No.

In the Supreme Court of the United States

HENRY SCHEIN, INC., ET AL., PETITIONERS

v.

ARCHER AND WHITE SALES, INC.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Federal Arbitration Act permits a court to decline to enforce an agreement delegating questions of arbitrability to an arbitrator if the court concludes the claim of arbitrability is "wholly groundless."

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioners are Henry Schein, Inc.; Danaher Corporation; Instrumentarium Dental Inc.; Dental Equipment LLC; Kavo Dental Technologies, LLC; and Dental Imaging Technologies Corporation. Respondent is Archer and White Sales, Inc.

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

Instrumentarium Dental Inc.; Dental Equipment LLC; Kavo Dental Technologies, LLC; and Dental Imaging Technologies Corporation are wholly owned subsidiaries of petitioner Danaher Corporation. Danaher Corporation has no parent corporation, and no publicly held company holds 10% or more of its stock.

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Henry Schein, Inc.; Danaher Corporation; Instrumentarium Dental Inc.; Dental Equipment LLC; Kavo Dental Technologies, LLC; and Dental Imaging Technologies Corporation respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-17a) is reported at 878 F.3d 488. The district court's opinion denying petitioners' motions to compel arbitration (App., *infra*, 18a-38a) is unreported. The magistrate judge's order granting petitioners' motions (App., *infra*, 39a-44a) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 21, 2017. The jurisdiction of this Court is invoked under 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 presents a recognized and vitally important circuit conflict concerning the interpretation of the Federal Arbitration Act (FAA). Under the FAA, "parties can agree to arbitrate 'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." *Rent-A-Center, West, Inc.* v. *Jackson*, 561 U.S. 63, 68-69 (2010). This Court has held that "[a]n agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other." *Id.* at 70. The question presented is whether the FAA permits a court to decline to enforce an agreement delegating

questions of arbitrability to an arbitrator if the court concludes the claim of arbitrability is "wholly groundless."

Respondent is a former distributor of certain petitioners. Respondent's distributorship agreements required it to arbitrate disputes "arising under or related to" the agreements, including disputes over arbitrability. Respondent nevertheless filed a complaint in federal court, alleging that petitioners had violated federal and state antitrust laws by wrongfully restricting or terminating respondent's distributorship rights under the agreements. Petitioners moved to compel arbitration, citing the provisions in the parties' arbitration agreements delegating questions of arbitrability to an arbitrator.

The district court denied the motions to compel arbitration, and the court of appeals affirmed. The court of appeals invoked its own exception to the rule that parties may delegate questions of arbitrability to arbitrators—an exception that purportedly applies when a court analyzes the merits of the movant's arbitrability arguments and concludes they are "wholly groundless."

The court of appeals' decision exacerbates an entrenched split of authority in the federal courts of appeals on the validity of the "wholly groundless" exception. And it cannot be reconciled either with the FAA's text or with its "primary purpose": namely, to "ensure that private agreements to arbitrate are enforced according to their terms." *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682 (2010) (internal quotation marks and citations omitted). As it has in many other recent cases, this Court should grant certiorari to correct the lower courts' arbitration-unfriendly interpretation of the FAA and reaffirm the "emphatic federal policy in favor of arbitral dispute resolution." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985).

A. Background

Congress enacted the FAA almost a century ago to "reverse the longstanding judicial hostility to arbitration agreements." *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). Section 2 of the FAA—the Act's "primary substantive provision," *Moses H. Cone Memorial Hospital* v. *Mercury Construction*, 460 U.S. 1, 24 (1983)—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. Section 2 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).

Section 2 of the FAA requires courts to "place[] arbitration agreements on an equal footing with other contracts[] and * * * enforce them according to their terms." *Rent-A-Center*, 561 U.S. at 67. The FAA's command that courts rigorously enforce agreements to arbitrate according to their terms applies in disputes over "gateway" issues, such as whether a particular claim falls within the scope of the arbitration provision or whether a nonsignatory to the agreement is required to participate in arbitration. *Id.* at 69. And it applies to disputes over an equally important antecedent question: who decides such gateway issues, the court or the arbitrator? See *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 943-944 (1995).

