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 RESPONDENT

LEWIS T. LECLAIR
GARY CRUCIANI
CHELSEA A. PRIEST
MCKOOL SMITH, P.C.
300 Crescent Court, Ste. 1500
Dallas, TX 75201

DANIEL L. GEYSER
Counsel of Record
ALEXANDER DUBOSE &
JEFFERSON LLP
Walnut Glen Tower
8144 Walnut Hill Lane, Ste. 1000
Dallas, TX 75231
(214) 396-0441
dgeyser@adjtlaw.com

QUESTIONS PRESENTED

1. Whether a provision in an arbitration agreement that exempts certain claims from arbitration under the AAA rules negates an otherwise clear and unmistakable delegation of questions of arbitrability to an arbitrator.

2. Whether the mere incorporation of AAA rules is "clear and unmistakable evidence" that the parties delegated questions of arbitrability to an arbitrator.

PARTIES TO THE PROCEEDING BELOW AND RULE 29.6 STATEMENT

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

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

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STATEMENT

1. Respondent is the archetypal small, family-owned business. It sells dental products—such as chairs, cabinetry, lights, drills, and imaging machines—to dentists. James Archer, Sr. started the business in 1983. J.A. 35. His son, James Archer, Jr., began working in the family business when he was only 12 and now runs the business. *Id.* at 40. Like many small businesses, respondent has tried to expand over the years, but petitioner and its co-conspirators hampered respondent's efforts through their ongoing anticompetitive conduct. So respondent has remained small. As of October 2017, it had 7 full-time employees and 2 part-time employees; it has no lawyers or in-house counsel.

Respondent obtains access to the dental products it sells through agreements with manufacturers. It has had

a relationship with various brands now owned by Danaher Corporation[1] for decades. Some agreements are written and contain arbitration clauses, such as respondent's agreement with Danaher-brand Pelton & Crane. Some agreements are written and affirmatively require that any dispute be resolved in court, not arbitration, such as respondent's agreement with Danaher-brand Kavo. D. Ct. Dkt. 24-4, at 18 (requiring disputes be litigated in court in County of Lake, Illinois). And some agreements are oral and do not specify how the parties should resolve any dispute, such as respondent's agreement with Danaher-brand Instrumentarium (also previously a defendant).

In 2007, respondent signed the distributor agreement containing the arbitration clause that petitioner, as a nonsignatory, is attempting to enforce (the Agreement). See J.A. 105-116. The Agreement is relatively short—only four pages—and mostly boilerplate. Part of that boilerplate is an arbitration clause. The arbitration provision does not contain an express delegation clause. Instead, it merely states that any arbitration will be "in accordance with" the AAA rules:

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

J.A. 114 (emphasis added). The AAA rules were not attached to the Agreement, and there is no evidence that

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[1] Danaher and several of its subsidiaries were defendants in the district court, but they settled and were dismissed before this Court granted certiorari. See D. Ct. Dkt. 497, 518, 519.

they were provided to respondent or drawn to its attention before it signed the Agreement.

Two years later, Danaher went "through a review of [its] dealer agreements" and "made some revisions and further clarification on various items." D. Ct. Dkt. 21-2. It presented the revised agreement to respondent for its signature; there was no negotiation. And despite making other "clarifications," the arbitration clause and its carve-out remained unchanged. Again, the AAA rules were not attached to the Agreement, and there is no evidence that they were provided to respondent or drawn to its attention before it signed the contract.

In 2012, Danaher sent respondent yet another revised dealer agreement.[2] The arbitration clause in the 2012 agreement was substantially modified from previous versions. Importantly, the proposed agreement lacked the carve-out language at issue in this case. For the first time, respondent attempted to negotiate the terms of the contract.[3] But Danaher apparently considered the terms non-negotiable; it never responded or signed the version with respondent's revisions. See D. Ct. Dkt. 24-1.

2. In 2012, Archer sued petitioner, Danaher, and several of Danaher's subsidiaries. Pet. App. 3a. Petitioner is another dental-products distributor and one of respondent's competitors. Respondent alleged that petitioner conspired with other large dental distributors to maintain supracompetitive margins by threatening to stop buying from manufacturers (such as Danaher) who sold to low-margin dental distributors, thereby bringing

[2] At the time Danaher proposed the revised agreement in 2012, it was aware of the dispute that led to this lawsuit. Danaher signed a tolling agreement with respondent in February 2012, and proposed an amended agreement in May 2012. See D. Ct. Dkt. 21-3.

[3] By this time, respondent had hired outside counsel in connection with this dispute and the related FBI investigation.

manufacturers into the conspiracy. See J.A. 31-33. These actions resulted in the conspirators boycotting low-margin distributors like respondent. *Ibid.* To redress these antitrust violations, respondent sought damages and "injunctive relief," because "[t]he violations * * * are continuing and will continue unless injunctive relief is granted." J.A. 100.

3. After respondent filed its original complaint, defendant Pelton (a Danaher subsidiary) moved to compel arbitration under its distribution agreement with respondent. Even though the other defendants were not parties to the arbitration agreement (and some even had agreements requiring that disputes be resolved in court), they joined Pelton's motion.

Petitioner filed its own motion to compel arbitration, arguing that under equitable estoppel, respondent had to arbitrate with petitioner (as a non-signatory) despite having no contractual relationship whatsoever.

4. The magistrate judge ordered arbitration (Pet. App. 37a-41a), but the district court vacated that order and denied the motions to compel arbitration (*id.* at 17a-36a). The district court found that the parties had not "clearly and unmistakably" agreed to delegate arbitrability. *Id.* at 30a. As the court explained, "[t]here is no express delegation clause in the [A]greement." *Id.* at 31a. And even if the AAA clause constituted a delegation, the court found that delegation did not apply in light of the carve-out for actions seeking injunctive relief: "[T]he present action falls squarely within the terms of an express carve-out," and "it would be senseless to have the AAA rules apply to proceedings that are not subject to arbitration." *Id.* at 32a. The court finally noted that even if the agreement delegated arbitrability disputes, the defendants' arbitrability argument was "wholly groundless." *Id.* at 35a.

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

The court of appeals affirmed. 878 F.3d 488 (5th Cir. 2017). With respect to delegation, the court explained that it was "not the case that any mention in the parties' contract of the AAA Rules trumps all other contract language." *Id.* at 494. Because "the interaction between the AAA Rules and the carve-out is at best ambiguous," the court found "a strong argument that the Dealer Agreement's invocation of the AAA rules does not apply to cases that fall within the carve-out." *Id.* at 494-495. The court did not ultimately decide the delegation issue, however, because it affirmed on the basis that the defendants' arbitrability argument was wholly groundless. *Id.* at 495.

6. This Court granted review and vacated the Fifth Circuit's ruling. 139 S. Ct. 524 (2019). The Court held that the "wholly groundless" exception was inconsistent with the Federal Arbitration Act. *Id.* at 529. But the Court "express[ed] no view about whether the contract at issue in this case in fact delegated the arbitrability question to an arbitrator." *Id.* at 531. Instead, this Court remanded with instructions for the Fifth Circuit to "address that issue in the first instance," underscoring that "courts 'should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so.'" *Ibid.* (quoting *First Options of Chi., Inc.* v. *Kaplan*, 514 U.S. 938, 944 (1995)).

7. After supplemental briefing and oral argument, the Fifth Circuit again affirmed on remand. Pet. App. 1a-16a.

First, consistent with this Court's admonition, the Fifth Circuit recognized the default rule that courts, not arbitrators, typically resolve arbitrability: "'Unless the

parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator.'" Pet. App. 7a (quoting *AT&T Techs., Inc.* v. *Commc'n Workers of Am.*, 475 U.S. 643, 649 (1986)). But under existing Fifth Circuit precedent, the panel explained, "[a] contract need not contain an express delegation clause to meet this standard." *Ibid.* To the contrary, a mere reference to the AAA rules was enough: "As we held in [*Petrofac, Inc.* v. *DynMcDermott Petroleum Operations Co.*, 687 F.3d 671 (5th Cir. 2012)], an arbitration agreement that incorporates the AAA Rules 'presents clear and unmistakable evidence that the parties agreed to arbitrate arbitrability.'" *Ibid.* (quoting *Petrofac*, 687 F.3d at 675).

