No. 17-1272

In the Supreme Court of the United States

HENRY SCHEIN, INC., ET AL., PETITIONERS

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

DANIEL L. GEYSER
GEYSER P.C.
One Energy Square
4925 Greenville Ave., Ste. 200
Dallas, TX 75206

LEWIS T. LECLAIR
Counsel of Record
CHARLES E. FOWLER, JR.
CHELSEA A. PRIEST
MCKOOL SMITH, P.C.
300 Crescent Court, Ste. 1500
Dallas, TX 75201
(214) 978-4984
lleclair@mckoolsmith.com

QUESTION PRESENTED

The Federal Arbitration Act (FAA) authorizes parties "aggrieved" by the "failure, neglect, or refusal of another to arbitrate under a written agreement" to "petition" for an order compelling arbitration. 9 U.S.C. 4. It further instructs courts to grant relief "upon being satisfied" of the counterparty's "failure to comply." *Ibid.*

The question presented is:

Whether the FAA requires courts to compel arbitration where the ultimate contention that the dispute is subject to arbitration is "[im]plausible," "without merit," and "wholly groundless."

PARTIES TO THE PROCEEDING BELOW AND RULE 29.6 STATEMENT

Petitioners are Henry Schein, Inc., Danaher Corporation, Instrumentarium Dental Inc., Dental Equipment LLC, Kavo Dental Technologies, LLC, and Dental Imaging Technologies Corporation, the appellants below and defendants in the district court.

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

TABLE OF CONTENTS

Page

Table of contents—continued:

TABLE OF AUTHORITIES

Cases:

Page

Cases—continued:

Page

Cases—continued:

Statutes and rule:

Miscellanoues:

Page

Miscellaneous—continued:

In the Supreme Court of the United States

No. 17-1272

HENRY SCHEIN, INC., ET AL., PETITIONERS

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

INTRODUCTION

This case involves the "wholly groundless" exception to arbitration demands: even if parties have generally agreed to let an arbitrator decide if a dispute is subject to arbitration, courts are not required to compel arbitration where the claim of arbitrability is "[im]plausible," "without merit," and "wholly groundless."

Contrary to petitioners' contention, this longstanding rule is sound. It is supported by the Federal Arbitration Act's plain text, structure, purpose, and history. It enforces basic principles of contract law, promotes traditional litigation norms, and reflects simple common sense. It prevents abusive litigation tactics and avoids a pointless detour for an arbitrator to confirm what everyone already knows: the dispute at issue is not even plausibly subject to arbitration.

Petitioners insist that the sky will fall unless courts are forced to reward frivolous, illegitimate arbitration demands. Yet the "wholly groundless" doctrine has been applied in multiple circuits for decades, and petitioners have not mustered even the slightest showing that it has interfered with the effective arbitration of disputes. Courts have routinely, and faithfully, reserved the exception for the rarest of cases; *any* legitimate argument defeats its application. This established doctrine simply recognizes the good faith inherent in all contracts and Congress's unwillingness to impose pointless burdens on parties and the courts.

As the court of appeals stated unequivocally, had petitioners below offered even a plausible reading of the contract, the court would have compelled arbitration. Their aggressive attempt to rewrite the contract's unambiguous terms flunked that exceptionally low bar. The "wholly groundless" doctrine protects the integrity of the parties' agreement without casting any doubt on the viability of arbitration as a useful mechanism of dispute resolution. Petitioners' contrary view, by contrast, is inconsistent with the FAA and its animating principles. The judgment below should be affirmed.

STATUTORY PROVISIONS INVOLVED

In addition to those provisions reproduced in petitioners' brief (at 2-3), Section 9 of the Federal Arbitration Act, 9 U.S.C. 9, provides in pertinent part:

> If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award,

> and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title * * * .

And Section 10 of the Federal Arbitration Act, 9 U.S.C. 10, provides in pertinent part:

> (a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—
>
> * * * * *
>
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
>
> * * * * *

STATEMENT

1. This case arises out of an antitrust conspiracy in the market for dental equipment and supplies. Respondent is a small, family-owned distributor in the industry. C.A. App. 21. Unlike most of its competitors, respondent offers low prices by using e-commerce to reduce its overhead. *Id.* at 21-22. Unnerved by this competition, respondent's larger competitors (including petitioner Henry Schein, Inc.) conspired to maintain supracompetitive margins by not competing on price. *Id.* at 33-34. To protect these margins, Schein and its co-conspirators pressured major manufacturers, including certain petitioners here, by threatening to drop their products unless they stopped working with low-margin distributors, including respondent. *Ibid.* Because manufacturers are dependent on major distributors for sales, the manufacturers fell in line and joined the

anticompetitive conspiracy. By 2002, manufacturers began restricting or terminating respondent's sales territories. And by 2014, Danaher Corporation and its subsidiaries (also petitioners here) completely terminated respondent's distribution rights. To this day, manufacturers continue to restrict respondent's ability to distribute products due to threats from Schein and its co-conspirators.

The harm from petitioners' conduct is extensive, hurting other low-margin distributors and also dentists (who, as the end users, ultimately pay inflated prices). Petitioners' conduct has prompted investigations by the FBI, the FTC, the Texas Attorney General, and the Arizona Attorney General, as well as an antitrust lawsuit by a class of dentists who purchased overpriced dental products (and recently entered a tentative $80 million settlement, see Jeff Overley, *Dentists Get $80M From Supply Cos. To End Collusion Case*, Law360 (Aug. 30, 2018) < https://tinyurl.com/80Msettlement>).[1]

After enduring this illegal conduct for years (with no end in sight), respondent sued petitioners in August 2012 for violating the Sherman Act. C.A. App. 16. Respondent sought both damages and "injunctive relief," because

---

[1] See Complaint, *In re Benco Dental Supply Co.*, FTC No. 9379 (Feb. 12, 2018); Agreed Final Judgment and Stipulated Injunction Between the State of Texas and Patterson Companies, Inc., *Texas* v. *Patterson Cos.*, No. D-1-GN-18-001916 (126th Judicial Dist. Apr. 19, 2018); Agreed Final Judgment and Stipulated Injunction Between the State of Texas and Henry Schein, Inc., *Texas* v. *Henry Schein, Inc.* No. D-1-GN-17-003749 (261st Judicial Dist. Aug. 3, 2017); Agreed Final Judgment and Stipulated Injunction Between the State of Texas and Benco Dental Supply, *Texas* v. *Benco Dental Supply Co.*, No. D-1-GN-15-001386 (353d Judicial Dist. Apr. 9, 2015); *In re Dental Supplies Antitrust Litig.*, No. 1:16-cv-00696 (E.D.N.Y.).

"[t]he violations * * * are continuing and will continue unless injunctive relief is granted." C.A. App. 35.[2]

2. Shortly after respondent filed its original complaint, a single petitioner, Dental Equipment, moved to compel arbitration under its distribution agreement with respondent. The agreement provided for arbitration of certain claims: "[a]ny 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 [the manufacturer]) shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association." J.A. 58 (emphasis added). The remaining petitioners then also requested arbitration; rather than invoke their own right to arbitrate, however, they argued that respondent was bound under equitable estoppel to arbitrate against everyone, even though respondent's sole arbitration agreement was with Dental Equipment.

In May 2013, the magistrate judge granted the motions to compel arbitration and stayed the case. Pet. App. 39a-44a. The magistrate judge recognized that "the exception carved out for actions seeking injunctive relief is problematic to the motions to compel arbitration." *Id.* at 41a. And the magistrate judge further noted that "[i]f there were no reasonable construction of the contract that allowed for arbitration, there would be nothing for an arbitrator to decide." *Ibid.* But the magistrate judge nevertheless felt there was a "plausible construction" calling for arbitration, because damages, not injunctive relief, was "the predominant relief sought." *Ibid.* In so finding, the

[2] Respondent amended its complaint in August 2017 to bring its allegations current after a three-year litigation delay and to join two additional large distributors as defendants.

magistrate judge did not identify any language in the contract supporting the view that the "predominant" relief was controlling (or even *relevant*); nor did the magistrate judge identify any language otherwise limiting the carve-out ("*actions* seeking injunctive relief") to mean anything other than what it plainly says—an *action* seeking injunctive relief. Pet. App. 39a-44a. Because the magistrate judge found that the agreement's adoption of the AAA rules implicitly delegated arbitrability issues to the arbitrator, it compelled arbitration. *Id.* at 41a.[3]

Having found that the arbitration clause applied, the magistrate judge also ruled that the "non-signatory defendants c[ould] avail themselves" of the agreement. Pet. App. 42a-43a (invoking the Fifth Circuit's two-prong test for equitable estoppel).