Although courts, not arbitrators, presumptively resolve gateway disputes, parties may supersede that gen-

eral rule by "clearly and unmistakably" agreeing to "arbitrate arbitrability." *First Options*, 514 U.S. at 943. One way for parties to accomplish that result is by including a so-called "delegation provision" in their arbitration agreement. A delegation provision is "simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other." *Rent-A-Center*, 561 U.S. at 70. When parties include such a provision in their arbitration agreement, the delegation of authority to the arbitrator applies to virtually all gateway disputes, including disputes over "whether their agreement covers a particular controversy." *Id.* at 68-69; see *BG Group, PLC* v. *Republic of Argentina*, 134 S. Ct. 1198, 1206 (2014).

A contract need not contain an express delegation provision to "clearly and unmistakably" delegate arbitrability questions to an arbitrator. As every court of appeals to consider the question has held, an agreement incorporating rules that themselves delegate arbitrability to the arbitrator, like the rules of the American Arbitration Association (AAA), provides the requisite clear and unmistakable delegation. See, *e.g.*, *Belnap* v. *Iasis Healthcare*, 844 F.3d 1272, 1283-1284 (10th Cir. 2017).

B. Facts And Procedural History

1. Petitioners manufacture and distribute dental equipment. During the relevant period, respondent distributed, sold, and serviced dental equipment on behalf of many different companies, including some of the petitioners. C.A. App. 18-20.

In 2012, respondent filed suit against petitioners 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. C.A. App.

18. The complaint sought "tens of millions of dollars" in damages stemming from petitioners' alleged conspiracy to boycott respondent and to restrict respondent's sales territories under certain distribution agreements. *Id.* at 16-17, 24-30. The complaint also included a summary request for unspecified injunctive relief, stating as follows:

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

Id. at 35-36. The complaint contained no further allegations concerning the requirements for obtaining injunctive relief. Since initiating this suit, respondent has never sought any form of preliminary or other injunctive relief.

2. Petitioners moved to compel arbitration of respondent's claims. C.A. App. 68-156, 166-181; see 9 U.S.C. 4. Petitioners' motions were based on respondent's distribution agreements, which provided in relevant part:

> This Agreement shall be governed by the laws of the State of North Carolina. 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. The place of arbitration shall be Charlotte, North Carolina.

C.A. App. 504.

Respondent opposed petitioners' motions, claiming that the boilerplate request for injunctive relief in its complaint rendered the *entire* dispute triable to a jury rather than an arbitrator. In response, petitioners noted that, where, as here, an arbitration provision contains a carve-

out for injunctive relief, courts routinely read the exception to permit injunctive relief from a court (1) on a preliminary basis to preserve the status quo *pending* arbitration or (2) on a permanent basis *after* the plaintiff secures an arbitration award in its favor. See, *e.g.*, *Erving* v. *Virginia Squires Basketball Club*, 468 F.2d 1064, 1067 (2d Cir. 1972); *Lawrence* v. *Comprehensive Business Services Co.*, 833 F.2d 1159, 1163 (5th Cir. 1987); *Sauer-Getriebe KG* v. *White Hydraulics, Inc.*, 715 F.2d 348, 350 (7th Cir. 1983); cert denied, 464 U.S. 1070 (1984).

A magistrate judge—to whom the case had been assigned for all pretrial purposes—granted petitioners' motions to compel arbitration. App., *infra*, 39a-44a. The magistrate judge explained that, while on "the most superficial level, [respondent's] lawsuit is clearly an action seeking injunctive relief," the complaint "does not seek *only* injunctive relief, and the Court is persuaded that damages * * * are the predominant relief sought." *Id.* at 41a. The magistrate judge accordingly determined that "there is in this case a plausible construction [of the arbitration provision] calling for arbitration." *Id.* at 41a-42a. On that basis, the magistrate judge concluded that the question whether the agreements' carve-out for actions seeking injunctive relief applied to petitioners' claims "should properly be left for the arbitrator to decide." *Id.* at 42a.