Because the court of appeals found it "undisputed that the Dealer Agreement incorporates the AAA rules," it concluded that it also "delegat[ed] the threshold arbitrability inquiry to the arbitrator for at least some category of cases." Pet. App. 8a.

The court then addressed the effect of the carve-out agreement. Recognizing that arbitration is a matter of contract formation and interpretation (Pet. App. 5a-6a), the court reviewed the specific language of the arbitration clause at issue and concluded that "the placement of the carve-out here is dispositive." *Id.* at 11a. As the court explained, "[w]e cannot rewrite the words of the contract," and "[t]he most natural reading of the arbitration clause at issue here states that any dispute, except actions seeking injunctive relief, shall be resolved in arbitration in accordance with the AAA rules." *Ibid.* As the panel reasoned, it followed that "[t]he plain language incorporates the AAA rules—and therefore delegates arbitrability—for all disputes except those under the carve-out." *Ibid.* And "[g]iven that carve-out," the court concluded, "we

cannot say that the Dealer Agreement evinces a 'clear and unmistakable' intent to delegate arbitrability." *Ibid.*

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

Because the court determined that the action is not arbitrable as it falls outside the scope of the arbitration clause, the Fifth Circuit affirmed. Pet. App. 14a-15a.

8. Petitioner sought rehearing en banc, which the Fifth Circuit denied. This Court granted a stay pending the filing of a petition for a writ of certiorari. After petitioner filed its petition, respondent filed a cross-petition out of an abundance of caution, explaining that such a petition "may" be necessary despite seeking an affirmance in this Court. See 19-1080 Cross-Pet. 5 n.2. In its brief in opposition, petitioner responded that a cross-petition was "unnecessary and improper" because "[t]he [AAA] incorporation question * * * presents an additional ground for affirmance." 19-1080 Br. in Opp. 6-7. The Court granted the petition and denied the cross-petition.

SUMMARY OF ARGUMENT

I. The arbitration clause does not delegate any gateway questions to the arbitrator, and petitioner's contrary contention is incompatible with the FAA, this Court's

authority, the agreement's plain language, and simple common sense.

A. The AAA incorporation question presents a vitally important and recurring issue of federal law, and this Court should decide that question in this case. The issue is properly before the Court for any number of reasons: it is an antecedent issue resting at the irreducible core of petitioner's case; it falls squarely within the question presented; and it presents a clear and obvious alternative ground for affirmance. Petitioner's arguments turn expressly on the proper disposition of this predicate issue, and it makes little sense to construe the carveout's effect on the "delegation" clause without first determining if a delegation clause even exists.

The incorporation question also cries out for the Court's immediate review. The issue arises constantly in federal courts nationwide. There is a sharp divide among lower courts, experts, scholars, and litigants about its proper disposition, and these disputes continue to arise despite a circuit consensus on the question. The issue has been fully ventilated and the sides are now clear. It is time for a definitive answer (up or down) to put the confusion to rest.

B. Contrary to petitioner's contention, the mere incorporation of AAA rules is not "clear and unmistakable evidence" that the parties agreed to arbitrate arbitrability.

The arbitration clause is silent on delegation; it does not even hint at the topic. In reality, no one who wants to arbitrate arbitrability relies on an oblique reference to the AAA rules rather than a simple, explicit sentence delegating the gateway issues.

Nor is it plausible that parties would focus on the issue and resolve it indirectly—by incorporating an entire body of rules (spanning dozens of pages) and presuming that all sides would spot the single provision that even debatably

delegates anything. This Court's heightened standard is designed to ensure that parties actually "focus" on this "arcane" issue. A clause that tells the parties what rules to apply *if there is an arbitration* does not give any hint that the arbitrators will also decide *whether* there is an arbitration in the first place.

In any event, even if a party somehow spotted Rule 7(a) tucked between dozens of pages of boilerplate, that rule still does not satisfy this Court's standards. Rule 7(a) merely grants arbitrators the *authority* to decide arbitrability; it does not grant *exclusive* authority, and it nowhere purports to deprive the courts of their traditional powers. While parties may elect to arbitrate arbitrability under Rule 7(a), they do not forfeit their rights to seek independent review in court.

II. A. Even if the AAA clause somehow serves as a delegation provision, the agreement's carveout exempts this action from that delegation.

Petitioner's initial error is conflating two distinct concepts: a carveout applicable to *arbitration* clauses and a carveout applicable to *delegation* clauses. Everyone agrees that the arbitrator decides the issue if the carveout is limited to the scope of arbitration. But there is no basis in law or logic for refusing to honor the parties' decision to limit the scope of a *delegation* to certain issues. When the parties limit those issues, the court retains its decisional authority and the delegation clause does not apply.

B. Nor is there any basis for reading this carveout not to apply to the (so-called) delegation. The carveout is found in a single sentence together with the so-called delegation; it applies indiscriminately to each part of that sentence. And disputes falling within the exemption are not subject to arbitration or the AAA rules in the first place—which eliminates the only conceivable hook for delegating anything to the arbitrator.

When the agreement is read as a whole, it makes clear that the parties *expressly* refused to arbitrate certain issues; it blinks reality to think they still *impliedly* required arbitrating arbitrability despite not saying a word about it.

When the arbitration provision is read to mean what it so plainly says, it is remarkably easy to understand. It designates certain disputes for arbitration under the AAA rules, and exempts other disputes from arbitration entirely—so the parties can seek relief in an efficient, indivisible action in court. Because petitioner's contrary view cannot be squared with the agreement's text or common sense, the decision below should be affirmed.

ARGUMENT

I. THE ARBITRATION CLAUSE DOES NOT DELEGATE ANY GATEWAY QUESTIONS TO THE ARBITRATOR

A. This Court Should Resolve The Important Predicate Question Whether This Agreement Contains Any Delegation Clause At All

1. Petitioner frames its case as presenting a single question, but it properly presents two questions, not one. The case arrives expressly "on the premise" that the agreement contains "a clear and unmistakable delegation." Pet. Br. 15, 19. That presumed delegation drives petitioner's analysis and is pervasive throughout its brief. See, *e.g.*, *id.* at 32 (asking why the parties were "silent about whether a court or arbitrator should resolve particular questions of arbitrability for the carved-out disputes"—a point that only makes sense *if the parties delegated in the first place*); *id.* at 38 (faulting the Fifth Circuit's reasoning specifically because it "would mean that the incorporation of [AAA] rules could never constitute an effective delegation"—a point impossible to assess

without first deciding if incorporating AAA rules constitutes an effective delegation). The AAA incorporation issue "is predicate to an intelligent resolution of the question presented," and it is properly regarded as "fairly included" within that question. *Caterpillar Inc.* v. *Lewis*, 519 U.S. 61, 75 n.13 (1996) (internal quotation marks omitted).

Indeed, it makes little sense to decide what this arbitration clause means without first deciding if the lower courts misconstrued the AAA clause below. And the simplest way to understand that is to see how all the confusion disappears if one simply reads the agreement to mean what it so plainly says: It provides for arbitration generally; it exempts certain types of actions from arbitration; and it requires that any arbitration be conducted under the AAA rules. When there is no (fictional) delegation, the carve-out provision is easy to understand and apply. The false complexity is a product of petitioner shoehorning a delegation clause into a provision that says nothing about delegation. That legal issue should be resolved before addressing the carve-out question. See, *e.g.*, *Richlin Sec. Serv. Co.* v. *Chertoff*, 553 U.S. 571, 579 n.4 (2008); *Rumsfeld* v. *Forum for Academic & Institutional Rights*, 547 U.S. 47, 56 (2006).

