governing arbitration agreements—including the presumption of arbitrability. Accordingly, a clear and unmistak-

able delegation of arbitrability questions to an arbitrator should be construed to encompass all such questions, absent a clear indication to the contrary. Under that rule, a carve-out provision that speaks only in terms of claims or actions exempted from arbitration does not provide the requisite clarity to show that the parties intended the carve-out provision to affect *who decides* questions of arbitrability. The court of appeals' contrary decision is erroneous, and its judgment should be vacated.

A. Background

1. As this Court is well aware, arbitration is an alternative form of dispute resolution that offers many benefits over traditional litigation. Arbitration allows the parties to design their own "efficient, streamlined procedures tailored to the type of dispute" at issue. *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 344 (2011). It produces "expeditious results." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985). And it "reduc[es] the cost" of dispute resolution. *AT&T Mobility*, 563 U.S. at 345.

Despite those benefits, there has been a long history of "judicial hostility to arbitration." *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 510 (1974). That hostility dates from the English common law, which "traditionally considered irrevocable arbitration agreements as 'ousting' the courts of jurisdiction, and refused to enforce such agreements for this reason." *Id.* at 510 n.4. Because it was "firmly embedded" in English law, that judicial hostility to arbitration carried over into American law. H.R. Rep. No. 96, 68th Cong., 1st Sess. 1-2 (1924). It "manifested itself in a great variety of devices and formulas declaring arbitration against public policy." *AT&T Mobility*, 563 U.S. at 342 (internal quotation marks and citation omitted).

In 1925, Congress enacted the Arbitration Act to "reverse the longstanding judicial hostility to arbitration agreements." *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). As this Court has repeatedly recognized, the Arbitration Act reflects "both a liberal federal policy favoring arbitration and the fundamental principle that arbitration is a matter of contract." *AT&T Mobility*, 563 U.S. at 339 (internal quotation marks and citation omitted).

Section 2 of the Arbitration Act—the Act's "primary substantive provision," *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1, 24 (1983)—provides that "[a] written provision in * * * a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract * * * shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. 2. Consistent with that express mandate and the broader policy underlying the Arbitration Act, courts must "place[] arbitration agreements on an equal footing with other contracts and * * * enforce them according to their terms." *Rent-A-Center, West, Inc.* v. *Jackson*, 561 U.S. 63, 67 (2010) (citations omitted).

2. The requirement that courts rigorously enforce arbitration agreements applies to "gateway" disputes over arbitrability. See *Rent-A-Center*, 561 U.S. at 68-70. The question of arbitrability concerns "whether the parties have submitted a particular dispute to arbitration." *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002). It encompasses issues such as "whether the parties are bound by a given arbitration clause" and "whether an arbitration clause in a concededly binding contract applies

to a particular type of controversy." *BG Group plc* v. *Republic of Argentina*, 572 U.S. 25, 34 (2014) (citation omitted).

The question whether an arbitration agreement covers a particular type of dispute is often referred to as the question of "scope." See, *e.g.*, *Lamps Plus, Inc.* v. *Varela*, 139 S. Ct. 1407, 1418 (2019); *Granite Rock Co.* v. *Teamsters*, 561 U.S. 287, 298 (2010). That question may arise when the agreement is limited to claims "arising under" or "related to" a particular contract. See, *e.g.*, *Koch* v. *Compucredit Corp.*, 543 F.3d 460, 466-467 (8th Cir. 2008); 1 Martin Domke et al., *Domke on Commercial Arbitration* § 15:20, at 15-41 (3d ed. 2003). It can also arise when an arbitration agreement contains a so-called "carve-out provision": that is, a provision that expressly exempts certain types of disputes from the obligation to arbitrate. See, *e.g.*, *Oracle America, Inc.* v. *Myriad Group A.G.*, 724 F.3d 1069, 1071, 1075 (9th Cir. 2013). This Court has repeatedly stated that, as a matter of federal law, "any doubts concerning the scope of arbitrable issues"—including "the construction of the contract language itself"—"should be resolved in favor of arbitration." *Moses H. Cone*, 460 U.S. at 24-25.

Although courts presumptively resolve disputes over the scope of an arbitration agreement, parties may specify otherwise by "clear[ly] and unmistakab[ly]" agreeing to "arbitrate arbitrability." *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 944 (1995) (citation omitted). One way for parties to accomplish that result is by including in their arbitration agreement a provision delegating questions of arbitrability to an arbitrator. As this Court has explained, a delegation provision is "simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce," and the Arbitration Act "operates on this additional arbitration agreement just as it

does on any other." *Henry Schein*, 139 S. Ct. at 529 (internal quotation marks and citation omitted). When parties include such a provision, the delegation of authority to the arbitrator applies to virtually all gateway disputes over arbitrability, including disputes over whether the arbitration agreement "covers a particular controversy." *Ibid.* (citation omitted).

A contract need not contain an express delegation provision in order to satisfy the requirement that parties "clearly and unmistakably" delegate arbitrability questions to an arbitrator. As all eleven courts of appeals to have considered the question have held, an agreement incorporating rules that themselves assign questions of arbitrability to the arbitrator, such as the rules of the American Arbitration Association (AAA), clearly and unmistakably indicates that the parties intend for the arbitrator to resolve questions of arbitrability. See, *e.g.*, *Blanton* v. *Domino's Pizza Franchising LLC*, 962 F.3d 842, 846 (6th Cir. 2020) (collecting cases); J.A. 135 (AAA Commercial Rule R-7).

B. Facts And Procedural History

1. Petitioner and respondent are distributors of dental equipment. J.A. 35, 37.

In 2012, respondent filed suit against petitioner and other defendants in the United States District Court for the Eastern District of Texas, alleging violations of Section 1 of the Sherman Antitrust Act, 15 U.S.C. 1, and state antitrust law. J.A. 16; see J.A. 98-102. The operative version of the complaint seeks approximately $100 million in damages stemming from an alleged conspiracy to boycott respondent and to restrict respondent's sales territories under certain distribution agreements. J.A. 32-33. On

each of the two counts, the complaint also includes a summary request for unspecified injunctive relief, stating in its entirety as follows:

> [Respondent] also seeks injunctive relief. The violations set forth above are continuing and will continue unless injunctive relief is granted.

J.A. 100, 102. The complaint contains no allegations tending to show that respondent could establish the requirements for obtaining injunctive relief. After initiating this suit, respondent did not seek a preliminary injunction, and the distribution agreements at issue have now terminated.

2. Petitioner and the other defendants moved to stay the litigation and to compel arbitration of respondent's claims. J.A. 16-17; see 9 U.S.C. 3, 4. The motions were based on respondent's distribution agreements with manufacturing companies operated by Dental Equipment LLC, previously a defendant in this case. The agreements provided in relevant part:

> Any dispute arising under or related to this Agreement (except for actions seeking injunctive relief and disputes related to trademarks, trade secrets or other intellectual property of [the manufacturing company]) shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association. The place of arbitration shall be in Charlotte, North Carolina.