3. Respondent asked the district court to reconsider the magistrate judge's order compelling arbitration. More than three years later, the district court vacated the magistrate judge's order and denied petitioners' motions to compel arbitration. App., *infra*, 18a-38a. Explicitly interpreting the "[s]cope of [the] [a]rbitration [c]lause," *id.* at 26a, the court reasoned that the agreements' exception

for "actions seeking injunctive relief" meant that respondent's inclusion of a perfunctory request for injunctive relief entitled respondent to a jury trial on the entirety of its claims. *Id.* at 27a-28a. Of particular relevance here, the court further determined that any contrary reading of the agreements' arbitration provision would be "wholly groundless." *Id.* at 34a-37a.

4. Petitioners filed an interlocutory appeal under the FAA, see 9 U.S.C. 16(a), and the court of appeals affirmed. App., *infra*, 1a-17a.

The court of appeals based its decision on its earlier holding in *Douglas* v. *Regions Bank*, 757 F.3d 460 (5th Cir. 2014), that, "[i]f an 'assertion of arbitrability [is] wholly groundless,' the court need not submit the issue of arbitrability to the arbitrator." App., *infra*, 11a (quoting *Douglas*, 757 F.3d at 463). In *Douglas*, as in this case, the court of appeals considered whether to compel arbitration based on the existence of a delegation provision in the parties' arbitration agreement. The court of appeals acknowledged that, under this Court's precedents, "[d]elegation provisions * * * normally require an arbitrator to decide in the first instance whether a dispute falls within the scope of the arbitration provision." 757 F.3d at 462. But relying on decisions from the Federal Circuit, the court of appeals purported to identify an exception to that rule where "the argument that the claim at hand is within the scope of the arbitration agreement is 'wholly groundless.'" *Id.* at 464 (citing *Qualcomm Inc.* v. *Nokia Corp.*, 466 F.3d 1366, 1371 (Fed. Cir. 2006); *Agere Systems, Inc.* v. *Samsung Electronics Co.*, 560 F.3d 337 (5th Cir. 2009)). The court of appeals adopted this test over a dissent from Judge Dennis, who contended that the

court's newfound "wholly groundless" exception "appear[ed] to be contrary to Supreme Court authority." *Ibid.* (Dennis, J., dissenting).

In this case, petitioners argued to the court of appeals that applying the "wholly groundless" standard "would allow the court to construe the bounds of [the] arbitration clause before an arbitrator can do so—effectively obviating the entire purpose of delegating the gateway question to the arbitrator in the first place." App., *infra*, 14a. But the court rejected that argument, concluding that, "if the ['wholly groundless'] doctrine is to have any teeth, it must apply where, as here, an arbitration clause expressly excludes certain types of disputes." *Id.* at 15a-16a. The court went on to determine, based on its own interpretation of "the four corners of the contract," *id.* at 16a, that there was "no plausible argument that the arbitration clause applies here to an 'action seeking injunctive relief,'" *ibid.* The court of appeals reached that conclusion despite the magistrate judge's contrary determination that "there is in this case a plausible construction [of the arbitration clause] calling for arbitration." *Id.* at 41a-42a.[1]

[1] The court of appeals separately considered whether the parties had "clearly and unmistakably" delegated the issues of arbitrability to the arbitrator. App., *infra*, 6a-11a. Petitioners contended that, because the agreements in question expressly incorporated AAA rules, they contained the requisite delegation of arbitrability disputes. *Id.* at 8a-9a. Respondents disagreed, arguing that the agreements' incorporation of AAA rules should be interpreted as applying only to cases outside the carve-out for "actions seeking injunctive relief." *Id.* at 9a-10a. The court of appeals determined that it "need not decide which reading to adopt here because *Douglas* provides us with another avenue to resolve this issue: the 'wholly groundless' inquiry." *Id.* at 11a.

5. Petitioners sought a stay of further proceedings in the district court while their appeal was pending. The district court denied petitioners' motion, and the court of appeals (after carrying the stay motion with the merits) denied petitioners' motion as well. App., *infra*, 45a. Petitioners thereafter filed an application with this Court seeking a stay of proceedings pending a petition for a writ of certiorari (No. 17A859). On March 2, 2018, the Court granted petitioners' application and entered a stay pending the disposition of this petition.