2. For multiple reasons, this predicate question of law is properly before the Court.

The AAA incorporation issue is an antecedent question; it falls squarely within the umbrella of the question presented; and it presents an alternative ground for affirmance. Each point provides ample justification for the Court to decide the issue. See, *e.g.*, Stephen M. Shapiro et al., *Supreme Court Practice* § 6.25(g), at 457-460 (10th ed. 2013) (subsidiary questions that are fairly included); *id.* § 6.26(c), at 466 (alternative grounds for affirmance).

Although petitioner now insists the "carve-out" issue alone is before the Court (Br. 39), its objections are unfounded and a reversal of its prior position. First, it says this Court "expressly declined to consider" the incorporation issue. That is wishful thinking: the Court did not "expressly" decline to consider anything—it merely denied a cross-petition *filed out of an abundance of caution*. See 19-1080 Cross-Pet. 5 n.2 (explaining why "a cross-petition *may* be necessary") (emphasis added). Indeed, petitioner itself declared that cross-petition "unnecessary and improper" because "[t]he incorporation question * * * presents an additional ground for affirmance." 19-1080 Br. in Opp. 6. Petitioner cannot shift gears now. See *Supreme Court Practice* § 6.26(c), at 466 ("The winning party below, without taking a cross-appeal, can generally defend (but not enlarge or change) the judgment in that party's favor on any ground properly raised in the court below, even though that court rejected or ignored it.").

Nor is there any doubt that the incorporation issue falls squarely within the question presented, which is explicitly premised on the existence of "an otherwise clear and unmistakable delegation" (Pet. Br. I). See, *e.g.*, *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 381 (1995). That "antecedent" question (Pet. Br. 36) is teed up for disposition and essential to correctly construing the arbitration agreement.

Petitioner also properly conceded during *Schein I* that the incorporation question was open to the Court. 17-1272 Tr. 8 ("We certainly think it would be appropriate for this Court to provide guidance on that issue, but the Court certainly does not have to reach it if it so chooses."). While the Court ultimately declined to resolve the question at the time, it "express[ed] no view" about the delegation question, reminded the lower courts "'not [to] assume that the parties agreed to arbitrate arbitrability unless there

is clear and unmistakable evidence that they did so,'" and invited the court of appeals to "address that issue in the first instance." *Henry Schein, Inc.* v. *Archer and White Sales, Inc.*, 139 S. Ct. 524, 531 (2019). Now that the Fifth Circuit has resolved that antecedent issue incorrectly, it is ripe for this Court's consideration.

3. The incorporation question is also the most important legal issue in the case. As described below, it arises repeatedly in litigation nationwide; it continues to divide the lower courts; the arguments on each side are fully developed; and there is every reason to put the issue to rest—no matter how the Court ultimately resolves it. Given the sheer frequency of arbitration clauses that incorporate AAA rules—and the weakness of the majority approach—there is every reason to believe the issue will continue generating confusion until this Court provides a definitive answer.

This case is the ideal opportunity to provide that guidance, and it is proper to decide the key predicate question before trying to construe this arbitration clause on a tenuous presumption about what half the clause actually says. The Fifth Circuit was correct in its construction of the carve-out provision, but wrong to find any delegation here; the judgment can be affirmed on that basis alone.

B. The Mere Incorporation Of The AAA Rules Is Not "Clear And Unmistakable" Evidence That The Parties Agreed To Arbitrate Arbitrability

According to petitioner, respondent's agreement contains a "'clear and unmistakable'" delegation clause. Br. i. Of course, the arbitration clause on its face says nothing about delegation; it is wholly silent on the issue. Instead, petitioner's entire case rests on a theory of incorporation: (i) the agreement's language states that certain disputes will be "resolved by binding arbitration in accordance with the [AAA] arbitration rules" (J.A. 114); and (ii) because a

single provision of those rules (out of dozens) happens to give arbitrators authority to decide their own jurisdiction, petitioner says the parties "*clearly and unmistakably*" delegated the gateway issue to the arbitrator—even though the incorporating language never references delegation at all; the incorporated rules serve other obvious purposes (which is the actual reason the parties reference them); the only relevant rule is buried among 58 separate rules spanning dozens of pages; and the AAA rule itself does not obviously answer the delegation question in any event.

Petitioner's argument fails on every conceivable level; its only legal support is profoundly flawed or barely reasoned, which is why courts and experts continue to reject it despite a lopsided circuit consensus in petitioner's favor. And now that the Sixth Circuit (per Judge Thapar) has provided the exhaustive defense of petitioner's position, there is no reason to permit the constant litigation over this issue to continue. The sides are clear. This important antecedent question cries out for the Court's guidance, and it is the appropriate basis for affirming the decision below.

1. As this Court has consistently held for decades, "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." *First Options*, 514 U.S. at 944 (quoting *AT&T Techs., Inc.* v. *Commc'ns Workers*, 475 U.S. 643, 649 (1986)). That standard is "an 'interpretive rule'" rooted in federal law, and it is "based on an assumption about the parties' expectations." *Rent-A-Center, West, Inc.* v. *Jackson*, 561 U.S. 63, 69 n.1 (2010). The concept of who should decide arbitrability is "rather arcane" (*First Options*, 514 U.S. at 945); most litigants have never heard of "arbitrability," and it is the unusual party who assumes that an arbitrator will decide whether there

should be arbitration in the first place—assuming they even consider the issue at all. The "strong pro-court presumption" thus avoids taking parties by surprise, and reflects their "likely intent." *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U.S. 79, 86 (2002). A weaker standard "might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide." *First Options*, 514 U.S. at 945.

For that reason, "the law treats silence or ambiguity about the question '*who* (primarily) should decide arbitrability' differently from the way it treats silence or ambiguity about the question '*whether* a particular merits-related dispute is arbitrable.'" *First Options*, 514 U.S. at 944. If the language of the arbitration clause leaves any "ambiguity" about whether the parties intended to delegate arbitrability, "clear and unmistakable" evidence is lacking, and the arbitrability question remains "an issue for judicial determination." *Howsam*, 537 U.S. at 83.[4]

2. Under these settled principles, the mere incorporation of AAA rules is insufficient to "clearly and unmistakably" show that the parties intended to arbitrate arbitrability.

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[4] This Court's established rule is also consistent with the FAA's plain text. The Act's natural reading suggests that the court, not the arbitrator, decides whether "the issue involved * * * is referable to arbitration." 9 U.S.C. 3; see also 9 U.S.C. 4 (requiring courts to be "satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue"). While the "ship has sailed" regarding whether parties may contract around this default, the language reflects Congress's view—and the traditional presumption—that parties would not be compelled to arbitrate absent a judicial determination of their contractual rights. *Schein I*, 139 S. Ct. at 530 (noting that "parties may delegate threshold arbitrability questions to the arbitrator, *so long as the parties' agreement does so by 'clear and unmistakable' evidence*") (emphasis added).

a. First, the arbitration clause is silent on delegation; it does not utter one syllable on the topic. It is implausible that anyone truly thinking about this "arcane" issue would write a contract that way. In the real world, when parties actually contemplate a delegation clause, *they expressly include a delegation clause*. *Hoyle, Tanner & Assocs., Inc.* v. *150 Realty, LLC*, 172 N.H. 455, 464 (2019). Five simple words can easily be inserted into every contract and avoid endless waste and confusion: "The arbitrator shall decide arbitrability." There is no excuse for parties not to include express language if that is what they intend—and especially no excuse given the background "clear and unmistakable" standard.[5]