Respondent immediately filed a "motion for reconsideration" of the magistrate judge's order. C.A. App. 444. The motion was fully briefed by early July 2013, but the case remained stayed until the district court sua sponte scheduled a status conference in October 2016. *Id.* at 626.[4]

3. The district court rejected the magistrate judge's ruling and denied petitioners' motions to compel arbitration. Pet. App. 18a-38a.

At the outset, the district court recognized this Court's "'strong pro-court presumption'" on gateway issues of arbitrability. Pet. App. 23a (quoting *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U.S. 79, 86 (2002)). Unlike the

---

[3] The magistrate judge did not address whether the carve-out for "actions seeking injunctive relief" also had implications for the scope of the delegation clause.

[4] The extended delay was the apparent result of confusion regarding whether respondent's motion sought reconsideration from the magistrate judge or review (in the form of objections) by the district court. See Pet. App. 20a. The district court construed the filing as "objections to the Order" and decided them accordingly. *Ibid.*

usual presumption in favor of arbitration, those gateway questions are reserved for "judicial determination [u]nless the parties clearly and unmistakably provide otherwise." *Ibid.* (quoting *Howsam*, 537 U.S. at 83) (internal quotation marks omitted); see also *id.* at 24a ("'[t]he law presumes that courts have plenary power to decide the gateway question of a dispute's 'arbitrability'") (quoting *Houston Ref., L.P.* v. *United Steel, Paper & Forestry, Rubber, Mfg.*, 765 F.3d 396, 408 (5th Cir. 2014)).

The district court then conducted that analysis under the "narrow circumstances" here, and rejected the magistrate judge's ruling on "two independent rationales." Pet. App. 32a.[5]

First, the district court found the parties "did not clearly and unmistakably agree to arbitrate the arbitrability of actions seeking injunctive relief." Pet. App. 32a. As the court explained, the agreement's carve-out for such "actions" was "clear on its face." *Id.* at 27a. "[T]he arbitration clause here 'cabins application of the AAA rules to disputes "arising under or related to" the Agreement that are *not* "actions seeking injunctive relief" or "disputes relating to trademarks, trade secrets or other intellectual property of [the manufacturer]."'" *Id.* at 33a. It found petitioners' contrary reading violated the clause's "plain language," tried to "read" limitations into the agreement, and lacked "any substantive basis." *Id.* at 27a-28a. "Indeed," the court explained, "it would be senseless to have the AAA rules apply to proceedings that are not subject to arbitration." *Id.* at 34a.

---

[5] The district court separately noted that "[t]here is no *express* delegation clause in the [A]greement," but followed Fifth Circuit authority holding that "the adoption of the AAA rules" implicitly delegates arbitrability in some cases. Pet. App. 32a-33a.

The court thus concluded that the case "falls squarely within the clause excluding actions like this from arbitration," and it refused to "re-write the terms of the Parties' agreement to accommodate a party—notably, the party that drafted the agreement—that could have negotiated for more precise language." Pet. App. 30a, 34a (footnote omitted).

That decision alone was a sufficient basis for rejecting petitioners' motion. *Id.* at 35a n.5 ("even if [the "wholly groundless"] test ha[d] not been adopted by the Fifth Circuit," "the Court finds that there is not clear and unmistakable evidence that the Parties intended to send the question of arbitrability to an arbitrator").[6]

Second, the court held that even had it found a clear and unmistakable delegation, petitioners would still lose "in these unique circumstances" under the Fifth Circuit's "narrow" exception for "'wholly groundless'" arbitrability claims. Pet. App. 34a-37a (quoting *Douglas* v. *Regions Bank*, 757 F.3d 460, 463-464 (5th Cir. 2014)). As the court explained, the Fifth Circuit's test reflects "'the parties' intent'": no one agrees to an "absurd[]" process where a plaintiff is compelled "to go to an arbitrator merely to have the arbitrator 'flatly' explain that the claim did not fall within the scope of the agreement and promptly send plaintiff back to court." *Id.* at 35a-36a. That was precisely the "unequivocal response" the court expected here: petitioners' argument was "wholly without merit" given the clause's "plain language," and it would be "senseless to refer the issue of arbitrability to the arbitrator, only to have the arbitrator read the plain language of the clause and then send the Parties back to this Court." *Id.* at 36a-37a.

---

[6] The district court also highlighted that the "arbitration clause in this case is unique," and it "differs" from "standard arbitration clause[s] suggested by the [AAA]." Pet. App. 28a.

Without a "plausible" argument that the dispute was subject to arbitration, the "wholly groundless" exception applied under "the precise facts of this case." *Id.* at 38a.

In so ruling, the court stressed that this "narrow" exception was limited to "'exceptional' circumstances." Pet. App. 37a (quoting *Kubala* v. *Supreme Prod. Servs., Inc.*, 830 F.3d 199, 202 n.1 (5th Cir. 2016)). Indeed, the court explained, the rule "'is not a license for the court to prejudge arbitrability disputes more properly left to the arbitrator pursuant to a valid delegation clause,'" and any "'plausible' argument" is enough to require arbitration. *Ibid.* (quoting *Kubala*, 830 F.3d at 202 n.1). But given the utter implausibility of petitioners' arguments, the exception "is appropriate in this particular case." *Ibid.*[7]

4. Petitioners filed an interlocutory appeal, and respondent urged affirmance on each of the district court's independent grounds: (i) "[t]he parties did not delegate the question of arbitrability to the arbitrator," and (ii) even if they had, petitioners' "arbitrability argument is 'wholly groundless.'" Resp. C.A. Br. 17, 26.

5. The court of appeals affirmed. Pet. App. 1a-17a.

First, the court "ask[ed] if the parties 'clearly and unmistakably' delegated the issue of arbitrability." Pet. App. 6a. After examining the parties' contentions, it found a "strong argument" that the delegation clause does not apply to cases "within the [injunctive-relief] carve-out." *Id.* at 10a. It rejected petitioners' notion that "any mention in the parties' contract of the AAA Rules trumps all other contract language." *Ibid.* On the contrary, the court found, "the interaction between the AAA Rules and the

[7] Having rejected petitioners' arguments on multiple grounds, the court elected not to decide a potential *additional* ground for denying arbitration: "whether the third parties to the arbitration clause in this case can enforce such arbitration clause." Pet. App. 37a-38a.

carve-out is at best ambiguous," and controlling state law requires any ambiguity to be "'construed against the drafter[s]'"—here, petitioners. *Ibid.* (quoting *T.M.C.S., Inc.* v. *Marco Contractors, Inc.*, 780 S.E.2d 588, 597 (N.C. Ct. App. 2015)).

Despite these "strong" points against petitioners' reading, the court did not ultimately decide whether the agreement reflected a "clear and unmistakable" delegation. Pet. App. 10a-11a. Instead, the court found it sufficient to reject petitioners' reading under the "'wholly groundless' inquiry." *Id.* at 11a.[8]

In explaining that inquiry, the court emphasized that the "wholly groundless" exception was a "narrow escape valve," and that arbitration should be compelled "'in almost all cases.'" Pet. App. 5a, 11a. While the doctrine's exact "contours" are "not yet fully developed," the court confirmed that it does not apply if there is *any* "legitimate argument that th[e] arbitration clause covers the present dispute." *Id.* at 11a, 15a. It was only where the party's assertions are "[im]plausible" that the exception applies: "This limited inquiry allows the parties to avoid jumping through hoops to begin arbitration only to be sent directly back to the courthouse." *Id.* at 11a, 12a n.35.