J.A. 114.

Respondent opposed petitioner's motion. Respondent contended that the district court should decide whether its claims were arbitrable; in respondent's view, the boilerplate request for injunctive relief in its complaint rendered the entire dispute non-arbitrable. Respondent also

argued that petitioner, as a non-signatory, was not entitled to invoke the arbitration provision under the doctrine of equitable estoppel. In response, petitioner noted that the arbitration provision incorporated AAA rules delegating questions of arbitrability to the arbitrator. Petitioner further noted that, where (as here) an arbitration provision contains a carve-out for injunctive relief, such a carve-out is routinely understood merely to permit injunctive relief from a court either on a preliminary basis to preserve the status quo *before or during* arbitration of the underlying claims, or on a permanent basis *after* the plaintiff secures an arbitral award in its favor. See, *e.g.*, *Comedy Club, Inc.* v. *Improv West Associates*, 553 F.3d 1277, 1285-1286 (9th Cir.), cert. denied, 558 U.S. 824 (2009); *Lawrence* v. *Comprehensive Business Services Co.*, 833 F.2d 1159, 1163 (5th Cir. 1987); *Erving* v. *Virginia Squires Basketball Club*, 468 F.2d 1064, 1067 (2d Cir. 1972).

A magistrate judge—to whom the case was assigned for all pretrial purposes—ruled in favor of petitioner, compelling arbitration and staying the litigation. Pet. App. 37a-41a. Respondent moved the district court to reconsider the magistrate judge's order. J.A. 20. More than three years later, the district court vacated the order and denied the motions to compel arbitration. Pet. App. 17a-36a. Purporting to interpret the "[s]cope of [the] [a]rbitration [c]lause," *id.* at 24a, the court reasoned that the clause's exception for "actions seeking injunctive relief" meant that the mere inclusion of a request for injunctive relief entitled respondent to litigate its claims in court. *Id.* at 26a-29a. The court concluded that there was no clear and unmistakable evidence that the parties had agreed to delegate questions of arbitrability to the arbitrator. *Id.* at 30a-32a. The court also concluded, in the alternative, that

any contrary reading of the agreements' arbitration provision would be "wholly groundless." *Id.* at 33a-35a. Because the court concluded that the dispute at issue was not arbitrable, it declined to address the question whether petitioner was entitled to invoke the arbitration provision under the doctrine of equitable estoppel. *Id.* at 36a.

3. Petitioner and the other defendants filed an interlocutory appeal as of right under the Arbitration Act, 9 U.S.C. 16(a), and the court of appeals affirmed. See 878 F.3d 488 (5th Cir. 2017). The court held that, "[i]f an assertion of arbitrability [is] wholly groundless, the court need not submit the issue of arbitrability to the arbitrator." *Id.* at 495 (internal quotation marks and citation omitted). The court proceeded to determine, based on its own interpretation of "the four corners of the contract," that there was "no plausible argument that the arbitration clause applies here to an 'action seeking injunctive relief.'" *Id.* at 497. The court did not resolve the question whether the arbitration provision contained clear and unmistakable evidence of the parties' intent to delegate questions of arbitrability to the arbitrator. See *id.* at 495.

4. a. Petitioner applied to this Court for a stay of further proceedings in the district court pending a decision on a forthcoming petition for a writ of certiorari. See Appl. No. 17-859 (Feb. 12, 2018). The Court granted the stay and subsequently granted certiorari. See 138 S. Ct. 2678 (2018).

b. On the merits, the Court unanimously vacated the court of appeals' judgment. 139 S. Ct. 524 (2019). The Court held that "the 'wholly groundless' exception is inconsistent with the text of the [Arbitration] Act and with [the Court's] precedent." *Id.* at 529. That holding proceeded from two basic premises. The first was that "an agreement to arbitrate [questions of arbitrability] is simply an additional, antecedent agreement," on which

the Arbitration Act operates "just as it does on any other" arbitration agreement. *Ibid.* (citation omitted). The second was that a court may not rule on the merits of a claim that is assigned to an arbitrator, "because the agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious." *Ibid.* (internal quotation marks and citation omitted).

Applying those two principles to the context of arbitrability, the Court reasoned that a court "possesses no power to decide" a question of arbitrability if the parties agreed to arbitrate disputes regarding those questions. 139 S. Ct. at 529. "Just as a court may not decide a merits question that the parties have delegated to an arbitrator," the Court explained, "a court may not decide an arbitrability question that the parties have delegated to an arbitrator." *Id.* at 530. The Court thus held that, "[w]hen the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract"—"even if the court thinks that the argument that the arbitration agreement applies to a particular dispute is wholly groundless." *Id.* at 529.

After resolving the question presented in petitioner's favor, the Court noted that the court of appeals had not decided whether the parties had delegated questions of arbitrability to the arbitrator. See 139 S. Ct. at 531. The Court therefore remanded for further proceedings. See *ibid.*

5. On remand, the same panel of the court of appeals again affirmed the denial of the motions to compel arbitration. Pet. App. 1a-16a. As a threshold matter, the court of appeals acknowledged that the agreement's incorporation of the AAA rules constituted "clear and unmistakable evidence that the parties agreed to arbitrate arbitrability." *Id.* at 7a (citation omitted). The court therefore concluded that the agreement "delegat[ed] the

threshold arbitrability inquiry to the arbitrator for at least some category of cases." *Id.* at 8a. The court noted, however, that the parties "dispute[d] the relationship of the carve-out clause—exempting actions seeking injunctive relief—and the incorporation of the AAA rules." *Ibid.*

Turning to that dispute, the court of appeals determined that the "plain language" of the agreement "incorporates the AAA rules—and therefore delegates arbitrability—for all disputes *except* those under the carve-out" for actions seeking injunctive relief. Pet. App. 11a. The court viewed "the placement of the carve-out" in the agreements as dispositive: "[g]iven that carve-out," the court could not say that the agreement "evince[d] a 'clear and unmistakable' intent to delegate arbitrability" *as to the carved-out claims*. *Ibid.*

In so concluding, the court of appeals rejected petitioner's argument: namely, that a provision exempting certain claims from arbitration does not exempt those claims from a clear and unmistakable delegation of arbitrability, because the scope of the carve-out provision is one of the very questions of arbitrability that the parties chose to arbitrate. Pet. App. 9a-10a.

The court of appeals then determined that the action was one "seeking injunctive relief" within the meaning of the carve-out provision. Pet. App. 12a-16a. Oddly, however, the court did not make that determination as part of its analysis of whether the delegation of arbitrability applied. Instead, once it concluded that the delegation of arbitrability did not apply when the action involved one of the carved-out claims, the court simply "[a]ccept[ed]" that a court, and not an arbitrator, had the power to decide arbitrability in this case. Pet. App. 12a. The court then turned to the question of "whether the underlying dispute

is arbitrable at all" and only then determined that the district court had correctly decided that the action was one "seeking injunctive relief." *Id.* at 12a-16a.