It is not difficult to find examples of true delegation clauses. See, *e.g.*, Square, Inc., *General Terms of Service* § 21 ("[t]he Arbitrator shall be responsible for determining all threshold arbitrability issues") <https://tinyurl.com/square-arb> (visited Oct. 12, 2020); *Oliveira* v. *New Prime, Inc.*, 857 F.3d 7, 10 & n.6 (1st Cir. 2017) (agreeing to arbitrate "any disputes arising under, arising out of or relating to [the contract], * * * including the arbitrability of disputes between the parties"), aff'd, 139 S. Ct. 532 (2019); *Vierican, LLC* v. *Midas Int'l*, No. 19-620, 2020 WL 4430967, at *3 (D. Haw. July 31, 2020) ("the decision as to whether a claim is subject to mandatory arbitration shall be made by an arbitrator, not a court") (emphasis omitted). Yet when, as here, an agreement fails to drop so much as a hint about delegation, there is no

[5] A party aware of the concept of delegation is also likely to be aware of the "heightened standard" necessary to establish a delegation. *Rent-A-Center*, 561 U.S. at 69 n.1. No one operating in that rarified universe would opt for an oblique reference to the AAA rules rather than a simple, explicit sentence delegating the gateway issues. Compare, *e.g.*, *id.* at 66-67 (discussing an actual, unambiguous delegation clause).

indication that the parties even realized the issue existed. This Court's "clear and unmistakable evidence" standard is designed to ensure parties have "focus[ed]" on that question. *First Options*, 514 U.S. at 945. Silence is no substitute for the required "*manifestation* of intent." *Rent-A-Center*, 561 U.S. at 69 n.1 (some emphasis omitted).

b. Second, it is equally implausible that anyone thinking about delegation would address the "arcane" topic only indirectly—by identifying an entire body of rules (spanning dozens of pages) and assuming that both parties are silently thinking the same thing. That type of "broad, nonspecific, and cursory" reference (*Doe* v. *Natt*, 299 So.3d 599, 606 (Fla. App. Ct. 2020)) does not reflect any obvious awareness of the arbitrability issue. *Global Client Solutions, LLC* v. *Ossello*, 382 Mont. 345, 354-355 (2016).

On the contrary, parties incorporate the AAA rules for an obvious reason, and it has nothing to do with delegation: *to provide the ground rules for any arbitration*. Those rules tell the parties where to go, who to pay, how to select an arbitrator, and how the arbitration will be conducted. There is little reason for parties even to pay attention to those rules before a dispute arises, and there is no reason to think the parties would thumb through all the rules (tucked in boilerplate), isolate the single subpart affirming the arbitrator's *competence* to decide his own jurisdiction, and conclude the parties thereby *clearly and unmistakably* agreed that the arbitrator, not the court, would decide any question of arbitrability.

In reality, "[i]t is doubtful that many people read the small print in form contracts, let alone the small print in arbitration rules that are cross-referenced by such contracts, however explicit the cross-reference." *Awuah* v. *Coverall N. Am., Inc.*, 554 F.3d 7, 12 (1st Cir. 2009). And when a clause has an obvious, independent reason for its

existence, there is nothing approaching "clear and unmistakable evidence" that the parties *actually contemplated* anything about delegation at all.[6]

Petitioner might have a (slightly) stronger case if the agreement at least singled out Rule 7(a). But a generic, indiscriminate reference to *all* the AAA rules is a far cry from specifically invoking the single provision that happens to say anything about arbitrating arbitrability. And, put simply, "[i]ncorporation by reference of an obscure body of rules to show a clear and unmistakable intent to adhere to one rule specifically is preposterous." *Ashworth* v. *Five Guys Ops., LLC*, No. 16-6646, 2016 WL 7422679, at *3 (S.D. W. Va. Dec. 22, 2016).

In sum, "incorporating forty pages of arbitration rules into an arbitration clause is tantamount to inserting boilerplate inside of boilerplate, and to conclude that a single provision contained in those rules amounts to clear and unmistakable evidence of an unsophisticated party's intent would be to take 'a good joke too far.'" *Allstate Ins. Co.* v. *Toll Bros., Inc.*, 171 F. Supp. 3d 417, 429 (E.D. Pa. 2016) (quoting *Campbell Soup Co.* v. *Wentz*, 172 F.2d 80, 83 (3d Cir. 1948)).

Sophisticated or not, no rational person thinking about that "arcane" issue relies on a single, unspecified, oblique

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[6] Petitioner's view suffers from an additional problem: It cannot explain why parties adopted *the same linguistic formulation* in agreements *before* Rule 7(a) was adopted; in agreements that separately include an *express* delegation clause (which is redundant under petitioner's view); and in agreements that separately include an express *anti*-delegation clause (which introduces an internal conflict under petitioner's view). These parties are not confused: the overriding reason to specify procedural rules *is to specify procedural rules*. There is no hint the parties knew or understood an important, distinct, "antecedent agreement" (*Schein I*, 139 S. Ct. at 529) would be hidden in those dozens of pages without the slightest indication in the contract itself.

provision tucked away in a copious set of rules primarily incorporated for an entirely different purpose (read: setting the ground rules for any arbitration). *Ashworth*, 2016 WL 7422679, at *3. It is mystifying how this constitutes "clear and unmistakable" evidence on the gateway issue. *Little*, 610 B.R. at 568; *Ajamian*, 203 Cal. App. 4th at 789-790.[7]

c. Moreover, even had the parties specifically invoked Rule 7(a) (*out of 58 commercial rules*), the rule still does not mean what petitioner says: it does not say the arbitrator has *exclusive* authority to decide arbitrability; this classic "competence-competence" clause merely confirms the arbitrator's *authority* to resolve gateway issues. It does not remove the judiciary's independent authority to decide arbitrability. *E.g.*, *AvMed*, 2020 WL 2028261, at *11; *Doe*, 2020 WL 1486926, at *7; *In re Zetia (Ezetimibe) Antitrust Litig.*, No. 18-2836, 2018 WL 4677830, at *6 (E.D. Va. Sept. 6, 2018); *Ajamian*, 203 Cal. App. 4th at 790.[8]

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[7] This Court requires "clear and unmistakable *evidence*" that the parties understood and agreed to delegate the gateway issue; that standard suggests more than simply charging a party with constructive knowledge or a legal fiction. Indeed, a lesser showing would defeat the entire point of the heightened standard: arbitration requires an agreement, and parties cannot agree over an "arcane" issue without actual knowledge that it exists. Cf., *e.g.*, *Intel Corp. Inv. Policy Comm.* v. *Sulyma*, 140 S. Ct. 768, 777-778 (2020). Yet the Court need not embrace that theory to affirm here: the AAA rules were included for a limited purpose (not delegation), and Rule 7(a)'s non-exclusive language independently falls short.

[8] In that sense, Rule 7(a) is much like 28 U.S.C. 1331: a provision may grant one tribunal *authority* to decide federal claims without removing those claims from the power of other tribunals (*e.g.*, state courts). "Exclusive" jurisdiction is a different story. See, *e.g.*, 28 U.S.C. 1334(a) (generally providing that "district courts shall have original and exclusive jurisdiction of all cases under title 11" of the Bankruptcy Code).

And there is every reason to read the rule to mean what it says. It is far from obvious that arbitrators automatically have the power to decide arbitrability. Cf. 9 U.S.C. 3-4. This rule confirms their "competence" to do so.

There are also practical reasons for parties to raise "competence"-based concerns. Unlike judges (who are paid annual salaries), arbitrators are paid by the hour. Asking to expand or contract their work directly affects their bottom line. They may act in perfectly good faith and have the best of intentions, but they face an inherent and unavoidable conflict of interest. There is thus every reason to be concerned that, absent express permission, an arbitrator could not rule on the scope of his or her own jurisdiction, even if the parties agreed that the inherent conflict was fine.