Looking to the facts here, the court determined this was the rare case warranting the doctrine's application. Pet. App. 11a-16a. The court examined petitioners' arguments in favor of arbitrability and declared each had "no footing within the four corners of the contract." *Id.* at 16a. The court found the contract "'clear and unambiguous,'" and found the arbitration clause "expressly exclude[d] certain types of disputes." *Id.* at 12a-13a, 15a-16a. Like the district court, the court of appeals saw "no plausible

[8] The court of appeals also noted the district court's observation that this arbitration clause has atypical language. Pet. App. 12a.

argument that the arbitration clause applies here to an 'action seeking injunctive relief.'" *Id.* at 16a; see also *id.* at 13a (repeating the district court's conclusion that petitioners' reading was "'wholly without merit'"). Petitioners' reading, in short, was at odds with "the clause's plain meaning." *Id.* at 16a.

The court of appeals concluded petitioners' arguments were "wholly groundless," and it thus affirmed the order denying petitioners' motion to compel arbitration. Pet. App. 16a-17a.

6. Both the district court and the court of appeals denied petitioners' requests for a stay pending appeal. Pet. App. 45a. The case proceeded through discovery and virtually all other pretrial phases and was set for trial in May 2018. This Court granted a stay (No. 17A859) pending its disposition of the petition for a writ of certiorari and subsequently granted the petition.

SUMMARY OF ARGUMENT

According to petitioners, the "wholly groundless" doctrine is yet another example of courts seeking to undermine arbitration agreements and flout the FAA. If the parties agreed to delegate arbitrability determinations to an arbitrator, petitioners say they have an absolute right to compel arbitration—even when their arbitrability claim is illegitimate or frivolous.

Petitioners are mistaken. Congress did not endorse a pointless and wasteful detour for an arbitrator to confirm what everyone already knows. The "wholly groundless" doctrine provides a limited upfront check; it applies only where the movant cannot identify a single, plausible argument supporting arbitrability. It avoids needless expense and delay. This "narrow" exception has its roots in the FAA's text, structure, purpose, and history. It has been

applied in multiple circuits for decades without any obvious disturbance to the strong federal policy favoring arbitration. Petitioners' efforts to upset this doctrine are baseless, and the judgment below should be affirmed.

I. A. The doctrine has an obvious grounding in the statutory text. A counterparty has not "fail[ed] to comply" with an arbitration clause (9 U.S.C. 4) if there is no plausible basis for reading the clause to cover the case. While the FAA requires courts to compel arbitration where the underlying *merits* are frivolous, it has drawn a clear textual distinction for arbitrability. The statute does not authorize courts to entertain a pointless detour only to watch the case, predictably, return immediately to court.

This plain-text reading is reinforced by the statutory design. Section 10(a)(4) already requires courts to vacate arbitration awards where arbitrators exceed their powers—which they necessarily do by deciding a dispute that does not even arguably belong in arbitration. Section 10(a)(4) thus replicates on the backend what Section 4 provides on the front. It is absurd to read the Act to eliminate this filter only on the front end, where it can avoid ex ante the terrible waste and inefficiency of enduring a do-over in court after a full arbitration.

B. The FAA's plain text is reinforced by its statutory purpose.

1. Arbitration is a matter of contract, and traditional contract principles foreclose petitioners' claim. No contracting party agrees to tolerate frivolous, bad-faith actions. A delegation clause is necessarily limited to resolving *genuine* disputes; there is no basis to presume that parties intended to be subjected to baseless demands that promise only pointless expense and delay.

The Court routinely looks to common-sense presumptions about parties' intent when considering questions under the FAA. The presumed intent here is obvious: No one

agrees to a wasteful detour so the arbitrator can confirm the inevitable. Petitioners' mechanical rule blinks reality and does not reflect how contracts are sensibly read. It would undermine the parties' actual expectations, and should be rejected.

2. The "wholly groundless" doctrine also reflects traditional legal norms. The FAA was enacted to provide a judicial mechanism for enforcing arbitration agreements; it puts arbitration agreements on equal (but not *greater*) footing with other contracts. But all contracts are enforced against the backdrop of general legal principles, including simple baselines of acceptable conduct. Those baseline rules do not tolerate frivolous or abusive filings, and they certainly do not permit parties to use the courts as a tool for *compelling* meritless or inappropriate action. Nothing in the FAA creates an exception to these traditional norms. The "wholly groundless" doctrine respects the underlying purposes of the FAA while protecting the parties and the system from abuse.

3. This common-sense doctrine also promotes the chief benefits of arbitration: the fast and efficient resolution of disputes. There is nothing fast or efficient about permitting parties to use frivolous arbitration demands to add cost and delay. Those implausible demands only set up the inevitable: the wasted time and effort of a doomed trip for the arbitrator to confirm what everyone already knows: the dispute belongs in court.

The "wholly groundless" exception, by contrast, achieves the FAA's objectives. The judicial check occurs in summary fashion; it does not displace the arbitrator's role in deciding *genuine* disputes, but is limited to ferreting out the exceptionally rare case that does not even *plausibly* belong in arbitration.

The only time petitioners' view has any practical effect—aside from imposing undue burdens on parties and

courts—is when an arbitrator would *disagree* with the judiciary and declare an "implausible" argument the winner. And the result of such an outcome would be starting over in court after the award is eventually vacated under Section 10(a)(4).

Petitioners have not yet shown that eliminating this modest exception would protect legitimate arbitration rights in more than the tiniest subset of cases (if any such cases exist). The FAA's policies are advanced by maintaining this sensible check on groundless demands.

C. The FAA's history reinforces the doctrine's viability. Congress considered the importance of preserving a modest judicial role at the FAA's enactment, and it followed the example of the New York courts—which already endorsed their own version of the "wholly groundless" doctrine.

And for decades now, courts have applied that doctrine in multiple jurisdictions. There is no indication that this minor judicial review over meritless demands imposes any actual cost on the arbitration system.

II. Petitioners' remaining efforts to undermine the doctrine are unavailing.

First, the "wholly groundless" exception is not anti-arbitration. It does not presume that arbitrators are incapable of deciding arbitrability correctly; on the contrary, it applies when the issue is so insubstantial that no one could possibly get it wrong—meaning that the game is not worth the candle. The doctrine thus attacks *pointless* arbitration, but not arbitration itself.

Second, petitioners insist that the doctrine will burden the system and harm arbitration. But if that were true one would expect to see—*evidence of burden and harm*. Instead, there is a paucity of cases applying the doctrine at any level, and even fewer that foreclosed arbitration.

There is zero evidence that this "narrow" backdrop frustrates legitimate arbitration demands.

Third, petitioners have misstated the factual backdrop of this case. For one, the courts below did not find that the parties indeed delegated arbitrability to the arbitrator. The district court flatly rejected petitioners' arguments, and the Fifth Circuit effectively did the same—explaining why petitioners were wrong before deciding the case on alternative grounds. This fact-bound issue is outside the question presented, but petitioners err in suggesting the contract supports their views on this question.

Finally, petitioners point to the extended duration of these proceedings—"six years"—as evidence of the steep costs of the "wholly groundless" exception. This is misleading. The case was lost below for years in a void between the magistrate judge and the district court. And the additional effort and expense is attributable to petitioners' aggressive behavior: the parties were not merely litigating the "wholly groundless" exception, but multiple issues related to petitioners' marginal attempts to avoid litigating in court. The "wholly groundless" doctrine does not generate pointless costs and expense; it is a tool for avoiding them.

ARGUMENT

I. THE "WHOLLY GROUNDLESS" DOCTRINE IS CONSISTENT WITH THE FAA'S TEXT, STRUCTURE, PURPOSE, AND HISTORY

A. The FAA's Text And Structure Support The "Wholly Groundless" Exception

According to petitioners, the "wholly groundless" exception has no support in the FAA's text. Pet. Br. 23-29. Petitioners are wrong. The FAA provides a clear textual basis for the doctrine, and petitioners' contrary reading makes nonsense of the statutory scheme.