The court of appeals thus affirmed the district court's decision. Pet. App. 16a. The court acknowledged petitioner's argument that, under the court's interpretation, "one party could unilaterally evade the agreement to arbitrate with an attenuated request for injunctive relief." *Id.* at 15a. Yet the court rejected petitioner's proposed interpretation, see p. 10, *supra*, reasoning that the arbitration agreement did not limit the carve-out provision to "actions seeking *only* injunctive relief" or "actions for injunction in aid of an arbitrator's award." *Id.* at 14a. Like the district court, the court of appeals did not address whether petitioner was entitled to invoke the arbitration provision under the doctrine of equitable estoppel. *Id.* at 16a.

The court of appeals subsequently denied rehearing. Pet. App. 42a-43a.

6. Petitioner again applied to this Court for a stay of further proceedings in the district court pending a decision on a forthcoming petition for a writ of certiorari. See Appl. No. 19-766 (Jan. 8, 2020). The Court again granted the stay.

After petitioner filed its petition for a writ of certiorari, respondent filed a conditional cross-petition asking the Court to resolve two additional questions if it granted the underlying petition. See 19-1080 Pet. i. The first question was whether the incorporation in an arbitration agreement of a set of arbitration rules that themselves assign questions of arbitrability to an arbitrator clearly and unmistakably indicates that the parties intend for the arbitrator to resolve those questions. See *ibid.* The second question was whether a court, and not an arbitrator, must

decide whether a non-signatory to an arbitration agreement can enforce the agreement under the doctrine of equitable estoppel. See *ibid.* The Court granted the petition but denied the cross-petition.

SUMMARY OF ARGUMENT

The question presented in this case concerns the effect of a provision in an arbitration agreement allowing the parties to litigate certain claims or actions in court—in simpler terms, a "carve-out" provision—on the determination of whether the parties agreed to arbitrate questions of arbitrability. This case comes to the Court on the premise that the arbitration agreement at issue clearly and unmistakably delegates at least some questions of arbitrability to the arbitrator: the court of appeals so interpreted the agreement, and this Court denied respondent's cross-petition on that question. Accordingly, the question presented concerns the scope of an enforceable delegation in an arbitration agreement that includes a carve-out provision. And under the analytical framework established by this Court's Federal Arbitration Act cases, a carve-out provision does not affect the scope of an otherwise valid delegation of arbitrability absent a clear indication that the parties intended to divide responsibility for arbitrability between the arbitrator and the court.

A. The Arbitration Act embodies a liberal federal policy in favor of arbitration and requires courts rigorously to enforce arbitration agreements according to their terms. When a party moves to enforce an arbitration agreement under the Act, two threshold questions of contract interpretation arise. Does the arbitration agreement mandate arbitration of the parties' dispute? And who should decide that question—the court or an arbitrator?

This Court has adopted two interpretive rules, derived from the Arbitration Act, to assist courts in resolving those threshold questions. The first is the presumption of arbitrability, under which a court presumes that parties to an arbitration agreement intended to arbitrate all disputes between them unless the agreement clearly provides otherwise. The second is the "clear and unmistakable evidence" rule, an exception to the presumption of arbitrability under which a court will not assume that the parties agreed to delegate questions of arbitrability to the arbitrator unless the agreement clearly and unmistakably provides that the parties intended to do so. The Court has made clear the latter rule is limited in scope. And it has never extended that rule beyond the initial question whether the parties agreed to delegate arbitrability.

B. This case presents the question whether a carve-out provision in an arbitration agreement can operate on, and thus negate, an otherwise clear and unmistakable delegation. The answer to that question turns on the answer to another, broader question: how should a court resolve a dispute over whether a particular question of arbitrability falls within the scope of a clear and unmistakable delegation? The best answer is that, once a court determines that a valid delegation is present, the court should no longer apply the "clear and unmistakable evidence" rule to determine the *scope* of that delegation. Instead, the court should apply the baseline presumption of arbitrability and interpret the delegation as encompassing all questions of arbitrability unless the agreement clearly provides otherwise.

That answer flows from both this Court's case law and the rationale for the "clear and unmistakable evidence" rule. As for the Court's case law: the Court has made clear that provisions delegating arbitrability should be treated as antecedent arbitration agreements that are

themselves enforceable under the Arbitration Act. And in cases involving delegation provisions, the Court has applied the normal federal-law rules that govern agreements to arbitrate merits questions. The normal federal rule for determining the scope of an arbitration agreement is the presumption of arbitrability.

As for the rationale underlying the "clear and unmistakable evidence" rule: the Court adopted that rule based on an assumption that contracting parties "often" do not think about who should decide questions of arbitrability. But regardless of the validity of that assumption, it ceases to have any further relevance once a court has determined that the parties clearly and unmistakably agreed to a delegation of arbitrability. It therefore makes sense to revert to the default presumption of arbitrability in determining the *scope* of the delegation, as it furthers the parties' intent in delegating arbitrability in the first place: namely, to avoid delay and to protect the arbitration process.

C. Where an agreement includes a delegation of arbitrability and a carve-out provision, the carve-out provision should not be interpreted to limit the scope of the delegation absent a clear indication of the parties' intent to do so.

1. The defining aspect of carve-out provisions such as the one at issue here is that they speak in terms of *claims* or *actions* excluded from arbitration, and they undisputedly allow the parties to litigate in court the *merits* of those excluded disputes. Absent more, however, such provisions do not provide the clarity necessary to rebut the presumption of arbitrability as applied to a valid delegation of arbitrability, because they do not speak in terms of *questions of arbitrability*. Where a carve-out provision

does not expressly limit the scope of a delegation, the presumption of arbitrability requires a court to construe the delegation broadly.

2. The bizarre results that arise from the court of appeals' approach illustrate the wisdom of resolving any doubts about the interaction between a carve-out provision and a delegation of arbitrability in favor of the delegation. When a carve-out provision is treated as limiting the scope of a delegation, it requires a court to determine whether a claim falls inside or outside the carve-out before enforcing the delegation. But that is itself a question of arbitrability that would be delegated to the arbitrator if the delegation applied. Thus, the court of appeals' approach effectively guts the delegation: anytime the delegation is enforced, the court would have already resolved the question of arbitrability.

Taken to its logical conclusion, the court of appeals' approach could revive the "wholly groundless" exception that this Court previously rejected, but in a more pernicious form. Nearly every arbitration agreement has some limitation on its scope. The court of appeals' approach would allow a court to conclude that it must determine whether the claims at issue fall within the scope of the agreement before enforcing the delegation—thus arrogating to itself the power to decide arbitrability despite the delegation clause. When parties enter arbitration agreements that include both a delegation of arbitrability and a carve-out provision, it is highly unlikely that they desire that result. Application of the presumption of arbitrability to a delegation better respects the intent of contracting parties.