REASONS FOR GRANTING THE PETITION

This case presents a straightforward conflict among the courts of appeals on an important and frequently recurring question involving the FAA. There is an entrenched conflict on the question whether the FAA permits a court to decline to enforce an agreement delegating questions of arbitrability to an arbitrator if the court concludes the claim of arbitrability is "wholly groundless." Four courts of appeals, including the court below, have held that courts may resolve gateway disputes over arbitrability themselves, even if the arbitration agreement contains a delegation provision, if the court determines that the underlying claim for arbitration is "wholly groundless." But two other courts of appeals have held that, under this Court's precedents, disputes about arbitrability must be decided by an arbitrator whenever the parties have delegated that issue to an arbitrator, regardless of the court's views about the merits of the arbitrability issue. Only this Court can resolve that conflict, and this case is an excellent vehicle in which to do so. The petition for a writ of certiorari should therefore be granted.

A. The Decision Below Conflicts With The Decisions Of Other Courts of Appeals

The court of appeals' decision reinforces an existing conflict among the circuits on the question whether the FAA permits a court to decline to enforce an agreement delegating questions of arbitrability to an arbitrator if the court concludes the claim of arbitrability is "wholly groundless." Other courts of appeals have expressly recognized the conflict among the circuits on this issue, see, *e.g.*, *Jones* v. *Waffle House, Inc.*, 866 F.3d 1257, 1268-1269 (11th Cir. 2017); *Simply Wireless, Inc.* v. *T-Mobile US, Inc.*, 877 F.3d 522, 528 (4th Cir. 2017), as have legal commentators, see Neal Ross Marder et al., *Waffle House Arbitration Ruling May Reach Past Eleventh Circuit*, Law360 (Aug. 17, 2017) <tinyurl.com/wafflehouseruling>. That conflict, on an important question of federal law, plainly warrants the Court's review.

1. Four courts of appeals, including the court of appeals in this case, have held that a court may decline to compel arbitration, despite the parties' delegation of questions of arbitrability to an arbitrator, if the court concludes that the claim for arbitration is "wholly groundless."

In the earliest of those decisions, *Qualcomm Inc.* v. *Nokia Corp.*, 466 F.3d 1366 (Fed. Cir. 2006), a patentee filed suit against a competitor alleging infringement of patents related to a particular technology. See *id.* at 1368-1369. The defendant moved to compel arbitration and to stay the litigation, citing an arbitration provision in the parties' license agreement concerning a different technology. See *id.* at 1369. A divided panel of the Federal Circuit vacated the district court's order denying a stay, concluding that the court had erred in believing that it was

required to rule on the arbitrability of the defendant's defenses itself. See *id.* at 1374. The Federal Circuit stated that the court should first have considered "who has the primary power to decide arbitrability under the parties' agreement." *Id.* at 1371. Pertinently for present purposes, the Federal Circuit added that, if the court determined that the parties did intend to delegate the power to decide arbitrability to an arbitrator, "then the court should perform a second, more limited inquiry to determine whether the assertion of arbitrability is 'wholly groundless.'" *Ibid.* (quoting *Dream Theater, Inc.* v. *Dream Theater*, 21 Cal. Rptr. 3d 322, 326 (Cal. Ct. App. 2004)).

The Sixth Circuit adopted a materially identical standard in *Turi* v. *Main St. Adoption Services, LLP*, 633 F.3d 496 (2011). There, the defendants sought to compel arbitration based on a provision requiring arbitration of "[a]ny controversy or claim arising out of th[e] agreement." *Id.* at 506. The district court denied the defendants' motion, and the Sixth Circuit affirmed. See *id.* at 499. The Sixth Circuit recognized that "the question of whether a particular dispute is arbitrable is distinct from the issue of who should decide that question." *Id.* at 511. But like the Federal Circuit in *Qualcomm*, the Sixth Circuit reasoned that, "even where the parties expressly delegate to the arbitrator the authority to decide the arbitrability of the claims related to the parties' arbitration agreement, this delegation applies only to claims that are at least *arguably* covered by the agreement." *Ibid.* The Sixth Circuit went on to conclude that, although some of the plaintiffs' claims were clearly covered by the arbitration provisions, others were clearly not, thus obviating the "need for an arbitrator to decide the arbitrability of any of the plaintiffs' claims." *Ibid.*