1. a. Under Section 4, Congress expressly required that courts be "satisfied" that a nonmovant "fail[ed] to comply" before ordering arbitration. 9 U.S.C. 4. The failure to comply is the failure to arbitrate under the party's agreement. If a dispute is not even "arguably" subject to arbitration, there is no possible "failure to comply" by filing in court. See, *e.g.*, *Turi* v. *Main St. Adoption Servs., LLP*, 633 F.3d 496, 507 (6th Cir. 2011). And without a "*bona fide* dispute on arbitrability" (*Kubala* v. *Supreme Prod. Servs., Inc.*, 830 F.3d 199, 202 n.1 (5th Cir. 2016)), a court cannot be "satisfied" under Section 4 for purposes of ordering arbitration.[9]

This provision thus provides an obvious textual basis for the "wholly groundless" exception. When an arbitration claim is utterly meritless, there is no possible "failure to comply." This is precisely what the "wholly groundless" inquiry seeks to tease out: if there is *any* "plausible" argument, the courts will compel arbitration. *Douglas*, 757 F.3d at 463; *Turi*, 633 F.3d at 511. But where a movant's claim is baseless or illegitimate, the court cannot be "satisfied" that the order compelling arbitration is appropriate. See *Qualcomm Inc.* v. *Nokia Corp.*, 466 F.3d 1366, 1370, 1373 n.5 (Fed. Cir. 2006). "[E]ven where the parties delegate to the arbitrator the authority to decide which issues are subject to arbitration, the court must still determine, as a threshold matter, whether the claims in the

[9] Section 3 imposes a comparable restriction before granting a stay pending arbitration: the court may issue a stay only "upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration." 9 U.S.C. 3. "If the district court finds that the assertion of arbitrability is 'wholly groundless,' then it may conclude that it is not 'satisfied' under [S]ection 3, and deny the moving party's request for a stay." *Qualcomm*, 466 F.3d at 1371.

instant dispute 'arguably fall within the contemplated scope' of the parties' agreement." *Turi*, 633 F.3d at 507.[10]

In short, petitioners cannot explain how a party "fail[ed] to comply" simply because it filed a claim in court *that belongs in court*.[11]

b. In response, petitioners repeatedly attack the text's plain meaning, but their efforts fall short.

First, petitioners argue (Br. 20-21) that courts are required to compel arbitration "whether the claims of the party seeking arbitration are 'arguable' or not, indeed even if it appears to the court to be frivolous." *AT&T Techs., Inc.* v. *Comm'cns Workers of Am.*, 475 U.S. 643, 649-650 (1986). While that may be true for arguments about the *underlying merits*, it is not true for arguments about *arbitrability*. The FAA's text draws a clear distinction between the two. When a party's arbitration demand

---

[10] This is consistent with a long tradition of courts teasing out sham allegations. Cf. *Bell* v. *Hood*, 327 U.S. 678, 682-683 (1946) (refusing to exercise federal jurisdiction where the asserted "federal" claim is "wholly insubstantial and frivolous").

[11] For similar reasons, a movant is not "aggrieved" (9 U.S.C. 4) by a counterparty's decision to litigate a "dispute that plainly has nothing to do with the subject matter of an arbitration agreement." *Turi*, 633 F.3d at 507. No one is "aggrieved" by being denied the opportunity to arbitrate a frivolous demand. "Otherwise, the delegation of authority to the arbitrator to decide the scope of an arbitration agreement would require the parties to take all issues—no matter how unrelated these issues are to the parties' arbitration agreement—to the arbitrator for a threshold determination regarding arbitrability before such issues could properly be brought in court." *Ibid.*

Petitioners latch onto the fact that Section 3 does not repeat the word "aggrieved" in imposing a similar restriction (Br. 27), but this misses the point. The word "aggrieved" in Section 4 merely reinforces the notion that only parties with "*bona fide*" arbitration demands are entitled to relief. *Kubala*, 830 F.3d at 202 n.1. It does not do the work by itself. See 9 U.S.C. 4 (requiring the movant to "satisfy" the court that the counterparty "fail[ed] to comply").

is frivolous, the court cannot be "satisfied" of a "failure to comply." 9 U.S.C. 4. But there is no textual basis for refusing to compel arbitration because the underlying *claims* are frivolous. *AT&T Techs.* thus makes perfectly good sense, but it has no application in this context.

Moreover, Congress had good reason to draw the line that it did: When the underlying merits are frivolous, *someone* has to dispose of the claim, no matter how baseless it is. The parties still gain efficiencies by dispatching the claim in arbitration. But it benefits no one to add delay and expense with a pointless detour for the arbitrator to confirm that a dispute is not even "'arguably'" subject to arbitration. *Turi*, 633 F.3d at 507.

Second, petitioners argue that "'[a]n agreement to arbitrate a gateway issue is simply an additional, antecedent agreement,'" and respondent "fail[ed] to comply" with *that* agreement even if the actual dispute is not subject to arbitration. Br. 3 (quoting *Rent-A-Center, West, Inc.* v. *Jackson*, 561 U.S. 63, 70 (2010)); see also Br. 25 ("The relevant 'issue' here is *arbitrability*, and the relevant 'agreement' is the parties' agreement to delegate *arbitrability* to the arbitrator.").

This argument is specious. The "antecedent agreement" may be a separate agreement, but it does not exist in a vacuum. The entire point of an arbitration clause is to arbitrate the *underlying* claims. If there is no plausible argument that the case actually belongs in arbitration, the delegation issue becomes academic. Indeed, even petitioners presumably would agree that they could not invoke the "antecedent" agreement while *conceding* the underlying dispute is not arbitrable.

Where the arbitration demand is "implausible," the nonmovant does not "fail[] to comply" in any real-world sense.

Third, petitioners argue that the "wholly groundless" inquiry has no foothold in Section 4, because that provision focuses exclusively on "'the *making* and *performance* of the agreement to arbitrate.'" Br. 24-25 (quoting *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967)). But this proves *respondent's* point. The "wholly groundless" inquiry focuses on both the "making" and "performance" of the agreement.

The "making" asks whether the parties made an agreement to subject themselves to implausible or illegitimate demands, all designed to waste their time and resources and frustrate their rights to proceed in court. "[A]rbitration is a matter of contract" (*Rent-A-Center*, 561 U.S. at 67), and traditional principles of contract law foreclose the presumption that parties intended to tolerate this kind of abusive conduct. See Part I.B, *infra*. The "wholly groundless" exception merely reflects this common-sense understanding of the parties' intent. See, *e.g.*, *Douglas*, 757 F.3d at 463-464.

And the "performance" goes to the very heart of the inquiry. A party does not fail to "perform" by filing a lawsuit that is in fact *not* subject to arbitration, a point made clear where a dispute "plainly has nothing to do with the subject matter of an arbitration agreement." *Turi*, 633 F.3d at 507. "[T]he 'wholly groundless' inquiry allows the district court to determine whether it is 'satisfied' pursuant to [Section 4] while also preventing a party from asserting any claim at all, no matter how divorced from the parties' agreement, to force an arbitration." *Qualcomm*, 466 F.3d at 1373 n.5. A nonmoving party does not "fail[] to

comply" (contra Pet. Br. 25) where the arbitration demand is illegitimate and "[im]plausible." *Kubala*, 830 F.3d at 202 n.1.[12]

2. Respondent's reading of Section 4 is confirmed by Section 10(a)(4). Petitioners' view, by contrast, makes nonsense of the statutory scheme.

a. Section 10(a)(4) requires vacating an award if the arbitrators "exceeded their powers." 9 U.S.C. 10(a)(4). It applies even where parties delegate the threshold arbitrability determination to the arbitrator. See *First Options of Chi., Inc.* v. *Kaplan*, 514 U.S. 938, 943 (1995) (explaining that the arbitrability determination should be reviewed under the same "standard courts apply when they review any other matter that parties have agreed to arbitrate").