D. Under the appropriate analysis, the court of appeals' judgment should be vacated. The court of appeals erred by concluding that the district court properly resolved the parties' arbitrability dispute based on the

carve-out provision in the arbitration agreement at issue. Because the court of appeals left open the question whether petitioner can enforce the arbitration agreement under the doctrine of equitable estoppel, the case should be remanded so that the court of appeals can address that question (and who decides it).

ARGUMENT

THE EXEMPTION OF CERTAIN CLAIMS FROM THE SCOPE OF AN ARBITRATION AGREEMENT DOES NOT NEGATE A DELEGATION OF QUESTIONS OF ARBITRABILITY TO AN ARBITRATOR

The question presented in this case is whether, under the Federal Arbitration Act, a carve-out provision in an arbitration agreement can operate on, and thus negate, an otherwise clear and unmistakable delegation of questions of arbitrability to an arbitrator. The answer is no. Once a court is satisfied that a clear and unmistakable delegation is present, the presumption in favor of arbitrability applies to determine the scope of the delegation. And under that presumption, a carve-out provision cannot limit the scope of the delegation absent clear evidence that the parties intended to divide responsibility for arbitrability between the arbitrator and the court. The court of appeals erred by concluding otherwise, and its judgment should therefore be vacated.

A. The 'Clear and Unmistakable Evidence' Rule Applies Only To The Initial Question Whether The Parties Agreed To A Delegation Of Arbitrability

1. The Federal Arbitration Act reflects "both a liberal federal policy favoring arbitration and the fundamental principle that arbitration is a matter of contract." *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 339 (2011) (internal quotation marks and citations omitted).

The Act's primary substantive provision, Section 2, guarantees that "[a] written provision in * * * a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract * * * shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. 2. By its plain terms, that provision requires courts to "place[] arbitration agreements on an equal footing with other contracts." *Rent-A-Center, West, Inc.* v. *Jackson*, 561 U.S. 63, 67 (2010).

The next two sections of the Arbitration Act—Sections 3 and 4—"specifically direct[]" courts "to respect and enforce the parties' chosen arbitration procedures." *Epic Systems Corp.* v. *Lewis*, 138 S. Ct. 1612, 1621 (2018). Under Section 3, a party may seek a mandatory stay of litigation pending the arbitration of any issue subject to an arbitration agreement. See 9 U.S.C. 3. And under Section 4, a party may seek a mandatory order compelling arbitration in accordance with an arbitration agreement. See 9 U.S.C. 4. Together with Section 2, those provisions require courts "rigorously [to] enforce arbitration agreements according to their terms." *American Express Co.* v. *Italian Colors Restaurant*, 133 S. Ct. 2304, 2309 (2013) (internal quotation marks and citation omitted).

2. When a party moves for a stay under Section 3 or an order compelling arbitration under Section 4, a "gateway" interpretive question arises: does the parties' arbitration agreement require arbitration of the dispute at issue? See *Rent-A-Center*, 561 U.S. at 68-69. That question is known as the question of "arbitrability." See *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002); *AT&T Technologies, Inc.* v. *Communications Workers*, 475 U.S. 643, 649 (1986); 1 Martin Domke et al., *Domke on*

Commercial Arbitration § 15:16, at 15-31 to 15-32 (3d ed. 2019).

"Arbitrability" is in fact a label that encompasses several specific questions, such as "whether the parties are bound by a given arbitration clause" and "whether an arbitration clause * * * applies to a particular type of controversy." *BG Group plc* v. *Republic of Argentina*, 572 U.S. 25, 34 (2014). There is also a question antecedent to the question whether a particular dispute is arbitrable: who decides arbitrability, the court or the arbitrator? See, *e.g., Henry Schein, Inc.* v. *Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019); *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 942 (1995).

Although state law generally governs the interpretation of arbitration agreements, see *Stolt-Nielsen S.A.* v. *AnimalFeeds International Corp.*, 559 U.S. 662, 681 (2010), the Court has construed the Arbitration Act to establish two federal-law interpretive rules that a court should apply in deciding the foregoing questions—whether a dispute is arbitrable and who should decide that issue. See *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1, 24 (1983).

The first of those rules is the presumption of arbitrability. That presumption is based on the "settled federal rule that questions of arbitrability in contracts subject to the [Arbitration Act] must be resolved with a healthy regard for the federal policy favoring arbitration." *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 475 (1989). Under the presumption, where parties "have agreed to arbitrate *some* matters pursuant to an arbitration clause, * * * any doubts concerning the scope of arbitral issues should be resolved in favor of arbitration." *Granite Rock Co.* v. *Teamsters*, 561 U.S. 287, 298 (2010) (internal quotation marks and citation omitted). Only if it is "clear" that

the parties' arbitration agreement does not cover the dispute in question will the clause be construed to exclude it. See *First Options*, 514 U.S. at 945; Domke § 15:19, at 15-38 to 15-39.

The second federal-law interpretive rule is the "clear and unmistakable evidence" rule, which is best understood as an "exception" to the default presumption of arbitrability. See *Howsam*, 537 U.S. at 83. The "clear and unmistakable evidence" rule applies to the threshold question of whether the parties agreed to delegate questions of arbitrability to the arbitrator. As has long been settled, and as the Court reaffirmed when this case was last before it, "parties may agree to have an arbitrator decide not only the merits of a particular dispute but also gateway questions of arbitrability." *Henry Schein*, 139 S. Ct. at 529 (internal quotation marks and citation omitted); see *Rent-A-Center*, 561 U.S. at 68-69; *AT&T Technologies*, 475 U.S. at 649; *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 583 n.7 (1960). The Court has explained that an agreement to arbitrate questions of arbitrability is "simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce," and the Arbitration Act "operates on th[at] additional arbitration agreement" just as it does on an agreement to arbitrate the merits of a dispute. *Henry Schein*, 139 S. Ct. at 529 (internal quotation marks and citation omitted).

Under the "clear and unmistakable evidence" rule, a court should not conclude that parties have delegated questions of arbitrability to an arbitrator unless "there is clear and unmistakable evidence that they did so." *Henry Schein*, 139 S. Ct. at 531 (alterations, internal quotation marks, and citations omitted). The Court adopted that rule under the Arbitration Act in *First Options*, *supra*, on the assumption that parties "often" may not "focus upon

th[e] question" whether a court or arbitrator should decide whether a particular dispute is arbitrable. 514 U.S. at 945; see also *Warrior & Gulf*, 363 U.S. at 583 n.7 (stating rule for purposes of labor arbitration); *AT&T Technologies*, 475 U.S. at 649 (same). The Court reasoned that, because the question of who "should decide arbitrability" is a "rather arcane" one, interpreting "silence or ambiguity" on that question in favor of arbitration "might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge" would decide. *First Options*, 514 U.S. at 945; see *Lamps Plus, Inc.* v. *Varela*, 139 S. Ct. 1407, 1416-1417 (2019). By applying the "clear and unmistakable evidence" rule to the initial question of who decides arbitrability, the Court "reverse[d]" the general presumption of arbitrability with respect to that question. See *First Options*, 514 U.S. at 944-945.