In *Douglas*, *supra*, a divided panel of the Fifth Circuit joined those circuits in adopting the "wholly groundless" exception. Citing the Federal Circuit's *Qualcomm* decision, the Fifth Circuit determined that, "even *if* there is a delegation provision" in the parties' agreement, "the court must ask whether the averment that the claim falls within the scope of the arbitration agreement is wholly groundless." 757 F.3d at 464. The court determined that the defendant's motion to compel arbitration in that case rested on a "wholly groundless" interpretation of the arbitration agreement because the plaintiff's claim "has nothing whatsoever to do with her arbitration agreement." *Ibid.*

Judge Dennis dissented. He contended that the "wholly groundless" test "appear[ed] to be contrary to Supreme Court precedent" holding that, "in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims." 757 F.3d at 468 (quoting *AT&T Technologies, Inc.* v. *Communications Workers of America*, 475 U.S. 643, 649 (1986)). He added that "the Supreme Court would likely reject the majority's approach as being contrary to its previous decisions." *Ibid.*

Most recently, in *Simply Wireless*, the Fourth Circuit held that "a district court must give effect to a contractual provision clearly and unmistakably delegating questions of arbitrability to an arbitrator, unless it is clear that the claim of arbitrability is wholly groundless." 877 F.3d at 528 (internal quotation marks and citation omitted). The Fourth Circuit noted the existence of a circuit conflict on the validity of the "wholly groundless" exception, *id.* at 528 n.5, but nevertheless reasoned, relying on the Fifth Circuit's decision in *Douglas*, that a court should not enforce a delegation provision "when a party's assertion that

a claim falls within an arbitration clause is frivolous or otherwise illegitimate," *id.* at 529.

2. The preceding decisions of the Fourth, Fifth, Sixth, and Federal Circuits conflict with decisions of the Tenth and Eleventh Circuits.

In *Belnap* v. *Iasis Healthcare*, 844 F.3d 1272 (2017), the Tenth Circuit reversed a district court's denial of a motion to compel arbitration of a dispute between a surgeon and his employer. See *id.* at 1274. The plaintiff "urge[d]" the Tenth Circuit "to adopt the 'wholly groundless' approach of the Fifth, Sixth, and Federal Circuits." *Id.* at 1285. But "[h]aving thoroughly considered its merits," the Tenth Circuit "decline[d] to adopt" the "wholly groundless" exception. *Id.* at 1286. The Tenth Circuit noted that such an exception "appears to be in tension with language of the Supreme Court's arbitration decisions—in particular, with the Court's express instruction that when parties have agreed to submit an issue to arbitration, courts must compel that issue to arbitration without regard to its merits." *Ibid.* Reviewing this Court's decisions, the Tenth Circuit explained that the Court had "made clear that when parties agree to submit an issue to arbitration, courts are bound to effectuate the parties' intent by compelling arbitration—no matter what the court thinks about the merits of the issue." *Id.* at 1287 (footnote omitted).

In *Jones*, the Eleventh Circuit "join[ed] the Tenth Circuit in declining to adopt * * * the wholly groundless exception." 866 F.3d at 1269. Like the Tenth Circuit, the Eleventh Circuit reasoned that the "wholly groundless" exception "runs against the Supreme Court's unambiguous instruction that lower courts may not 'delve into the merits of the dispute.'" *Id.* at 1269 (quoting *Douglas*, 757 F.3d at 468 (Dennis, J., dissenting)). The Eleventh Circuit

observed that enforcing delegation provisions without regard to the merits of the underlying dispute was "altogether consonant with the FAA's 'liberal federal policy favoring arbitration agreements' " and its "overarching purpose" of "ensur[ing] the enforcement of arbitration agreements according to their terms." *Id.* at 1270 (quoting *Moses H. Cone*, 460 U.S. at 24, and *AT&T Mobility*, 563 U.S. at 344). The court added that "concerns about efficiency cannot justify adopting the wholly groundless exception"; even if questions of judicial economy could be considered, it was "by no means clear that the courts would save time by initially deciding the gateway questions rather than referring them to the arbitrator for resolution." *Ibid.*