If an arbitration demand is "wholly groundless," then the arbitrators necessarily will have exceeded their powers by proceeding with the arbitration. A "wholly groundless" demand is not "a claim which *on its face* is governed by the contract." *United Paperworkers Int'l Union* v. *Misco, Inc.*, 484 U.S. 29, 36-37 (1987) (emphasis added) (quoting *Steelworkers* v. *Am. Mfg. Co.*, 363 U.S. 564, 567-568 (1960)). It is not one "'even arguably construing or applying the contract'" (*Oxford Health Plans LLC* v. *Sutter*,

---

[12] Petitioners also argue that the "wholly groundless" exception is inconsistent with Section 2, which limits the available grounds for "invalidat[ing]" arbitration agreements. Br. 28-29 (citing 9 U.S.C. 2). This is wrong. The "wholly groundless" exception does not seek to "invalidate" the parties' agreement, but to *enforce* it. No one agrees to tolerate baseless or abusive conduct in a contract; that background presumption automatically limits *all* agreements, even where this (obvious) caveat is not spelled out. *Douglas*, 757 F.3d at 463-464; Part I.B, *infra*. In any event, the "wholly groundless" inquiry has its roots in other provisions of the FAA (*e.g.*, 9 U.S.C. 4), not Section 2.

569 U.S. 564, 569 (2013)), and it is not one "represent[ing] a plausible interpretation of the contract" (*George Day Constr. Co.* v. *United Bhd. of Carpenters & Joiners, Local 354*, 722 F.2d 1471, 1476-1477 (9th Cir. 1984)). It is effectively an invitation to "stray[] from interpretation and application of the agreement" and "dispense[] [one's] own brand of industrial justice." *Stolt-Nielsen S.A.* v. *Animal-Feeds Int'l Corp.*, 559 U.S. 662, 671 (2010) (internal quotation marks omitted); see also *Misco*, 484 U.S. at 38 ("[t]he arbitrator may not ignore the plain language of the contract").[13]

In the rare instances in which arbitrators overstep these bounds, courts are authorized to vacate the award. See, *e.g.*, *Kalb* v. *Quixtar, Inc.*, No. 3:07-cv-1061, 2008 U.S. Dist. LEXIS 25015, at *18 (M.D. Fla. Mar. 28, 2008) ("[A] court may vacate an arbitration award 'where the arbitrators exceeded their powers.' 9 U.S.C. 10. If it is later determined that the claims are not arbitrable, any arbitration award may be vacated as exceeding the scope of the arbitration agreement."); *Holz-Her U.S., Inc.* v. *Monarch Mach., Inc.*, No. 3:97CV56, 1998 U.S. Dist. LEXIS 15394, at *23-*24 (W.D.N.C. July 24, 1998) (holding that arbitrators exceeded their powers by deciding a matter that the parties had not agreed to submit to arbitration).

b. Section 10(a)(4) thus replicates on the backend what Section 4 provides on the front. This emphatically confirms respondent's reading of Section 4, and petitioners have no answer for how their argument makes sense in light of these tandem provisions.

---

[13] The parallel between the "exceeding powers" doctrine and the "wholly groundless" exception is obvious: a "wholly groundless" argument, for example, is "[im]plausible" (*Douglas*, 757 F.3d at 463), has no "footing within the four corners of the contract" (Pet. App. 16a), and does not "'arguably fall'" within the agreement's scope (*Turi*, 633 F.3d at 507).

Reading the provisions together reveals a coherent statutory scheme. Congress imposed effectively the same standard under each section—a limited check for minimum plausibility. One applies at the front-end and the other at the back. Section 10(a)(4) gives courts the authority to ask whether the arbitrators exceeded their powers, which includes the ability to ask whether the dispute was subject to arbitration in the first place; Section 4's "wholly groundless" exception simply mirrors that identical check prior to arbitration, at a time when it avoids the pointless waste of time and resources.

Put simply, if courts have the power (under Section 10(a)(4)) to vacate awards after months or years of costly arbitration, then surely courts have the power (under Section 4) to make the same determination where the result is a foregone conclusion. There is no reason to read the FAA to force parties to endure an expensive and futile detour just to obtain an unenforceable arbitration award.

Petitioners' contrary view sets up a bizarre statutory design. Petitioners cannot explain why Congress would permit courts to review the process on the backend but not the front. There is no reason to construe Section 4 (or the "wholly groundless" doctrine) in a manner that leaves the courts powerless to do anything until after parties have predictably wasted months or years in a doomed arbitration.

Once Congress made clear that courts have a role after an award is entered, it is absurd to think Congress did not impose the same filter on the front end. Section 4's plain text captures the "wholly groundless" exception, and petitioners' effort to undermine this common-sense doctrine should be rejected.

B. The FAA's Statutory Purpose Is Advanced By The "Wholly Groundless" Exception

Contrary to petitioners' contention, the "wholly groundless" exception also promotes the FAA's statutory purpose. It supports basic principles of contract law, enforces traditional litigation norms, and is consistent with the FAA's history.

1. Arbitration is a matter of contract, and the "wholly groundless" doctrine comports with basic contract-law principles

The "wholly groundless" doctrine promotes basic contract-law principles, and these principles foreclose petitioners' claim.

a. "[A]rbitration is a matter of contract" (*Rent-A-Center*, 561 U.S. at 67), and the parties' "intentions" control. *Stolt-Nielsen*, 559 U.S. at 682. There is no basis for presuming that the parties intended courts to compel arbitration where the contract does not even *plausibly* authorize arbitration. No contract grants a right to assert implausible claims or waste everyone's time with pointless detours for an arbitrator to confirm the obvious. A delegation clause reflects the parties' agreement to resolve *legitimate* arbitrability issues before an arbitrator (*Kubala*, 830 F.3d at 202 n.1); it is not a license for the other side to subject a party to frivolous claims. See, *e.g.*, *McCarroll* v. *L.A. County Dist. Council of Carpenters*, 315 P.2d 322, 333 (Cal. 1957).

The "wholly groundless" test simply honors "'the parties' intent'":

> When [plaintiff] signed the arbitration agreement containing a delegation provision, did she intend to go through the rigmaroles of arbitration just so the arbitrator can tell her in the first instance that her claim has nothing whatsoever to do with her arbitration

> agreement, and she should now feel free to file in federal court? Obviously not.

Douglas, 757 F.3d at 464.

This Court routinely makes common-sense presumptions about the parties' intent when considering questions under the FAA. *E.g.*, *Stolt-Nielsen*, 559 U.S. at 685 (asking about the parties' "presumed" intent for class-action arbitration); *First Options*, 514 U.S. at 945 (asking the parties' "likely" thinking with delegation clauses). And the Court crafts "'interpretive rule[s]'" based on "assumption[s] about the parties' expectations." *Rent-A-Center*, 561 U.S. at 70 n.1; see also *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002).

"In circumstance[s] where contracting parties would likely have expected a court to have decided the gateway matter," the Court "assume[s] that is what they agreed to." *Rent-A-Center*, 561 U.S. at 70 n.1 (internal quotation marks and citation omitted). That principle is dispositive here. It is safe to assume parties intended courts to refuse arbitration in the face of baseless demands that promise only gratuitous costs and delay. *Turi*, 633 F.3d at 511. Contract law ultimately seeks to identify a meeting of the minds. There is no conceivable meeting of the minds that justifies the lodging of meritless claims. And the parties did not have to include an explicit caveat ("but no frivolous arbitration demands") to make that clear.

As a matter of common sense, "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." *Turi*, 633 F.3d at 511; see also David Horton, *Arbitration about Arbitration*, 70 Stan. L. Rev. 363, 428

(2018). The "wholly groundless" doctrine merely enforces the contracting parties' presumed intent.[14]

b. These obvious presumptions are reinforced by traditional contract-law principles. See *First Options*, 514 U.S. at 944 (considering "ordinary state-law principles that govern the formation of contracts").