3. As the Court has emphasized, the "clear and unmistakable evidence" rule has a "limited scope." *Howsam*, 537 U.S. at 83. In *Howsam*, the Court considered whether a court or an arbitrator should decide whether a contractual provision setting a limitations period precluded arbitration. See *id.* at 85. In deciding whether the "clear and unmistakable evidence" rule applied to that question, the Court observed that, "[l]inguistically speaking," one might refer to "any potentially dispositive gateway question" as a "question of arbitrability." *Id.* at 83. But the Court noted that it had applied the "clear and unmistakable evidence" rule only in the "kind of narrow circumstance" in which the parties "would likely have expected a court to have decided the gateway matter." *Ibid.* Because the Court concluded that parties "would likely expect that an arbitrator would decide" threshold "procedural" questions that "grow out of the dispute and bear on its final disposition"—such as the limitations question at

issue—the Court declined to extend the "clear and unmistakable evidence" rule to govern those questions. *Id.* at 84-85 (citation omitted); see *BG Group*, 572 U.S. at 34-35.

The Court also emphasized the limits of the "clear and unmistakable evidence" rule in *Rent-A-Center*, *supra*. See 561 U.S. at 69 n.1. There, the Court held that a court may not determine whether an arbitration agreement is unconscionable when the agreement delegates questions of arbitrability to an arbitrator. See *id.* at 65, 68, 72. The dissent would have resolved the case by holding that the plaintiff's allegation that the arbitration agreement was unconscionable "undermine[d] any suggestion that [the plaintiff] 'clearly' and 'unmistakably' assented to submit questions of arbitrability to the arbitrator." 561 U.S. at 81 (opinion of Stevens, J.). But the Court rejected that approach, reasoning that the "clear and unmistakable evidence" requirement "pertains to the parties' *manifestation of intent*" to arbitrate questions of arbitrability, "not the agreement's *validity*." *Id.* at 69 n.1. Because the plaintiff's unconscionability argument went only to validity, the Court concluded that the delegation provision required that the arbitrator consider the argument. See *id.* at 69 n.1, 72.

Consistent with *Howsam* and *Rent-A-Center*, this Court has never extended the "clear and unmistakable evidence" rule beyond the initial question whether the parties agreed to delegate questions of arbitrability to an arbitrator. See *First Options*, 514 U.S. at 944-946; *Warrior & Gulf*, 363 U.S. at 583 n.7.

B. The Presumption Of Arbitrability Applies To Determine The Scope Of A Delegation Of Arbitrability

In determining the effect of a carve-out provision on a clear and unmistakable delegation, the Court is confronted with a question it has not yet addressed: how

should a court resolve a dispute over whether a particular question of arbitrability falls within the scope of an otherwise valid delegation? Based on the Court's case law and the rationale for the "clear and unmistakable evidence" rule, the answer to that question is clear. Once there is "clear and unmistakable" evidence that the parties intended to arbitrate some questions of arbitrability, the court should apply the normal presumption of arbitrability and conclude that the parties intended to arbitrate all questions of arbitrability, absent a clear indication to the contrary.

1. Applying the presumption of arbitrability to questions concerning the scope of a delegation provision comports with this Court's cases involving delegation provisions more generally.

a. As noted above, see p. 22, the Court has treated a delegation provision as "merely a specialized type of arbitration agreement," *New Prime Inc.* v. *Oliveira*, 139 S. Ct. 532, 538 (2019), that is "antecedent" to the parties' substantive arbitration agreement, see *Henry Schein*, 139 S. Ct. at 529 (citation omitted). For that reason, the Court has held that the Arbitration Act "operates on" a delegation provision "just as it does on any other" arbitration agreement. *Ibid.*

In line with that understanding, when the Court has faced questions about the enforceability of delegation provisions, it has applied the body of substantive federal rules that govern arbitration agreements more generally. The Court's previous decision in this case provides a good example. In rejecting the so-called "wholly groundless" exception to the enforceability of delegation provisions, the Court relied primarily on the principle from *AT&T Technologies*, *supra*, that "a court may not rule on the potential merits of the underlying claim that is assigned by contract to an arbitrator, even if it appears to the court to be

frivolous." *Henry Schein*, 139 S. Ct. at 529 (internal quotation marks and citation omitted). The Court had previously applied that rule only to agreements to arbitrate merits questions, but the Court concluded that the rule "applies with equal force to the threshold issue of arbitrability." *Id.* at 530. "Just as a court may not decide a merits question that the parties have delegated to an arbitrator," the Court reasoned, "a court may not decide an arbitrability question that the parties have delegated to an arbitrator." *Ibid.*

Of particular note, respondent defended the "wholly groundless" exception based in part on the notion that the "clear and unmistakable evidence" rule required it. See 17-1272 Br. 24-25. Respondent argued that the "clear and unmistakable evidence" rule was "dispositive," because "[i]t is safe to assume parties intended courts to refuse arbitration in the face of baseless demands." *Id.* at 24. Based on that assumption, respondent contended that a court should interpret a delegation provision as encompassing only "claims that are at least *arguably* covered by the agreement." *Ibid.* (citation omitted). The Court, however, plainly rejected that argument; it applied the "*AT&T Technologies* principle" without regard to the "clear and unmistakable evidence" rule. *Henry Schein*, 139 S. Ct. at 530.

The Court's decision in *Rent-A-Center*, *supra*, is to the same effect. To resolve the arbitrability dispute there, the Court turned to the severability rule applicable to arbitration agreements, which requires a party resisting arbitration to "challenge[] specifically the validity of the agreement to arbitrate" instead of the validity of the underlying contract in which the arbitration agreement is located. 561 U.S. at 70; see, *e.g.*, *Prima Paint Corp.* v. *Flood & Conklin Manufacturing Co.*, 388 U.S. 395, 403-404 (1967). The Court acknowledged that the facts before it differed

from previous cases involving the severability rule because the specific arbitration agreement at issue was a delegation provision and "the underlying contract [was] itself an arbitration agreement." 561 U.S. at 72. But the Court viewed that as a distinction without a difference: "Application of the severability rule does not depend on the substance of the remainder of the contract." *Ibid.* The court therefore applied the severability rule and determined that, because the party resisting arbitration had failed specifically to challenge the delegation, an arbitrator must decide whether the arbitration agreement was unconscionable. See *id.* at 72-76.

b. The Court's previous decisions in this case and in *Rent-A-Center* demonstrate that the regular body of federal rules that govern arbitration agreements subject to the Arbitration Act also governs delegation provisions in those agreements. And one of the most fundamental of those rules is the presumption of arbitrability. See pp. 21-22, *supra*.