3. There can be little doubt that there is a substantial circuit conflict on the question presented, or that the question is ripe for the Court's review. Decisions from six courts of appeals have fully developed the relevant arguments on both sides of the question. And given the depth of the conflict, there is no realistic prospect that it will resolve itself without the Court's intervention. Further review is therefore warranted.

B. The Decision Below Is Incorrect

This Court has repeatedly instructed lower courts to enforce arbitration agreements according to their terms. See, *e.g.*, *American Express Co.* v. *Italian Colors Restaurant*, 570 U.S. 228, 233 (2013); *CompuCredit Corp.* v. *Greenwood*, 565 U.S. 95, 98 (2012); *AT&T Mobility*, 563 U.S. at 339; *Rent-A-Center*, 561 U.S. at 67. The court of appeals ignored that emphatic instruction and instead held that courts may decide gateway questions of arbitrability themselves, even when the parties have delegated the resolution of arbitrability disputes to an arbitrator. That holding cannot stand.

1. "[A]rbitration is simply a matter of contract between the parties." *First Options*, 514 U.S. at 943. Consistent with that principle, parties may "agree to arbitrate 'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." *Rent-A-Center*, 561 U.S. at 68-69. "Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, so the question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about *that* matter." *First Options*, 514 U.S. at 943. And if the parties agree to arbitrate arbitrability, that agreement must be enforced according to its terms under the FAA. See *Rent-A-Center*, 561 U.S. at 70.

In addition, this Court has mandated that an arbitration agreement should be strictly enforced regardless of a court's views of the merits of the claim made by the party seeking to compel arbitration. For example, in *AT&T Technologies, Inc.* v. *Communications Workers of America*, 475 U.S. 643 (1986), the Court explained that the requirement to compel arbitration under valid agreements applies "whether the claims of the party seeking arbitration are "'arguable' or not, indeed even if it appears to the court to be frivolous." *Id.* at 649-650. Whatever the merits of the movant's claim, "[t]he courts * * * have no business weighing the merits of the grievance," because "[t]he agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious." *Id.* at 650.

2. Despite this Court's clear holdings that parties are free to delegate threshold disputes of arbitrability to arbitrators, the court of appeals refused to enforce the delegation provision at issue in this case solely on the ground that petitioners' claim for arbitrability was "wholly

groundless." App., *infra*, 11a-16a. That holding cannot be reconciled with the FAA or with this Court's decisions applying it.

a. First and foremost, the court of appeals' decision finds no basis in the text of the FAA. Section 2 of the FAA establishes that arbitration agreements "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. That provision does not authorize judicial interference with arbitration agreements; rather, it simply "places arbitration agreements on equal footing with all other contracts." *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440, 443 (2006). And it is undisputed that one party's belief that another party's claims under a contract are "wholly groundless" is not a valid basis for revoking the contract entirely. To the contrary, as explained above, the FAA directs courts to enforce a party's claim for arbitration "even if it appears to the court to be frivolous." *AT&T Technologies*, 475 U.S. at 649-650. Under that rule, "if a court determines that there is clear and unmistakable evidence that the parties agreed to arbitrate arbitrability but nevertheless believes that an underlying claim is almost certainly not subject to arbitration, the court must still order the parties to arbitrate arbitrability." *Douglas*, 757 F.3d at 468 (Dennis, J., dissenting).

In adopting and applying the "wholly groundless" exception, the court of appeals conflated the question of who *decides* arbitrability with the discrete question of who *prevails* on arbitrability. Because the parties here have already answered the first question and assigned responsibility for resolving arbitrability disputes to the arbitrator, there was no need for the court of appeals to reach the second question. The court did so anyway, engaging in an

extended analysis of whether petitioners' claim found "footing within the four corners of the contract." App., *infra*, 16a.