Rule 7(a) thus confirms the conflict is unobjectionable, and ensures that the arbitrator can decide arbitrability questions (*where the parties clearly and unmistakably agree*) without having to stop the proceedings and await a judicial ruling. It does not, by its plain terms or otherwise, grant the arbitrator the *exclusive* power to decide arbitrability; and it certainly does not expressly take away that power from a court. Contrast *Rent-A-Center*, 561 U.S. at 66 (an express delegation provision doing exactly that).

Accordingly, even had the parties somehow read and understood every single AAA rule, Rule 7(a) would still fall short: its lack of exclusivity leaves the provision ambiguous—and any ambiguity fails to satisfy the "clear and unmistakable" test. *First Options*, 514 U.S. at 944-945.[9]

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[9] The ALI Restatement of the U.S. Law of International Commercial and Investor-State Arbitration reached the same conclusion, rejecting the contrary circuit consensus: "there is little evidence to suggest that [arbitral rules] were specifically intended to render

3. Although petitioner is correct that the federal courts of appeals have rejected this position, petitioner is wrong that the "consensus" view has any valid analytical foundation. Indeed, other sources have roundly exposed the majority position as baseless: until recently, "none of [the majority's] cases have ever examined how or why the mere 'incorporation' of an arbitration rule * * * satisfies the heightened standard" in *First Options*; "[m]ost of the opinions have simply stated the proposition as having been established with citations to prior decisions that did the same." *Doe*, 299 So.3d at 608. The weakness has left "[t]he law * * * still unsettled," generating "prolonged litigation." Jonathan R. Engel, *Court Enforces Arbitration Clause in Email*, ABA Litigation (Mar. 3, 2020) <https://tinyurl.com/aba-arbitration>.

In a recent Sixth Circuit decision, the panel (per Judge Thapar) attempted to fill the void, exhaustively supporting the majority's view. See *Blanton* v. *Domino's Pizza Franchising LLC*, 962 F.3d 842 (6th Cir. 2020). Yet notwithstanding the best efforts by the Sixth Circuit and

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exclusive the competence of arbitral tribunals to make jurisdictional determinations." Restatement of U.S. Law of Int'l Commercial & Investor-State Arbitration § 2.8, reporter's note b(iii) (Tentative Draft No. 4, 2015) (emphasis added). Petitioner has discounted that assessment because the Restatement critiqued the circuits' approach in a tentative draft, not the final version. 19-1080 Br. in Opp. 13 n.2. Yet the Restatement's *conclusion* was the same: parties must make "a clear and unmistakable agreement to delegate *exclusively* to arbitrators," and arbitration rules "*do not expressly give the tribunal exclusive authority over these issues*." Restatement of U.S. Law of Int'l Commercial & Investor-State Arbitration § 2.8, cmt. b (proposed final draft Apr. 24, 2019; approved May 20, 2019); *id.* reporter's note b(iii) ("*[e]ven if* incorporation of arbitral rules containing a competence-competence clause *were* generally capable of constituting 'clear and unmistakable evidence'"—*framed as a counterfactual*). As Professor Bermann (the Restatement's "chief reporter") confirms, the Restatement rejects the "consensus" view. 19-1080 Bermann Amicus Br. 1-2.

petitioner's able counsel, the flaws in the "incorporation" theory remain remarkably clear. Those flaws underscore the urgent need for this Court to correct the majority's obvious mistake.

a. As its lead argument, petitioner contended that its position is supported by the "incorporated-by-reference" doctrine: the unadorned reference to AAA rules incorporates all 58 provisions directly into the agreement itself, including the provision granting the arbitrator "power to rule on his or her own jurisdiction." 19-1080 Br. in Opp. 10-11 (quoting Rule 7(a)). According to petitioner, "[t]hat is 'about as "clear and unmistakable" as language can get.'" *Ibid.*; see also *Blanton*, 962 F.3d at 851.

On the contrary, that is "anything but 'clear.'" *Taylor*, 2020 WL 1248655 at *4. Try this instead: "The arbitrator shall decide arbitrability." There is absolutely no reason that parties would not add those five simple words—or at least some express statement—to every contract where they actually spot the issue and intend to delegate the gateway issue to the arbitrator. It blinks reality that anyone would notice a passing reference to AAA rules and immediately think "delegation." See, *e.g.*, *ibid.* ("It is hard to see how an agreement's bare incorporation by reference of a completely separate set of rules that includes a statement that an arbitrator has authority to decide validity and arbitrability amounts to 'clear and unmistakable' evidence that the contracting parties agreed to delegate those issues to the arbitrator and preclude a court from answering them."); *Chong* v. *7-Eleven, Inc.*, No. 18-1542, 2019 WL 1003135, at *10 (E.D. Pa. Feb. 28, 2019) ("There is certainly no reason to have any confidence that these parties actually addressed the question of arbitrability."); *Hoyle*, 172 N.H. at 464-465; *Doe*, 299 So.3d at 605-609.

In any event, petitioner overlooks the limits on the incorporation doctrine itself: according to petitioner's own

authority, "when incorporated matter is referred to *for a specific purpose only*, it becomes a part of the contract for that purpose only, and should be treated as irrelevant for all other purposes." 11 Willison on Contracts § 30:25 (4th ed. May 2020 update) (emphasis added); compare *Blanton*, 962 F.3d at 845 (citing the same source). The arbitration clause is phrased solely as setting the ground rules for any arbitration—it does *not* hint that it also has anything to do with deciding *whether* the parties agreed to arbitrate in the first place.

The problem accordingly is not merely that Rule 7(a) is found in a companion document. Contra 19-1080 Br. in Opp. 12. The problem is that the incorporating language *never references delegation* at all; the incorporated rules serve other obvious purposes (and parties would thus assume they are referenced *solely for those reasons*); the only *relevant* rule is buried among an extended series spanning dozens of pages; and that rule itself still does not answer the *relevant* question—since it does not grant *exclusive* authority to decide these questions. *E.g.*, *Aguilera*, 2020 WL 1188142, at *6.

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

b. Nor is petitioner correct that state-law incorporation principles override "federal law" in this context. 19-1080 Br. in Opp. 12. Indeed, quite the opposite: while courts "generally" "should apply ordinary state-law principles," this Court "added an important qualification": "Courts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so.'" *First Options*, 514 U.S.

at 944 (quoting *AT&T Techs., Inc.* v. *Commc'ns Workers*, 475 U.S. 643, 649 (1986)). There accordingly is nothing wrong with presuming that documents can be incorporated into an agreement—but there *is* something wrong with relying on the fiction of incorporation without "clear and unmistakable" evidence that the parties *actually intended* to delegate the gateway issue.

c. Petitioner is wrong that Rule 7(a) must be read to grant the arbitrator "exclusive" authority to determine arbitrability to avoid rendering that rule "superfluous." Br. in Opp. 12; see also *Blanton*, 962 F.3d at 849. Again, there is a reason these rules are known as *competence* clauses: an arbitrator's authority to rule on his or her own jurisdiction was not "taken for granted." Bermann Amicus Br. 15. Arbitrability decisions were traditionally made by courts, and arbitrators have an inherent conflict of interest in deciding whether to expand the scope of their own (paid) work. "Competence" rules confirm the arbitrator is empowered to act *where the parties so wish*; it is not "superfluous" to negate the presumption that courts alone are permitted to determine arbitrability.[10]

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[10] According to the Sixth Circuit, Rule 7(a)'s legislative history (though a mixed bag) suggests that the AAA designed the amendments as a delegation clause. *Blanton*, 962 F.3d at 849-850. This is irrelevant. For one, an issue with two reasonable sides (as the academic literature establishes) does not constitute "clear and unmistakable evidence." For another, it does not matter what the AAA thought it was doing; it only matters *what the parties understood the amendment to have done*—and there is every reason to read Rule 7(a) as a non-exclusive "competence-competence" clause. In any event, the move to resort to the legislative history of a AAA rule says it all: it is absurd to presume that a party who has not given any thought to this "arcane" issue is now spotting the AAA reference, pulling the AAA rules, reading them carefully, perceiving the possible ambiguity in Rule 7(a), and tracking down the "legislative history" of the AAA

d. Nor is it true that parties relied on circuit authority and fixing the problem "now would deprive" them "of the benefit of their bargain." *Blanton*, 962 F.3d at 850. The entire point of this Court's "clear-and-unmistakable" standard is that *most parties never contemplate gateway questions of arbitrability*. *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 944 (1995). The issue is "arcane"; "[a] party often might not focus upon that question." *Id.* at 945. A party that never spots an issue has no reason to research that issue. And there is no reason an average party encountering a simple clause incorporating AAA rules will immediately think to scour the F.3d to see whether agreeing to follow certain procedures for arbitration *also agrees to bargain away a judicial determination* of arbitrability. *E.g.*, *Allstate*, 171 F. Supp. 3d at 429.