It naturally follows that, once a court finds clear and unmistakable evidence of an intent to delegate questions of arbitrability to an arbitrator, the presumption of arbitrability applies to determine the scope of the delegation provision. Once a valid delegation provision is present, a court should therefore presume that the parties intended to arbitrate all questions of arbitrability, and it should "insist upon clarity before concluding that the parties did not want to arbitrate" a particular question of arbitrability. *First Options*, 514 U.S. at 945 (emphasis omitted).

2. Applying the presumption of arbitrability to questions concerning the scope of a delegation provision also comports with the rationale animating the "clear and unmistakable evidence" rule.

a. As noted above, see pp. 22-23, the "clear and unmistakable evidence" rule is an interpretive principle

"based on an assumption about the parties' expectations." *Rent-A-Center*, 561 U.S. at 69 n.1. As this Court explained in adopting that rule in *First Options*, "[a] party often might not focus upon" the question of who decides arbitrability "or upon the significance of having arbitrators decide the scope of their own powers." 514 U.S. at 945. The Court therefore adopted the "clear and unmistakable evidence" rule to reduce the "risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate." *Howsam*, 537 U.S. at 83-84. In that way, the rule is designed to respect the presumed intentions of the contracting parties. See *Rent-A-Center*, 561 U.S. at 69 n.1; *First Options*, 514 U.S. at 945.

Once there *is* clear and unmistakable evidence of a delegation of arbitrability, however, the assumption animating the rule is no longer tenable. After all, the existence of clear and unmistakable evidence disproves the assumption: it demonstrates that the parties considered the question of who decides arbitrability and selected the arbitrator. At that point, no special rule is needed, and the ordinary rules governing arbitration agreements should apply. Given "the law's permissive policies in respect to arbitration," moreover, it would hardly be "reasonabl[e]" for a party that has affirmatively agreed to arbitrate questions of arbitrability to assume that "a judge, not an arbitrator, would decide" a specific question of arbitrability unless the agreement clearly excludes that issue from the delegation. *First Options*, 514 U.S. at 946.

b. Applying the presumption of arbitrability to questions concerning the scope of a clear and unmistakable delegation better tracks the parties' intentions and expectations. Parties agree to arbitrate questions of arbitrability based on "[c]oncerns about delays and inefficiencies caused by front-end resort to court." Thomas J. Stipanowich, *The Third Arbitration Trilogy: 'Stolt-Nielsen,'*

'Rent-A-Center,' 'Concepcion' and the Future of American Arbitration, 22 Am. Rev. Int'l Arb. 323, 348 (2011). "The goal of a delegation" is thus to "insulate and protect the arbitration process, preventing the parties from wasting time and money fighting in court before going to arbitration." Domke § 15:11.50, at 74 (2020 Supp.). A presumption that a delegation provision encompasses all questions of arbitrability furthers that goal by resolving any doubts about whether the court retains some responsibility for arbitrability at the "front end" of the case.

This case well illustrates the problem if no such presumption is applied. Petitioner first moved to compel arbitration in 2012. Yet eight years later—a period of time long enough for the parties' underlying claims to have been arbitrated many times over—petitioner and respondent are still attempting to resolve the threshold question of who should decide arbitrability. In this very case, therefore, the lower courts' failure to apply the presumption of arbitrability, in combination with their earlier efforts to preempt the delegation altogether, has trounced the efficiencies that the delegation was designed to promote.

It will be the rare case in which contracting parties intentionally divide responsibility for deciding questions of arbitrability between the court and the arbitrator. By agreeing to a delegation provision, parties are seeking to avoid protracted litigation in court over threshold issues. Yet a limitation on the scope of a delegation provision will always leave an antecedent question for a court to resolve—namely, whether an arbitrability dispute falls within the scope of the delegation. The possibility of a dispute over that antecedent question creates uncertainty for the contracting parties, as it could result in litigation in court—precisely the result that a party seeks to avoid by delegating questions of arbitrability to an arbitrator in

the first place. Perhaps for that reason, there appear to be few cases in which parties expressly exempt particular questions of arbitrability from a delegation. While such parties could agree to such a division of responsibility, the presumption in favor of arbitrability tracks the parties' most likely intent by assuming that they do not intend such an unusual result unless their agreement clearly provides for it.

Application of the presumption of arbitrability is particularly appropriate when the party resisting arbitration contends that the delegation does not require arbitration of a question concerning the *scope* of the underlying arbitration agreement. The question whether a particular dispute falls "within the scope of [an] arbitration agreement" is the paradigmatic question of arbitrability. *First Options*, 514 U.S. at 945; see, *e.g.*, *Lamps Plus*, 139 S. Ct. at 1416; *BG Group*, 572 U.S. at 34; *Granite Rock*, 561 U.S. at 297; *Rent-A-Center*, 561 U.S. at 68-69; *Green Tree Financial Corp.* v. *Bazzle*, 539 U.S. 444, 452 (2003) (plurality opinion); *Howsam*, 537 U.S. at 84. For that reason, when parties choose to delegate questions of arbitrability to the arbitrator, the question of scope is likely the primary one they are seeking to delegate.

In addition, by opting for arbitration in the first place, the parties choose an arbitrator as their "officially designated 'reader' of the contract." *Boise Cascade Corp.* v. *Steelworkers*, 588 F.2d 127, 128 (5th Cir. 1979) (Wisdom, J.) (citation omitted). And because the scope of an arbitration agreement is at bottom a question of contract interpretation, cf. *W.R. Grace & Co.* v. *Rubber Workers*, 461 U.S. 757, 765 (1983), "vesting the arbitrator with authority to resolve" a dispute over scope "would appear to be entirely consistent with the parties' intent as expressed in the agreement to arbitrate." Karen Halverson Cross,

Letting the Arbitrator Decide Unconscionability Challenges, 26 Ohio St. J. Disp. Resol. 1, 21 (2011). It therefore makes eminent sense to apply the presumption of arbitrability to ensure that the question of scope is arbitrated when the parties have clearly and unmistakably agreed to a delegation of arbitrability.

C. A Carve-Out Provision Does Not Negate A Valid Delegation Of Arbitrability

The presumption of arbitrability makes easy work of this case. Under that presumption, a carve-out provision cannot limit the scope of an otherwise valid delegation of arbitrability absent a clear indication that the parties intended to divide responsibility for arbitrability between the arbitrator and the court. The court of appeals' contrary approach—which required it to resolve the question of arbitrability in order to determine whether the parties had delegated that very question to the arbitrator—makes no sense. This Court should reject it.