The court of appeals thereby violated the general principle that, "in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims." *AT&T Technologies*, 475 U.S. at 649. It cannot seriously be disputed that that is exactly what the court of appeals did; indeed, in *Douglas*, the court of appeals forthrightly acknowledged that the "wholly groundless" exception "necessarily requires the courts to examine and, to a limited extent, construe the underlying agreement." 757 F.3d at 464. As this Court has admonished, however, that is exactly what lower courts should avoid doing in cases in which the parties have agreed to arbitrate.

b. The "wholly groundless" exception is also inconsistent with the "liberal federal policy favoring arbitration agreements" embodied in the FAA. *Moses H. Cone*, 460 U.S. at 24. "By its terms, the [FAA] leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213, 218 (1985).

The court of appeals acknowledged that policy in the decision below, yet reasoned that enforcing the arbitration provision would require it to "override the clear intent of the parties, or reach a result inconsistent with the plain text of the contract." App., *infra*, 16a (emphasis omitted) (quoting *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279, 294 (2002)). But again, under the parties' agreements, assessing intent and deciding what is or is not "inconsistent with the plain text of the contract" are tasks for

the arbitrator. The court of appeals usurped that authority, elevating its own views over the parties' actual intent as documented in their agreements to arbitrate arbitrability.

To be sure, cases may arise in which a party seeks to compel arbitration for reasons that could be considered "wholly groundless" under any definition of that term. But that hardly means that the party resisting arbitration will invariably be forced to arbitrate against its will. It is a foundational premise of the FAA that arbitrators will be "competent, conscientious, and impartial," *Mitsubishi Motors*, 473 U.S. at 634, and fully capable of deciding even the most complex issues, see *Shearson/American Express, Inc.* v. *McMahon*, 482 U.S. 220, 232 (1987). Courts must presume that arbitrators can be trusted faithfully to analyze the scope of the disputed provision and to refuse to allow arbitration of claims that fall outside it. The "wholly groundless" exception rejects that presumption, and in that respect is simply a new way of expressing the age-old "judicial hostility to arbitration." *Green Tree Financial Corp.-Alabama* v. *Randolph*, 531 U.S. 79, 89 (2000).

In any event, courts "cannot rely on * * * judicial policy concern[s]" to refuse to honor arbitration agreements. *14 Penn Plaza LLC* v. *Pyett*, 556 U.S. 247, 270 (2009). A party that proves the existence of a valid arbitration agreement is entitled to "an order directing that such arbitration proceed *in the manner provided for in such agreement*." 9 U.S.C. 4 (emphasis added). And that is true despite the possibility that a court might later disagree with the arbitrator's assessment of arbitrability. When the parties have clearly and unmistakably delegated the question of arbitrability to an arbitrator, the initial decision is the arbitrator's—and the arbitrator's

alone—to make. See *Dean Witter Reynolds*, 470 U.S. at 217.

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

The question presented in this case is a recurring one of substantial legal and practical importance. The Court's intervention is necessary to safeguard the FAA's commitment to the enforceability of commercial arbitration agreements and to provide clarity and uniformity in the law. This case, which cleanly presents the question, is an excellent vehicle for the Court's review.

1. As demonstrated by this Court's frequent grants of review in cases involving the FAA, commercial arbitration is a critical part of our Nation's legal system. Among other valuable benefits, arbitration agreements allow private parties to resolve a broad range of disputes while avoiding the costs associated with traditional litigation. Parties frequently seek to maximize those efficiencies by delegating questions of arbitrability to the arbitrator as well.

Under the "wholly groundless" test adopted by the court of appeals, however, a court may effectively nullify an arbitration agreement whenever it concludes, based on its own interpretation of the arbitration provision, that there is not "a legitimate argument that th[e] arbitration clause covers the present dispute." App., *infra*, 11a (alteration in original). The predictable upshot of that approach would be to unleash a wave of potentially protracted "mini-trials" over arbitrability in the district courts, "unnecessarily complicating the law and breeding litigation from a statute that seeks to avoid it." *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 275 (1995).