In the end, respondent is a small, family-owned business with no lawyers or in-house counsel. It had no deep knowledge of the intricacies of federal arbitration law, much less any reason to even *think* about asking who decides arbitrability. *E.g.*, *Aguilera* v. *Matco Tools Corp.*, No. 19-1576, 2020 WL 1188142 (S.D. Cal. Mar. 12, 2020). There is no indication respondent understood it was doing anything besides what the contract said on its face—agreeing to arbitrate (*if there is arbitration*) under AAA rules.[11]

The contrary presumption flouts the law and common sense, and stands this Court's "clear and unmistakable" test on its head. Because there is no delegation at all

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drafters—all to somehow establish "clear and unmistakable evidence" of an issue the average party likely has never heard of.

[11] Indeed, given that the arbitration clause at issue is exclusively with Pelton, respondent likewise had no reason to believe that by expressly agreeing to arbitrate certain claims against its supplier, it was also impliedly agreeing to arbitrate antitrust claims against a competitor and non-signatory such as petitioner.

under the only sensible construction of the parties' agreement, the decision below should be affirmed.

II. BECAUSE THE CARVE-OUT PROVISION EXEMPTS THIS ACTION FROM ANY PLAUSIBLE DELEGATION, THE GATEWAY QUESTION SHOULD BE RESOLVED IN COURT

As explained above, the arbitration agreement is silent as to who decides arbitrability, and the mere incorporation of AAA rules is insufficient to constitute a delegation. But even if the AAA rules "clearly and unmistakably" delegated some gateway issues to the arbitrator, petitioner is still wrong that this agreement (and its express carveout notwithstanding) automatically delegates everything to the arbitrator.

A. Petitioner Wrongly Conflates The Bright Line Between Carveouts To The Scope Of *Arbitration* And Carveouts To The Scope of *Delegation*

First and foremost, there is less daylight between the parties' positions than petitioner suggests—largely because petitioner's primary submission is aimed at a strawman. The key is separating the critical line between carveouts applicable to *arbitration* clauses and carveouts applicable to *delegation* clauses. If the carveout applies to the scope of arbitration, then everyone agrees that the arbitrator makes the call: that is indeed the entire point of delegating the gateway issue in the first place. But where, as here, the carveout applies *to the delegation*, then the court makes the decision.

The only reason this strikes petitioner as "bizarre," "circular," and "incoheren[t]" (Br. 33, 36-37) is because the parties here *imposed the same carveout as to both arbitration and delegation*. Indeed, the arbitration clause is functionally identical to a contract with the following two provisions (if this contract had a delegation clause at all):

- *Except for actions seeking injunctive relief*, the parties agree to resolve any dispute by binding arbitration.
- *Except for actions seeking injunctive relief*, the parties agree to arbitrate arbitrability.

There is no plausible basis for refusing to enforce the parties' specific, express limit on the arbitrator's power. *Mastrobuono* v. *Shearson Lehman Hutton*, 514 U.S. 52, 57 (1995) ("parties are generally free to structure their arbitration agreements as they see fit"); see also *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662, 683 (2010). That does not "negate" the delegation clause (contra, *e.g.*, Pet. Br. 39); it simply negates any delegation of the *specific* topics that the parties withdrew for judicial disposition.

To be sure, petitioner is correct that this means that, in some cases, the overlap between the carveout and the delegation might be total. Pet. Br. 37. But that is so only *because the identical clause happens to limit both the arbitration clause and the delegation clause*. Petitioner may think it odd that a party would do such a thing, but petitioner simply overlooks the obvious answer: the reason the result is so "odd" is simply because petitioner is conjuring up a delegation where none exists, and reading an unremarkable reference to AAA rules as a fictional delegation that no rational party would ever intend or expect. Once the AAA clause is correctly construed, all petitioner's perceived problems evaporate.[12]

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[12] And where parties draft *express* delegation clauses, it is easy to avoid circularity issues. Take the same example as above: (i) "Except for actions seeking injunctive relief, the parties agree to resolve any dispute by binding arbitration"; and (ii) "The parties agree to arbitrate arbitrability." The express provision easily separates the carveout from the delegation, avoiding any overlap.

Petitioner's theory requires artificially divorcing a carveout from a delegation to which it textually attaches. By contrast, respondent's view reflects an administrable rule that respects the parties' intent but avoids the indefensible position of overriding and ignoring an *express* carveout to delegation (*e.g.*, "the parties agree the arbitrator decides arbitrability *unless* the case is filed on a Thursday, in which case the court decides arbitrability"). The Fifth Circuit was wrong to find any delegation at all in the mere reference to AAA rules; but the court was correct to apply the carveout to the (presumed) delegation.

B. Under Its Plain Text, The Carve-Out Clause Confirms That This Action Is Not Subject To Arbitration

With those clear principles in place, what remains is deciding the proper way to read this particular arbitration clause. And there is no plausible basis for refusing to apply the parenthetical carveout to each element of the single sentence in which it appears.

1. Petitioner's novel burden-shifting framework is suspect.

Petitioner is correct that the "clear and unmistakable" standard's primary justification is that parties are typically unaware of the delegation issue (*First Options*, 514 U.S. at 944-945)—and that justification may be diminished where parties expressly contemplate delegating questions to an arbitrator. Pet. Br. 24-31. But that still does not spare petitioner from satisfying a "heightened standard" in this case. *Rent-A-Center*, 561 U.S. at 69 n.1.

First, that is not the only justification for requiring "clear and unmistakable" evidence. That standard reflects the traditional default under the FAA's plain text and ordinary practice. Sections 3 and 4 contemplate a distinct gatekeeping role for the court (9 U.S.C. 3-4), and parties will naturally presume that courts, not arbitrators,

will decide whether they agreed to arbitrate in the first place. *Rent-A-Center*, 561 U.S. at 69 n.1; *First Options*, 514 U.S. at 945. So while a delegation agreement is indeed an "antecedent" agreement (*Schein I*, 139 S. Ct. at 529), it is not an agreement like any other: it targets a specific issue with a "strong pro-court presumption" (*Howsam*, 537 U.S. at 86), and parties aware of this Court's consistent practice would likely be surprised to learn that any mention of delegation suddenly tips the scales in favor of full delegation. *Id.* at 83 (requiring "clear and unmistakable evidence" where the parties "would likely have expected a court to have decided the gateway matter"); see also *First Options*, 514 U.S. at 944; *AT&T Techs.*, 475 U.S. at 649.

Second, while petitioner's argument has some force in the face of an *express* delegation, it carries little weight with *implied* delegations. As noted above, it will be the rare party who sees a bare reference to the AAA rules and has any idea they are giving away their rights to a judicial decision on arbitrability (Part I.B, *supra*)—especially when contrasted with an *express* carve-out that *specifically preserves their rights to pursue certain actions in court*. J.A. 114.

Indeed, when parties take care to limit the scope of a delegation, it necessarily means they wanted courts alone to resolve certain issues. It is not clear why an express withdrawal from arbitration should be construed in favor of arbitrability.