Implicit in every contract is the presumption of "good faith." See, *e.g.*, Restatement (Second) of Contracts § 205 (1981); 23 Williston on Contracts § 63:22 (4th ed.). Parties do not act in good faith by filing frivolous arbitration demands, and no contract implicitly authorizes baseless or abusive conduct. Under these rules, a contract delegating disputes over arbitrability is effectively delegating *bona fide* disputes over arbitrability. *Kubala*, 830 F.3d at 202 n.1. Such contracts cannot be permissibly read to endorse

[14] The facts of *Douglas* illustrate the point. Douglas signed an arbitration agreement when opening a checking account with a bank. Years later, she was injured in a car crash and sued the driver; they settled, and Douglas's lawyer ultimately embezzled her funds using *the lawyer's own account*. When Douglas sued the bank for helping the lawyer, it sought to compel arbitration under the contract for her "completely unrelated" account, which, by happenstance, was at the same bank. See 757 F.3d at 461-463. The Fifth Circuit refused to credit this "untenable" argument: "Douglas would have to go to the arbitrator, who would flatly tell her that this claim is not within the scope of the completely unrelated arbitration agreement she signed many years earlier when opening a checking account and that she must actually go to federal court after all." *Id.* at 463. Looking to a realistic assessment of "intent," the court found that parties only "bind [themselves] to arbitrate gateway questions of arbitrability if the argument that the dispute falls within the scope of the agreement is not wholly groundless." *Id.* at 464.

bad-faith maneuvers designed solely to inject unnecessary expense and delay into a party's action. See 11 Williston on Contracts § 32:11 (4th ed.).[15]

c. In response, petitioners argue that if the contract *says* that arbitrability disputes must be arbitrated, then the parties must have "intend[ed] to send any and all claims of arbitrability—regardless of their merit—to arbitration." Br. 32. This lacks any grounding in reality. If parties agree to arbitrate arbitrability over widgets but not copyrights, the parties did not intend for the court to send a copyright case to arbitration and cost the parties needless time and money, all for the case predictably to start over in court after a wasteful round trip.[16]

---

[15] The parties' agreement here is bound by North Carolina law, which follows these traditional contract-law principles. See, *e.g.*, *Maglione* v. *Aegis Family Health Ctrs.*, 607 S.E.2d 286, 291 (N.C. Ct. App. 2005) (endorsing "the basic principle of contract law that a party who enters into an enforceable contract is required to act in good faith").

[16] Petitioners insist there is a "particularly good reason" for the parties to wish to arbitrate *any* threshold determination, frivolous or otherwise: the agreement supposedly required any action to be filed in North Carolina; North Carolina courts apparently insist on using local counsel; an arbitration probably could be conducted without local counsel; and thus arbitrating even baseless arbitrability issues would save the cost of hiring local counsel. Br. 32-33. This argument fails on every conceivable level. Just a few: (i) a frivolous arbitration demand will not stay in arbitration for long, meaning the parties will eventually be stuck—wait for it—*hiring local counsel*; (ii) the cost of a pointless detour to a doomed arbitration assuredly exceeds the cost of local counsel; (iii) this action need *not* be filed in North Carolina, which is why it was filed in Texas—without any objection regarding jurisdiction or venue from any defendant; and (iv) there is no apparent evidence that any contracting party viewed the costs of local counsel as the driving force in deciding the arbitration clause's scope (for gateway issues or otherwise). If petitioners' argument proves anything, it is that they truly have no reason why respondent would agree to accept the pointless costs of a frivolous arbitration demand.

The FAA does not impose such an absolutist, wooden regime. Congress required courts to enforce the parties' "expectations" (*Stolt-Nielsen*, 559 U.S. at 682), which requires a real-world look into the parties' intent. It is not a task of mechanically reading contract language divorced from common sense. "If the argument that the claim at hand is within the scope of the arbitration agreement is 'wholly groundless,' surely [the parties] never intended that such arguments would see the light of day at an unnecessary and needlessly expensive gateway arbitration." *Ibid.*

Petitioners' contrary presumption flouts the parties' obvious expectations and thus the FAA's fundamental purpose. It undermines the parties' agreement and should be rejected.

2. The doctrine is consistent with traditional litigation norms, and nothing in the FAA requires courts to tolerate baseless filings

The "wholly groundless" doctrine also reflects background legal principles. Congress enacted the FAA to make "arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint*, 388 U.S. at 404 n.12. It thus enforces arbitration rights (*e.g.*, 9 U.S.C. 2) but does not exempt arbitration demands from general prohibitions against abusive and meritless filings. A "wholly groundless" arbitration claim "puts the machinery of justice in motion, burdening courts and individuals alike with needless expense and delay." *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 398 (1990). Nothing in the FAA requires courts to endorse this bootless practice.

a. Petitioners' arguments are at odds with basic litigation norms. Those norms do not tolerate frivolous or abusive filings (cf. Fed. R. Civ. P. 11), and they certainly do not permit parties to enlist the judiciary as a tool for *compelling* meritless or inappropriate conduct.

An attempt to force a party to arbitrate where the arbitration clause indisputably does not apply fits squarely within these prohibitions. *Simply Wireless, Inc.* v. *T-Mobile US, Inc.*, 877 F.3d 522, 528-529 (4th Cir. 2017) (drawing parallel to Rule 11). It promotes the abusive tactics—and unnecessary delay and expense—that Rule 11 is designed to prevent. See *Cooter & Gell*, 496 U.S. at 397-398. There is no indication that Congress intended to exempt the FAA from the general rules applicable to all other litigation practice. See *Simply Wireless*, 877 F.3d at 529 (holding that "a district court need not, and should not, enforce a delegation provision when a party's assertion that a claim falls within an arbitration clause is frivolous or otherwise illegitimate").[17]

The "wholly groundless" exception respects the underlying purpose of the FAA without violating the core precepts that protect judicial integrity. If an arbitration demand is not remotely plausible, nothing in the FAA requires the judiciary to take part in the abusive scheme.

b. Nor is there any doubt about the upshot of petitioners' views. According to petitioners, a completely baseless arbitration demand must be sent to arbitration, even if it is unmistakably clear that the parties did not agree to arbitrate the dispute. See Pet. Br. 32. The U.S. Chamber, supporting petitioners, is even more forthcoming: it explicitly argues that Rule 11 cannot stop a frivolous arbi-

---

[17] In related settings, courts refuse to tolerate frivolous arbitration-based appeals likewise designed to disrupt district-court proceedings. See, *e.g.*, *Britton* v. *Co-op Banking Grp.*, 916 F.2d 1405, 1412 (9th Cir. 1990) (refusing to allow defendant to stall trial by bringing a frivolous motion to compel arbitration); see also *Bradford-Scott Data Corp.* v. *Physician Comput. Network, Inc.*, 128 F.3d 504, 505-506 (7th Cir. 1997) (allowing case to proceed in district court pending a baseless appeal of an order refusing to compel arbitration).

tration demand, so long as the party has a legitimate argument that "the agreement delegates arbitrability" to the arbitrator. U.S. Chamber Amicus Br. 8-9 & n.3.

These contentions are extraordinary. A motion to compel arbitration cannot simply focus on the *delegation* provision; it must seek arbitration *of the case*. If the movant makes frivolous or bad-faith arguments about the arbitrability of the underlying claims, it is still abusing the judicial process, even if its predicate argument (about delegation) is sound. Moreover, if the movant is fully aware that its arbitrability claims are groundless, it is also aware that the arbitrator will simply send the case back—showing that the motion's entire purpose is impermissible cost, harassment, and delay.

The FAA was designed to put arbitration agreements on "equal footing" with other contracts. *Rent-A-Center*, 561 U.S. at 67. Refusing to compel arbitration where the arbitration claim is wholly groundless—*i.e.*, where the parties never genuinely thought an arbitrator would decide the dispute—"enforce[s] [the agreement] according to [its] terms." *Ibid.*; *Douglas*, 757 F.3d at 464. Nothing in law or logic requires courts and parties to tolerate (indeed, *promote*) the wasteful actions of parties filing frivolous arbitration demands. Petitioners' contrary contention is plainly wrong, and the judgment accordingly should be affirmed.