1. The Presumption Of Arbitrability Requires A Carve-Out Provision To Be Construed Not To Limit The Scope Of A Valid Delegation

The contractual provision at issue here is one that exempts, or "carves out," certain claims and actions from an arbitration agreement. The defining aspects of such a carve-out provision are that it speaks in terms of the particular *claims* or *actions* that are exempted, and that it unquestionably operates to allow the parties to litigate, rather than arbitrate, the *merits* of those particular disputes. The question here, then, is whether a court may construe such a provision *also* to operate on a delegation of arbitrability, thereby requiring the court to resolve the question whether the parties' dispute falls inside or outside the carve-out provision before enforcing the delegation.

The arbitration agreement at issue in this case illustrates the problem in practice. Under that agreement, the parties must arbitrate "[a]ny dispute arising under or related to" the underlying agreement. J.A. 114. But there is a carve-out provision exempting "actions seeking injunctive relief" from arbitration. *Ibid.* The agreement also includes a valid delegation of arbitrability. See Pet. App. 7a-8a. The carve-out provision undisputedly requires a court to adjudicate the merits of the claims where a plaintiff is "seeking injunctive relief" within the meaning of the contract (in petitioner's view, where a plaintiff is seeking a preliminary injunction *before* the arbitration of its claims or a permanent injunction *after*). The question here is whether the carve-out provision requires a court to determine for itself whether the action is one "seeking injunctive relief" before sending the case to the arbitrator to decide arbitrability (and, if the arbitrator decides the dispute is arbitrable, the merits). See *id.* at 6a-7a.

The presumption of arbitrability provides the answer. Because the agreement at issue includes a clear delegation of arbitrability, a court should presume that all questions of arbitrability are arbitrable absent a clear indication to the contrary. See pp. 24-31, *supra*. And a carve-out provision of the variety at issue here does not provide the requisite clarity. Such a provision speaks in terms of *claims* or *actions*, as opposed to *particular questions of arbitrability*. Its primary effect is to exempt those claims or actions from the obligation to arbitrate the *merits* of those disputes. Yet such a provision is silent about whether a court or an arbitrator should resolve particular questions of arbitrability for the carved-out disputes. A carve-out provision that says nothing about arbitrability (or any particular question of arbitrability) will at best be "ambiguous" as to whether it acts on the delegation. See

Granite Rock, 561 U.S. at 301. Without more, the presumption of arbitrability requires a court to give effect to the delegation in those circumstances and to permit the arbitrator to decide all questions of arbitrability.

2. The Court Of Appeals' Contrary Approach Conflicts With This Court's Case Law And Leads To Illogical Results

In the decision below, the court of appeals accepted that the arbitration agreement at issue contained the requisite clear and unmistakable evidence that the parties had agreed to a delegation of arbitrability. Pet. App. 8a. But instead of applying the presumption of arbitrability to determine the scope of the delegation, it relied on the agreement's carve-out provision to conclude that the agreement "delegate[d] arbitrability * * * for all disputes *except* those under the carve-out." *Id.* at 11a. That conclusion is badly flawed, and the bizarre results it creates further illustrate why a court should not construe a carve-out provision to operate on a delegation of arbitrability absent clear evidence that the parties so intended.

a. The core flaw in the court of appeals' reasoning is that it conflates the question of who decides arbitrability with the question of whether the dispute is arbitrable—questions that this Court has made clear are analytically distinct. See *Henry Schein*, 139 S. Ct. at 529-530. The whole point of a delegation of arbitrability is to have an arbitrator determine whether the plaintiff's claim is arbitrable—and a core aspect of that determination is whether the claim falls within the scope of the arbitration agreement. See p. 7, *supra*. By deciding that very question as part of the inquiry into who decides arbitrability, a court is necessarily resolving the underlying question of arbitrability too.

That approach effectively guts the delegation. Under the court of appeals' logic, the delegation of questions of

arbitrability has force only when the carve-out provision is inapplicable. But if the court will enforce the delegation only *after* determining that the claims at issue do not fall within the carve-out provision, then the question of arbitrability that will be sent to the arbitrator is the very question the court just resolved. Indeed, the court's ruling on that question "could bind the arbitrator under the doctrine of res judicata." *Blanton* v. *Domino's Pizza Franchising LLC*, 962 F.3d 842, 849 (6th Cir. 2020); see *Collins* v. *D.R. Horton, Inc.*, 505 F.3d 874, 880 (9th Cir. 2007).

As illustrated by this Court's decision in *Warrior & Gulf*, *supra*, that perverse result provides a good reason to reject the court of appeals' approach. There, the Court was asked to construe a collective bargaining agreement that contained a "no-strike" provision and provided for arbitration to settle employee grievances with management. The arbitration agreement also contained a carve-out provision stating that "matters which are strictly a function of management shall not be subject to arbitration under this section." 363 U.S. at 576. In the dispute before the Court, the employees alleged that management had violated the collective bargaining agreement by contracting out certain work to non-union employees.

In determining whether the grievance was arbitrable, the Court began from the presumption of arbitrability, stating that "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Warrior & Gulf*, 363 U.S. at 582-583. The Court then held that the grievance was not "necessarily excepted" from the arbitration agreement and therefore compelled arbitration. See *id.* at 583. The Court acknowledged that the carve-out for "management functions" could be construed to refer to any act of management that did not violate the

collective bargaining agreement. See *id.* at 583-584. That is because the very essence of any labor grievance under a collective bargaining agreement is that management has acted in a way that the agreement forbids. See *ibid.* The Court reasoned that, "if courts, in order to determine arbitrability, were allowed to determine" which management functions were permitted under the agreement, "the arbitration clause would be swallowed up by the exception"—the court would be resolving the parties' grievance in order to determine whether that very grievance was arbitrable. *Id.* at 584.

To avoid that obvious problem, the Court concluded that the "management function" carve-out "must be interpreted" to refer only to functions that the agreement "make[s] clear" are not matters for arbitration. See *Warrior & Gulf*, 363 U.S. at 584. "In the absence of any express provision excluding a particular grievance from arbitration," the Court reasoned, "only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail." *Id.* at 584-585. In so deciding, the Court stressed that courts should be wary of becoming "entangled in the construction" of the agreement "even through the back door of interpreting the arbitration clause." *Id.* at 585.