2. With or without any presumption, the carveout here plainly applies to the delegation clause.

a. In the same sentence that supposedly delegates arbitrability, the agreement carves out "actions seeking injunctive relief." J.A. 114. The structure and language of the carve-out removes such disputes not only from arbitration, but also from the AAA incorporation:

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

J.A. 114 (emphasis added).

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

b. This reading accords with traditional rules of grammar. The parenthetical "except for actions seeking injunctive relief" modifies the immediately preceding phrase—"[a]ny dispute arising under or related to this Agreement." See *Lockhart* v. *United States*, 136 S. Ct. 958, 962-963 (2016) (describing the "rule of the last antecedent"). Only those "dispute[s]"—as limited by the parenthetical phrase—"shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association." Because this is an "action[] seeking

injunctive relief," it is not a "dispute" to which the *AAA rules and any attendant delegation apply*.[13]

c. Given the language of the arbitration clause and the facts at issue here, it is implausible that the parties gave arbitrability *any* thought, much less the depth of thought necessary to invoke a presumption of arbitrability. There is no evidence that the parties negotiated the terms of the arbitration clause. There is no express delegation (though Danaher had multiple opportunities to insert such a clause). The AAA rules were not attached to any version of the agreement. Danaher, as the drafter, *chose* to put a parenthetical carve-out in the very sentence invoking the AAA rules.[14] To believe that respondent "focus[ed] upon [the arbitrability] question or upon the significance of having arbitrators decide the scope of their own powers" in this context—so much that respondent agreed to allow arbitrators to decide arbitrability even of disputes *expressly* carved out of the arbitration clause—is perplexing. There is little more "arcane" than a jurisdictional rule, buried in a larger set of AAA arbitration rules, which are

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[13] While that follows as a matter of plain text, it doubly follows under *First Options*: if the language of the arbitration clause leaves any "ambiguity" about whether the parties intended to delegate arbitrability, "clear and unmistakable" evidence is lacking, and the arbitrability question is for the court. *First Options*, 514 U.S. at 944. The arbitration clause is, at best, ambiguous whether the AAA rules—much less the AAA's jurisdictional rule specifically—apply to disputes carved out from arbitration. That flunks *First Option*s' heightened standard.

[14] There is no genuine dispute that Danaher drafted the agreement. The record shows that Danaher presented the 2009 and 2012 dealer agreements to respondent for signature. See D. Ct. Dkt. 21-2. Additionally, the fact that the agreement between Benco—another of Danaher's distributors—and Danaher contains "the same arbitration clause" as the agreement between respondent and Danaher, Benco Amicus Br. 8, is further evidence that Danaher drafted the clause.

referenced in (though not attached to) a sentence agreeing to arbitrate with an explicit carve-out for "actions seeking injunctive relief."

3. Petitioner's contrary reading is also inconsistent with basic contract-interpretation principles. "The FAA reflects the fundamental principle that arbitration is a matter of contract." *Rent-A-Center*, 561 U.S. at 67. So when interpreting arbitration agreements, "courts generally * * * should apply ordinary state-law principles that govern the formation of contracts." *First Options*, 514 U.S. at 944. One of those principles is that contracts must be "read as a whole and every part will be read with reference to the whole." 11 Williston on Contracts § 32:5 (4th ed.); see also Restatement (Second) of Contracts § 202. "The contract's meaning must be gathered from the entire context, and not from particular words, phrases, or clauses, or from detached or isolated portions of the contract. All the words in a contract are to be considered in determining its meaning, and the entire contract in all of its parts should be read and treated together." Am. Jur. § 366. "A party's intent is not determined by viewing a clause or provision in isolation, or in looking at detached portions of the contract * * * ." Am. Jur. § 367; see also C.J.S. § 416 ("A contract must be construed as a whole, and emphasis not given to particular provisions.").[15]

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[15] North Carolina law, which governs the agreement pursuant to a choice-of-law clause, recognizes these principles. *Certain Underwriters at Lloyd's London* v. *Hogan*, 556 S.E.2d 662, 666 (N.C. Ct. App. 2001) (Contracts must be "interpreted in context and construed in a manner that gives proper meaning and effect" to all of the contract's terms."); see also *Johnston Cty* v. *R.N. Rouse & Co.*, 414 S.E.2d 30, 34 (N.C. 1992) (explaining that courts must construe a contract "in a manner that gives effect to all of its provisions"); *Root* v. *Allstate Ins. Co.*, 158 S.E.2d 829, 833 (N.C. 1968) (interpreting lease only after "examination of the entire written lease").

In fact, this Court has previously refused to elevate one provision of a contract over others, even where one provision, taken alone, appears unambiguous. In *O'Brien* v. *Miller*, 168 U.S. 287 (1897), the Court found "no ambiguity in the words" of a specific clause. "But the question presented involves not the interpretation of this language apart from the whole agreement, but is, on the contrary, the ascertainment of the meaning of the entire contract." *Id.* at 297. It refused to allow "a few words" to "be segregated from the entire context," and instead reiterated "[t]he elementary canon of interpretation" that particular words may not "be isolatedly considered, but that the whole contract must be brought into view." *Ibid.*

Petitioner's proposed rule violates this "elementary canon" by reading the arbitration clause—indeed, constituting a single clause of a single *sentence*—piecemeal, rather than in context. Under petitioner's rule, a court would first read the sentence at issue ignoring the carveout and find "clear and unmistakable" delegation via reference to the AAA rules. Then, the court would re-read the same sentence, this time considering the carveout, looking for evidence to overcome the presumption of arbitrability. This makes no sense. That is not reading the contract as a whole. Rather, the court would be "isolatedly considering" a portion of a single sentence within a contract—the reference to AAA rules—and elevating that portion over all other aspects of even the very same sentence.

In any event, even were it appropriate to elevate one clause of a sentence over another, the specific typically controls the general. "When general and specific clauses conflict, the specific clause governs the meaning of the contract." Williston on Contracts § 32:10; see also *Hollerbach* v. *United States*, 233 U.S. 165, 172 (1914) (explaining that a "positive statement of the specifications" governed

over "general language of the other paragraphs"); *Wood-Hopkins Contracting Co.* v. *N.C. State Ports Auth.*, 202 S.E.2d 473, 476 (N.C. 1974) ("[W]hen general terms and specific statements are included in the same contract and there is a conflict, the general terms should give way to the specifics.").

Again, petitioner's approach entirely ignores this elementary principle of contract interpretation. According to petitioner, the contract at issue here *impliedly* delegates arbitrability, but the agreement also *expressly* excludes "actions seeking injunctive relief." Under petitioner's rule, a court would read and enforce the general (implied) delegation before considering the specific (express) carveout at all. The parties' specific decision to expressly exclude certain disputes trumps any sub silentio delegation by implication.

4. Petitioner, again, justifies its novel presumption-shifting scheme by claiming that applying the plain language of the parties' contract would lead to "bizarre" results. Petitioner is wrong.

Most of petitioner's complaints are a result, again, of Danaher's unusual drafting choices. Danaher chose to include the parenthetical carve out in the same sentence referencing AAA rules. Any overlap between the "who decides" question and the substantive arbitrability question is a result of that (unique) that drafting choice. If Danaher truly intended to delegate arbitrability disputes involving even the carveout clause, it could have drafted language that actually "clearly and unmistakably" delegated that question. It did not. Indeed, if anything, Danaher's choice should cause the court to wonder whether any delegation was intended at all (see Part I, *supra*), not double down on delegation by applying a presumption of arbitrability, as petitioner contends. Even more so given that courts construe ambiguities against the drafter. *T.M.C.S., Inc.* v.

Marco Contractors, Inc., 780 S.E.2d 588, 597 (N.C. Ct. App. 2015) ("Pursuant to well settled contract law principles, the language of [an] arbitration clause should be strictly construed against the drafter of the clause.").