3. The doctrine promotes the strong federal policy in favor of quick and efficient dispute resolution

The "wholly groundless" doctrine is also consistent with the FAA's driving policy: advancing the "fair and expeditious" resolution of disputes. *Howsam*, 537 U.S. at 85.

a. Petitioners argue that the "wholly groundless" exception "effectively nullif[ies]" the advantages of arbitration. Br. 33. This is exactly backwards. A frivolous dispute

over arbitrability benefits no one. It asks for a pointless detour for the arbitrator to confirm the inevitable. It *adds* cost and expense without corresponding savings. At best, it simply delays the case before it can return to court, where it obviously belongs. At worst, the arbitrator wrongly retains the case, and the award will ultimately be vacated after wasting months or years of time and resources.

Congress enacted a "liberal federal policy favoring arbitration," not a policy favoring *pointless* arbitration. *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 339 (2011). The arbitration system does not benefit from forcing futile extra proceedings where the arbitrability demand is "wholly groundless."

Petitioners retort that arbitrators have tools for quickly rejecting meritless demands. Br. 35-36. But this ignores that *any* extra process is too much process; the quick return of the case to court may reduce the costs of petitioners' position, but *some* cost still exists.

And while some arbitration rules *permit* arbitrators to decide arbitrability in "preliminary" hearings (Pet. Br. 35), they do not *require* it. See, *e.g.*, AAA Commercial Rules R-7(c) ("The arbitrator may rule on [objections to jurisdiction] as a preliminary matter *or as part of the final award*.") (emphasis added). That leaves open the distinct possibility that parties will incur the time and expense of a full arbitration before being told that the claim should have been in court all along. Courts, by contrast, are obligated to resolve the arbitrability question at the outset. *E.g.*, *Reyna* v. *Int'l Bank of Commerce*, 839 F.3d 373, 378 (5th Cir. 2016).

Nor does the promise of possible compensation cure the problem. Contra Pet. Br. 36. Even if arbitrators theoretically have the power to "sanction[] * * * bad-faith con-

duct" with fee- and cost-shifting (*ibid.*), it is far more efficient not to incur pointless fees and costs *in the first place*. Petitioners may be correct that there are ways to make its position more palatable, but it still interferes with the goals of arbitration. See *Stolt-Nielsen*, 559 U.S. at 685 (promising "lower costs" and "greater efficiency and speed").

b. The "wholly groundless" exception, by contrast, fulfills the FAA's objectives. It is quick and easy. It "look[s] only to whether there is a *bona fide* dispute on arbitrability," and does not require (or even permit) courts to "*resolve* the parties' arbitrability arguments." *Kubala*, 830 F.3d at 202 n.1; accord *Qualcomm*, 486 F.3d at 1374. Once a court identifies a "'plausible' argument," the inquiry is over. *Kubala*, 830 F.3d at 202 n.1.

This means that nonmovants with only a "colorable" objection (Pet. Br. 33) will always, and immediately, lose. The doctrine is reserved for the rare situation of truly implausible arguments. When that situation exists, it permits courts to cut off the futile attempt at the pass, avoiding a useless roundtrip before the case is eventually tried in court. That preserves the efficiencies and integrity of the system without doing any harm to the parties' agreement.[18]

---

[18] Petitioners are wrong that parties resisting arbitration will find this doctrine "irresistible," setting up protracted "mini-trials" and even appeals. Br. 33. For one, the "wholly groundless" doctrine sets an astoundingly high bar, which is why "[s]uch cases are exceptional." *Kubala*, 830 F.3d at 202 n1. It does not take much for the average movant to identify a *plausible* argument. *Qualcomm*, 466 F.3d at 1374. For another, the party opposing arbitration is typically *the plaintiff*. Plaintiffs do not seek out ways to waste their own time and money and delay their own case with baseless procedures and appeals. The actual concern—looking to the real world—is that parties (under petitioners' rule) would assert groundless arbitration claims

Nor does the doctrine present any serious risk of undermining arbitration. Few, if any, arbitration demands declared utterly implausible and meritless by a court will be declared *correct* by an arbitrator. So even if a court errs in declaring a claim "*wholly* groundless" (because it is actually just "ordinary" groundless), there is little chance it would have persuaded an arbitrator in any event. The doctrine thus spares waste and inefficiency without any realistic cost. It is fully consistent with the FAA's animating interests.

C. The FAA's History Reinforces The "Wholly Groundless" Exception As A Longstanding Check On Baseless Arbitration Demands

The FAA's history further supports the "wholly groundless" exception. At the time of the FAA's enactment, Congress was aware of the need for judicial review of arbitration demands, and it understood the role that Section 4 played in fulfilling that obligation. Nor has that limited role proved problematic: Courts have been applying the "wholly groundless" doctrine for decades, and there is no hint it has frustrated the effective arbitration of disputes.

1. a. Even where parties agree to arbitrate arbitrability, the FAA's history reveals that Congress still intended courts to play a substantive role in the process.

During congressional hearings on the FAA, for example, Senator Walsh expressed concern that a person would be forced to arbitrate against his will, having "surrender[ed] his right to have his case tried by the court" even though "a great many of these contracts that are entered into are really not voluntarily [sic] things at all." *Sales and Contracts to Sell in Interstate and Foreign Commerce,*

---

to force a detour to arbitration, driving up litigation costs and generating unwarranted delays.

and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before the Subcomm. of the S. Comm. on the Judiciary, 67th Cong. 2 (1923) (Sen. Walsh).

To overcome that objection, the FAA's proponents—including Julius Henry Cohen, its principal drafter—emphasized the role that Sections 3 and 4 gave to courts. Specifically, they pointed out that "the party who has refused to arbitrate because he believes in good faith * * * that the agreement is not applicable to the controversy, is protected by the provision of the law which requires the court to examine into the merits of such a claim." *Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong. 33-35 (1924) (statement of Julius Henry Cohen); see also Julius Henry Cohen, *The Law of Commercial Arbitration and the New York Statute*, 31 Yale L.J. 147, 149 (1921) (discussing the New York arbitration law—on which the FAA was modeled—and explaining that "if there be any dispute regarding the making of the contract * * * , a trial of that issue by the court * * * is preserved").

Congress relied on the understanding, then, that courts would play a protective role in ensuring that parties would not be forced to arbitrate unexpectedly. The "wholly groundless" doctrine is cut from this same cloth.

b. Congress also had a body of case law to serve as a reference. The FAA was eventually modeled on New York's state arbitration law.[19] In interpreting that law,

---

[19] *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before the Subcomm. of the S. Comm. on the Judiciary*, 67th Cong. 2 (1923) (statement of Charles L. Bernheimer) ("This bill follows the lines of the New York arbitration law, applying it to the fields wherein there is Federal Jurisdiction."); S. Rep. No. 68-536, at 3

New York courts adopted a form of the "wholly groundless" exception. Indeed, as early as 1924, the Court of Appeals of New York reasoned that "[u]nquestionably a claim may be so unconscionable or a defense so frivolous as to justify the court in refusing to order the parties to proceed to arbitration." *S.A. Wenger & Co.* v. *Propper Silk Hosiery Mills, Inc.*, 146 N.E. 203, 204 (N.Y. 1924). Congress thus enacted the FAA against the backdrop of rare situations where arbitration is properly refused because the demand was patently meritless.

2. Courts have now long applied the "wholly groundless" doctrine without any noted interference with arbitration rights. For over half a century, courts and treatises—both federal and state—have recognized that there is no obligation to order arbitration where "it is clear that the claim of arbitrability is wholly groundless." *McCarroll*, 315 P.2d at 333; see also *United Elec., Etc., Workers* v. *General Elec. Co.*, 233 F.2d 85, 101 (1st Cir. 1956) ("If * * * the applicant's claim of arbitrability is not frivolous or patently baseless, an order can be given, with the decision on arbitrability to be made in the arbitration proceedings that follow, subject of course to §§ 10-11 of the Act."); *Am. Stores Co.* v. *Johnston*, 171 F. Supp. 275, 277 (S.D.N.Y. 1959) ("When it appears that a claim of arbitrability is frivolous or patently baseless it would be an abuse of the arbitration process and would defeat the contractual intent of the parties to compel arbitration."); *Local No. 358, Bakery & Confectionery Workers Union* v. *Nolde Bros., Inc.*, 530 F.2d 548, 553 (4th Cir. 1975) (requiring courts to give effect to a delegation provision "unless it is clear that the claim of arbitrability is wholly

---

(1924) ("The bill, while relating to maritime transactions and to contracts in interstate and foreign commerce, follows the lines of the New York arbitration law enacted in 1920, amended in 1921 * * * .").

groundless") (quoting 48 Am. Jur. 2d *Labor and Labor Relations* § 1257).