This case well illustrates that concern. Petitioners first moved to compel arbitration in 2012. Yet more than five years later—a period of time long enough for the parties' dispute to have been arbitrated several times over—petitioners, respondent, and the courts are still attempting to resolve the threshold question of who should decide arbitrability. The court of appeals' adoption of the "wholly groundless" exception has thus effectively nullified the very efficiencies that led the parties to agree to arbitration in the first place. Absent this Court's intervention, more parties who seek to arbitrate will similarly be forced to expend significant time and money simply to enforce their arbitration clauses as written.

The deepening circuit conflict on this question has also upended parties' settled expectations regarding the enforceability of arbitration agreements. Numerous commentators have recognized "the uncertainty created by this circuit split." Karen Chesley, *Who Determines If A Dispute Is Arbitrable*, Nat'l L.J. (Nov. 16, 2017); see also, *e.g.*, Marder, *supra*; David Horton, *Arbitration About Arbitration*, 70 Stan. L. Rev. 363, 371 & n.54 (2018); Liz Kramer, *Tenth Circuit Resolves One Arbitrability Circuit Split, But Creates Another*, Arbitration Nation (Jan. 26, 2017) <tinyurl.com/arbitrationnation>.

The uncertainty is exacerbated by the vagueness of the "wholly groundless" inquiry itself. The facts of this case are again instructive: the magistrate judge expressly found that there was a plausible construction of the parties' agreement that required arbitration of respondent's claims, but the district court and the court of appeals reached the opposite conclusion on the same record. Unless this Court acts, parties who have bargained for arbitration agreements that include delegation provisions will

be unsure whether those provisions are binding and enforceable. That result is contrary to the FAA's "principal purpose" of "ensur[ing] that private arbitration agreements are enforced according to their terms." *AT&T Mobility*, 563 U.S. at 344.

In addition, the circuit conflict on the validity of the "wholly groundless" exception will "encourage and reward forum shopping." *Southland Corp.* v. *Keating*, 465 U.S. 1, 15 (1984). As matters currently stand, indisputably valid delegation provisions in arbitration agreements are always enforceable in some circuits, but only sometimes enforceable in others. Courts in the latter circuits (such as the Eastern District of Texas, where this case was litigated) will accordingly become the forums of choice for plaintiffs seeking to capitalize on "judicial hostility to arbitration agreements." *Gilmer*, 500 U.S. at 24. Inconsistency of that sort is intolerable under the FAA, which was intended to establish nationwide standards for the enforcement of arbitration agreements. Indeed, this Court routinely grants certiorari even where a circuit conflict is shallow (or non-existent) when the question presented concerns the interpretation of the FAA. See *New Prime Inc.* v. *Oliveira*, cert. granted, No. 17-340 (Feb. 26, 2018);[2] *Italian Colors*, 570 U.S. at 228; *AT&T Mobility*, *supra*; *Stolt-Nielsen S.A.*, 559 U.S. at 662. In light of that practice, this case, which presents a clear and important

[2] *New Prime* presents a distinct question from the one in this case, but it likewise concerns the circumstances under which a court must enforce a valid delegation provision in an arbitration agreement. See Pet. at i, *New Prime*, *supra* (No. 17-340). If the Court grants the instant petition, it may wish to order that petitioners' case and *New Prime* be argued on the same day in October Term 2018, allowing the Court to consider the questions in the two cases at the same time.

conflict involving six circuits, cries out for the Court's review.

2. This case is an apt vehicle in which to decide the question presented. Whether the "wholly groundless" exception is consistent with the FAA is a pure question of law, and it formed the sole basis for the court of appeals' decision below. As such, there is no threshold obstacle to reviewing and resolving that question in this case. In addition, the courts of appeals have comprehensively analyzed the arguments for and against the existence of a "wholly groundless" exception to arbitrability. Accordingly, this case provides the Court with an excellent opportunity to consider and resolve the question presented.

There is no basis in law or logic for imposing on the FAA an exception for "wholly groundless" claims of arbitrability. The court of appeals' contrary decision was erroneous, and the Court should grant the petition for certiorari to correct that error and resolve a circuit conflict that is affecting parties to arbitration agreements across the country.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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