These concerns are unlikely to be replicated in the mine-run of cases, notwithstanding petitioner's hyperbole (Pet. Br. 37). Unlike the "arising out of" language that petitioner uses as an example and that appears in many arbitration clauses, this case involves an *express* carve out in the *same sentence* as the purported delegation. Courts are perfectly capable of drawing a line between the former and the latter. It is not too much to ask that a court not send to arbitration actions that the parties expressly agreed would not go to arbitration (for arbitrability determinations or otherwise). After all, arbitration "is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration." *First Options*, 514 U.S. at 943. Respondent's position is simply that courts should apply the plain language of each contract, whatever that language might be.

Petitioner's reliance on *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), is misplaced. Most importantly, *Warrior & Gulf* had nothing to do with arbitrability delegation, see *id.* at 583 n.7, so it provides little insight into the relationship between a delegation clause and a carveout. As petitioner acknowledges, the Court "began from the presumption of arbitrability," Pet. Br. 34; it says nothing about the "clear and unmistakable evidence" standard. Even putting that aside, however, the Court recognized that an agreement could exclude certain topics from arbitration. *Warrior & Gulf*, 363 U.S. at 584-585. The Court found no such "express provision" in that case, which involved an exception for "matters which are strictly a function of management," an undefined but potentially broad term. *Id.* at

583-584. Here, by contrast, the carve-out language is explicit: the arbitration clause (and therefore any delegation) does not apply to "actions seeking injunctive relief."

This Court's subsequent decisions confirm that *Warrior & Gulf* does not stand for the proposition that courts must always order arbitration if the decision they are charged with making somehow involves a potentially arbitrable issue. *AT&T Technologies* v. *Communications Workers of America*, 475 U.S. 643 (1986), proves the point. In that case, the court of appeals ordered arbitration of arbitrability in part because "deciding the issue would entangle the court in interpretation of substantive provisions of the collective bargaining agreement and thereby involve consideration of the merits of the dispute." *Id.* at 647 (quoting court of appeals).

This Court reversed. It recognized that courts should not "rule on the potential merits of the underlying claims." 475 U.S. at 649. But it reiterated that "[i]t is the court's duty to interpret the agreement and to determine whether the parties intended to arbitrate [the] grievances" at issue. *Id.* at 651. The parties may draft a contract that involves some overlap between the arbitrability question and the merits question, but that does not allow courts to delegate to arbitrators an issue the parties did not agree to arbitrate.

5. It is petitioner's approach that would lead to illogical results. For example, imagine that respondent had pursued emergency injunctive relief to prevent Danaher from terminating its distribution contracts.[16] Such a

[16] Carveouts for emergency relief are common, because arbitration generally is not well-equipped to handle requests for emergency relief due to, for example, the delay inherent in identifying and appointing an arbitrator. See Christopher R. Drahozal & Stephen J. Ware, *Why Do Business Use (or Not Use) Arbitration Clauses?*, 25 Ohio St.

request indisputably would have fallen within the scope of the carveout, and thus would have to be resolved by a court.[17] See Pet. Br. 32 (conceding that the carveout would require a court to adjudicate the merits of a request for a preliminary injunction). But according to petitioner, before a court could decide the merits of respondent's request for a preliminary injunction, petitioner would be entitled to have an arbitrator decide "whether the action is one 'seeking injunctive relief.'" *Ibid.* This is so, petitioner says, because "a carve-out provision of the variety at issue here does not provide the requisite clarity" regarding "questions of arbitrability for the carved-out disputes." *Ibid.* So, petitioner says, a court must "permit the arbitrator to decide *all* questions of arbitrability" in this case. *Id.* at 32-33 (emphasis added). That means petitioner could put a stop to any request for emergency injunctive relief simply by demanding that the scope of the carve-out be put to the arbitrator. In other words, petitioner could force the detour to arbitration that the arbitration clause carve out was designed to avoid. That cannot be what the parties intended.

What is more, this same example illustrates why—contrary to petitioner's unsupported assertions—parties might want to divide responsibility for deciding arbitrability between courts and arbitrators. Doing so can minimize "bifurcation" costs—the cost of having the dispute split between two fora. Parties often prefer to seek

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J. on Disp. Resol. 433, 456-457 (2010); Christopher R. Drahozal & Erin O'Hara O'Connor, *Unbundling Procedure: Carve-Outs from Arbitration Clauses*, 66 Fla. L. Rev. 1945, 1958, 1967 (2014).

[17] While the carve-out clause certainly covers a request for emergency injunctive relief, it is also broader because Danaher drafted it to apply to any "action seeking injunctive relief," not just "claims for emergency injunctive relief" or similarly limited language. See *infra*; Pet. App. 14a-15a.

injunctive relief in court. Christopher R. Drahozal & Erin O'Hara O'Connor, *Unbundling Procedure: Carve-Outs from Arbitration Clauses*, 66 Fla. L. Rev. 1945, 1958, 1967 (2014). After parties initiate an action in one forum (such as a court in which one party seeks emergency injunctive relief) it may be more efficient for the parties to complete adjudication of their entire dispute in that same forum. *Ibid.* Doing so avoids having to redo the work, such as educating a new decisionmaker about the dispute. So it makes sense that parties who agree that actions seeking injunctive relief are not arbitrable would also agree not to delegate a related arbitrability dispute to the arbitrator.

If it were otherwise, a party would have to seek emergency injunctive relief in court, go to arbitration for an arbitrability ruling, and then go back to court, thereby incurring exactly the "bifurcation" costs parties seek to minimize. The parties can avoid that cost by agreeing to a carve-out from both the merits *and* delegation that encompasses the entire action, such as "actions seeking injunctive relief." *Id.* at 1998 ("[P]arties seemed to opt for court resolution of some claims in part to avoid having to shuffle back and forth between courts and arbitration when the claim is best enforced with injunctive relief."). And one way they might do so is by writing the carveout into the same sentence that both establishes the arbitrability and delegation of some disputes. In this way, the parties can keep their entire dispute in the courts (or arbitration, as the case may be), without redoing the same work twice in different tribunals.

6. Finally, even if the Court were to abandon its well-established "clear and unmistakable" test and replace it with petitioner's "presumption-shifting" test, that new test is satisfied here. The same language that carves out "actions for injunctive relief" from arbitration also carves out those actions from delegation. The carve-out is not

limited to "claims" for injunctive relief, or actions seeking "only" injunctive relief. See Pet. App. 14a. Thus, even if one presumes the *arbitrator* decides the gateway issue of arbitrability *unless* the parties "clearly reserved" the arbitrability question for the court, here the parties did indeed *clearly reserve the arbitrability question for the court*. They expressly carved out "actions seeking injunctive relief."

Petitioner may not like the contract's language, but that will sometimes happen when parties are strangers to an agreement. Nevertheless, arbitration remains a matter of contract, and courts are not permitted "to rewrite" an "unambiguous" arbitration clause. Pet. App. 15a. The FAA "requires courts to enforce the bargain of the parties to arbitrate, and 'not substitute [its] own views of economy and efficiency.'" *Dean Witter Reynolds Inc.* v. *Byrd*, 470 U.S. 213, 217 (1985) (alteration in original; citation omitted). Here, the parties expressly excluded "actions seeking injunctive relief" from both arbitration and delegation, and that action is binding under this Court's settled decisions.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

LEWIS T. LECLAIR
GARY CRUCIANI
CHELSEA A. PRIEST
MCKOOL SMITH, P.C.
300 Crescent Court, Ste. 1500
Dallas, TX 75201

DANIEL L. GEYSER
Counsel of Record
ALEXANDER DUBOSE &
JEFFERSON LLP
Walnut Glen Tower
8144 Walnut Hill Lane, Ste. 1000
Dallas, TX 75231
(214) 396-0441
dgeyser@adjtlaw.com

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