And more recently, multiple circuits have expressly endorsed the doctrine. See *Douglas*, 757 F.3d at 463-464; *Turi*, 633 F.3d at 507, 511; *Qualcomm*, 466 F.3d at 1370-1371, 1374. These cases alone extend back over a decade, and petitioners have not even tried to establish that parties in those jurisdictions have been hampered, much less that arbitration has suddenly ground to a halt.

History and experience thus confirm that the "wholly groundless" exception has traditionally served as a useful check in rare cases. Petitioners have failed to offer any compelling excuse for jettisoning this established doctrine.

II. PETITIONERS' CONTRARY POSITION DISTORTS KEY ASPECTS OF THE DOCTRINE AND FACTUAL COMPONENTS OF THIS CASE

Petitioners' remaining attempts to undermine the "wholly groundless" doctrine are meritless.

A. Contrary to petitioners' contention (Br. 37), the "wholly groundless" doctrine is not anti-arbitration; it is anti-*litigation-abuse*. The exception is not premised on the idea that arbitrators will fail to get it right. It is premised on the idea that the arbitration demand is so meritless that *no one* could possibly get it wrong, and thus it is useless to tolerate the cost and delay of a needless detour.

This accordingly is not "a return to the bad old days of 'judicial hostility to arbitration.'" Pet. Br. 37. On the contrary, the courts applying the exception have stressed, emphatically, the need to respect "the province of the arbitrator" (*Qualcomm*, 466 F.3d at 1374), and have underscored that the rule "is not a license for the court to prejudge arbitrability disputes" (*Kubala*, 830 F.3d at 202 n.1). It simply enforces the parties' obvious expectations,

which is what the FAA was designed to do. *Stolt-Nielsen*, 559 U.S. at 682.

B. Contrary to petitioners' contention, this "narrow escape valve" (Pet. App. 11a) is not prone to mischief or abuse. Any party seeking arbitration need only show it has a *plausible* basis for its claim; the standard is thus limited to the rare case that flunks the lowest bar of review. See Pet. App. 5a (stating that arbitration demands will be "granted in almost all cases"). Just as there is every reason to believe arbitrators will act in good faith, there is also every reason to believe lower courts will faithfully apply this "limited" exception. *Douglas*, 757 F.3d at 463.

Petitioners nonetheless decry that the doctrine will burden the system (Br. 33-35), but their concerns are overblown. This doctrine has been endorsed for decades, and there is no evidence that courts have frustrated legitimate arbitration demands. Indeed, quite the contrary: respondent has identified only *four* other cases in which an appellate court invoked the "wholly groundless" exception to reject arbitration. *Douglas*, 757 F.3d at 464; *Turi*, 633 F.3d at 511; *Interdigital Commc'ns, LLC* v. *ITC*, 718 F.3d 1336 (Fed. Cir. 2013), vacated on other grounds, 134 S. Ct. 1876 (2014); *Evans* v. *Bldg. Materials Corp.*, 858 F.3d 1377, 1380 & n.1 (Fed. Cir. 2017) (accepting the "wholly groundless" standard for purposes of the appeal because any contrary argument was waived). This is hardly compelling evidence that the sky is falling.[20]

---

[20] The doctrine's use in district court is also extraordinarily rare. A Lexis search of district-court opinions (looking for "wholly groundless" and "arbitration") produced only 96 results, dating from 1991 to 2018. Moreover, in only 8 of those 96 cases did the court declare an arbitrability argument "wholly groundless." This paucity of cases disproves petitioners' speculation that the doctrine is unmanageable or abused in practice.

C. In multiple respects, petitioners misstate the factual backdrop of this case.

First, petitioners wrongly imply they won an issue they actually lost. The courts below did *not* find that respondent "[a]gree[d] to arbitrate questions of arbitrability." Pet. Br. 32; see also *id.* at 22, 34. Not a single Article III judge reviewing the contract's "unique" language (Pet. App. 28a) believed the parties delegated the threshold question; the magistrate judge alone disagreed, but did so by rejecting the clause's plain language in favor of the judge's own view of what the contract *ought* to say. See, *e.g.*, Br. in Opp. 20-24. The district court rejected petitioners' argument outright (Pet. App. 32a-34a), and the shoe was poised to drop again in the Fifth Circuit.

In order to prevail on this question, petitioners must identify clear and unmistakable evidence supporting their position. Below, the Fifth Circuit did not suggest that petitioners were right (contra Pet. Br. 10 n.1) or even that the question was somewhat close; it instead identified "strong" reasons that petitioners were wrong. Pet. App. 10a. Far from a "clear and unmistakable" showing, petitioners failed to establish their position was even debatably correct.

The proper resolution of this question involves a close reading of this particular arbitration clause, against background rules of North Carolina contract law and the parties' specific intent (at least with respect to the single petitioner-signatory who bargained for arbitration). See Br. in Opp. 20-24. Those issues fall outside the question presented, and the Fifth Circuit can decide them, if necessary, on remand. But suffice it to say that petitioners are

incorrect to suggest the agreement delegated arbitrability when the proceedings below held it did not.[21]

Second, petitioners attribute the "years-long dispute" in this case to the "wholly groundless" doctrine. Pet. Br. 15. This is false. As previously explained (Br. in Opp. 7 n.6), the extended delay was the result of a procedural snafu where the case was apparently lost in the district court's docket. The parties were not engaged in active litigation for all "six years" (Pet. Br. 34), and it is misleading to suggest otherwise.

Petitioners further ignore that the "wholly groundless" exception was not the only source of litigation. Parties asserting "wholly groundless" arbitration demands are usually litigating aggressively, and this case proves the point: (i) only one petitioner had an actual arbitration agreement with respondent, yet all petitioners tried to take advantage of that third-party agreement; (ii) the language of the arbitration clause was suspect at best, as the district court held (and the Fifth Circuit all but held); (iii) petitioners tried to force the arbitrability determination itself into arbitration; and (iv) petitioners, of course,

---

[21] Petitioners argue that the contract's "carve-out for injunctive relief" is "routinely understood" to provide temporary relief pre-arbitration or permanent relief post-arbitration. Pet. Br. 8. Those odd limitations appear nowhere in the agreement's text. If that is what the parties intended, petitioners (one of whom drafted the agreement) easily could have drafted it that way. Instead, as the court of appeals found, the arbitration provision is "clear on its face"—it categorically exempts "action[s] seeking injunctive relief." Pet. App. 12a-13a. Any contrary reading has "no footing within the four corners of the contract." *Id.* at 16a. Petitioners may regret inserting this limitation into the agreement, but the task is to "interpret and enforce a contract," not to rewrite the policy according to one's "own brand of industrial justice." *Stolt-Nielsen*, 559 U.S. at 671-672 (internal quotation marks omitted).

premised their entire arbitration demand on a "wholly groundless" argument.

Petitioners' effort to avoid respondent's day in court generated extensive litigation—and would have generated extensive litigation even *without* the "wholly groundless" doctrine. That doctrine prevented additional and fruitless expense and delay; it was not its source.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

DANIEL L. GEYSER
GEYSER P.C.
One Energy Square
4925 Greenville Ave., Ste. 200
Dallas, TX 75206

LEWIS T. LECLAIR
Counsel of Record
CHARLES E. FOWLER, JR.
CHELSEA A. PRIEST
MCKOOL SMITH, P.C.
300 Crescent Court, Ste. 1500
Dallas, TX 75201
(214) 978-4984
lleclair@mckoolsmith.com

SEPTEMBER 2018