The same principle applies to a delegation of arbitrability—which this Court has made clear should be treated as an arbitration agreement in and of itself. In deciding the scope of the delegation in the presence of a carve-out provision, a court should not read the carve-out provision in a way that requires the court to decide a question of arbitrability in order to determine whether the parties delegated that same question to an arbitrator. Instead, a court should apply the presumption of arbitrability—as this Court did in *Warrior & Gulf*—and construe the

carve-out provision not to limit the scope of the delegation.

b. The incoherence of the court of appeals' approach is illustrated in the decision itself. When addressing the antecedent question of who decides arbitrability, the court of appeals determined that a court would have to decide arbitrability if the action fell within the carve-out provision, but that the arbitrator would decide arbitrability otherwise. See Pet. App. 11a. Yet the court failed to decide the now-doubly antecedent question of whether the action fell within the carve-out provision. See *id.* at 11a-12a. Instead, the court simply "[a]ccept[ed]" that the district court, and not the arbitrator, had the power to decide arbitrability, and then (and only then) proceeded to determine whether the district court correctly decided the question of whether the action fell within the carve-out provision. See *id.* at 12a. In other words, the court of appeals assumed the answer to the question of who decides arbitrability in order to reach the underlying question of whether the dispute was arbitrable. See *ibid.*

That approach may have nominally avoided deciding arbitrability as part of the question of who should decide arbitrability. If so, however, it runs squarely into the Court's previous decision in this case. As the Court made clear, "a court possesses no power to decide the arbitrability issue" if "the parties' contract delegates the arbitrability question to an arbitrator." 139 S. Ct. at 529. By failing definitively to resolve the question of who decides arbitrability, the court of appeals skipped a crucial step in the analysis that it was required to address fully before deciding the question of arbitrability. See *ibid.*

There is thus no escaping the serious problems that arise from the court of appeals' approach, under which either a court must decide the arbitrability question in order to determine whether the parties delegated that very

question to the arbitrator, or it must ignore the delegation and thereby violate the Court's previous decision in this case. An interpretation of an arbitration agreement that puts a court in such a bind cannot be correct.

c. Those problems are not limited to the particular agreements at issue in this case; they could arise with virtually any delegation. See Pet. App. 11a-12a. Almost every arbitration agreement includes some limitation on scope, such as a limitation of arbitration to disputes "arising out of" the contract. A party resisting arbitration could almost always argue that, because certain claims do not necessarily arise out of a contract, a delegation provision does not apply to those claims, meaning that questions concerning arbitrability as to those claims have not been delegated to the arbitrator. Under the court of appeals' approach, regardless of the contractual language, a court confronted with any limitation on the scope of an arbitration agreement would need to determine whether the dispute was arbitrable before determining whether the arbitrator should decide the question of arbitrability. The court of appeals' reasoning is thus entirely circular: it would effectively mean that "a court must always resolve questions of arbitrability and that an arbitrator never may do so." *Henry Schein*, 139 S. Ct. at 530.

Carried to its logical end, that flawed approach replaces the "wholly groundless" exception that this Court rejected with what is effectively an expanded version of that same doctrine. Previously, a court could refuse to delegate a question of scope only if a party's proposed interpretation was plainly without merit. But under the court of appeals' approach, a court need only disagree with a party's interpretation of the scope of the agreement in order to refuse to delegate the question of scope to the arbitrator. There is no basis in law or logic for that result,

especially in light of the "liberal federal policy favoring arbitration agreements" embodied in the Arbitration Act. *Moses H. Cone*, 460 U.S. at 24.

d. The court of appeals created further problems by focusing on the fact that the delegation in this case occurred through the incorporation of the AAA rules. In the court of appeals' view, the presence of the carve-out provision meant that the agreement incorporated the AAA rules "for all disputes *except* those under the carve-out." Pet. App. 11a. But that same logic would apply to any arbitration agreement that incorporated the AAA or similar rules: a party resisting arbitration could always argue that the arbitration rules are incorporated only for actions that fall inside the scope of the agreement. Indeed, the AAA's model arbitration clause includes a limitation on scope to "any * * * claim arising out of * * * [the underlying] contract"—as have the arbitration provisions in numerous cases in which courts of appeals have upheld delegations through incorporation. J.A. 119; see, *e.g.*, *Awuah* v. *Coverall North America, Inc.*, 554 F.3d 7, 9 (1st Cir. 2009); *Contec Corp.* v. *Remote Solutions, Co.*, 398 F.3d 205, 208 (2d Cir. 2005); *Simply Wireless, Inc.* v. *T-Mobile US, Inc*, 877 F.3d 522, 525 (4th Cir. 2017), cert. denied, 139 S. Ct. 915 (2019); *Fallo* v. *High-Tech Institute*, 559 F.3d 874, 876 (8th Cir. 2009); *Brennan* v. *Opus Bank*, 796 F.3d 1125, 1128 (9th Cir. 2015); *Belnap* v. *Iasis Healthcare*, 844 F.3d 1272, 1275 (10th Cir. 2017); *Qualcomm Inc.* v. *Nokia Corp.*, 466 F.3d 1366, 1368 (Fed. Cir. 2006).

If the court of appeals' reasoning were correct, therefore, a court would always have to decide the question of arbitrability in order to determine whether the AAA or similar rules applied. And that in turn would mean that the incorporation of such rules could never constitute an effective delegation. That runs contrary to the decisions

of all eleven courts of appeals to have addressed the validity of delegation through incorporation—an issue this Court expressly declined to consider. See 19-1080 Pet. i; *Blanton*, 962 F.3d at 846 (collecting cases).

In sum, a provision in an arbitration agreement that exempts certain claims from arbitration but is silent as to questions of arbitrability does not negate an otherwise clear and unmistakable delegation. The presumption of arbitrability compels that result. This Court should reject the court of appeals' contrary approach, which was badly flawed and would create intractable problems.

D. The Court Should Vacate The Judgment Below And Remand The Case For Further Proceedings

Under the appropriate analysis, the court of appeals' decision cannot stand. The arbitration agreement in this case provided in relevant part:

> Any dispute arising under or related to this Agreement (except for actions seeking injunctive relief and disputes related to trademarks, trade secrets or other intellectual property of [the manufacturing company]) shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association.

J.A. 114.

In the decision below, the court of appeals accepted that the incorporation of the AAA rules provided the requisite clear and unmistakable evidence that the parties agreed to delegate questions of arbitrability to the arbitrator, and this Court declined to review that holding when it denied respondent's conditional cross-petition. See Pet. App. 7a-8a; 19-1080 Pet. i. The only aspect of the court of appeals' decision before this Court is thus its holding that the carve-out provision required judicial resolution of the parties' arbitrability dispute.

The court of appeals erred when it so held. Because the carve-out provision is silent as to who should decide arbitrability, the presumption of arbitrability required the court to construe the carve-out provision as having no effect on the delegation. See pp. 31-33, *supra*.

While reversal of the decision not to compel arbitration would ordinarily be appropriate, respondent argued below that petitioner could not invoke the arbitration provision under the doctrine of equitable estoppel; the court of appeals did not reach that argument, and this Court declined to add a question concerning equitable estoppel. See Pet. App. 16a; 19-1080 Pet. i. While the law in the court of appeals is clear that the applicability of equitable estoppel is a matter for the arbitrator to decide, see *Brittania-U Nigeria, Ltd.* v. *Chevron USA, Inc.*, 866 F.3d 709, 715 (5th Cir. 2017); 19-1080 Pet. 20-21, this Court should vacate the judgment below and remand to allow the court of appeals to address that question in the first instance.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for further proceedings.

Respectfully submitted.

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