No. 17-1272

IN THE

Supreme Court of the United States

HENRY SCHEIN, INC., ET AL.,
Petitioners,

v.

ARCHER AND WHITE SALES, INC.,
Respondent.

On Writ of Certiorari to
the United States Court of Appeals
for the Fifth Circuit

BRIEF OF AMERICAN ASSOCIATION FOR JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENT

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QUESTION PRESENTED

When parties enter into a contract that delegates questions of arbitrability to an arbitrator, does the Federal Arbitration Act permit courts to require arbitration in any unrelated future dispute without first making an inquiry into the intended scope of the delegation?

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INTEREST OF *AMICUS CURIAE*[1]

The American Association for Justice was established in 1946 to safeguard victims' rights, strengthen the civil-justice system, and protect access to the courts. With members in the United States, Canada, and abroad, AAJ is the world's largest trial bar.

AAJ files this brief to highlight an important feature of this case that the parties have largely overlooked: that this case, and the "wholly groundless" doctrine more broadly, need not be reduced to the question whether an agreement to delegate arbitrability can be ignored if the underlying issue of arbitrability is clear. Instead, this case raises the question of how courts should go about construing the scope of a delegation of arbitrability in the first place. As this brief explains, there is no way of properly construing the scope of a delegation of arbitrability consistent with the parties' intent without considering, to at least some degree, the nature of the underlying contractual agreement. If courts cannot consider the nature of the underlying contractual agreement, that results in an absurdity: any valid delegation clause becomes, essentially, a delegation for life, allowing one party to force another to pay for and submit to a round of arbitration in any future dispute—no matter how unrelated.

Based on its members' experience with costly threshold litigation over issues of arbitrability—and its organizational concern for the development of the law on those issues—AAJ is well positioned to offer a unique perspective on these questions.

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[1] No counsel for a party authored this brief in whole or in part and no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of *amicus* briefs are on file with the Clerk.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents an attempt by the petitioners to uproot this Court's established doctrine. It is settled law that parties to a contract can delegate to an arbitrator the power to decide both the merits of disputes that arise between them and the arbitrability of those disputes. *See, e.g.*, *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995). But, when it comes to delegations of arbitrability in particular, this Court has directed federal courts to apply a "heightened standard" to enforce an arbitration agreement, requiring "clear and unmistakable" evidence that the parties intended for their dispute's arbitrability to be decided by an arbitrator. *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 69 n.1 (2010). This reflects "the fact that arbitration is simply a matter of contract between the parties; it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration." *First Options of Chicago*, 514 U.S. at 943.

The petitioners try to circumvent this clear requirement by proposing a rule that would eliminate any meaningful inquiry into the parties' intent when it comes to construing a delegation of arbitrability. They argue that when two or more parties to a contract enter into such a delegation clause as to some potential disputes, it should bind them as to "any dispute." Pet. Br. 21.

The petitioners dress this theory up by casting it as an argument that courts cannot look through to the merits of an issue that the parties have delegated to an arbitrator. *Id.* But that obscures the fact that cases like this one require courts to construe the scope of delegation provisions themselves. Interpreting the contours of

those provisions in a way that effectuates the parties' intent requires courts to examine the contract as a whole, considering its context and, possibly, provisions that could be construed as exempting claims from arbitrability. That examination is required by this Court's precedent and the Federal Arbitration Act, and this Court should reject any theory that would prohibit it.

ARGUMENT

I. The FAA does not require a court to blindly enforce a delegation clause.

This Court's arbitration jurisprudence is grounded in the principle that the enforcement of arbitration agreements under the FAA is "a matter of contract." *First Options of Chicago*, 514 U.S. at 943. To that end, courts must ensure that arbitration agreements are enforced "according to the intentions of the parties," as "a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration." *Id.* at 947, 943.

The Court's arbitration jurisprudence also rests on a key distinction between questions about the merits of an underlying dispute and "question[s] of arbitrability." *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 569 n.2 (2013). Questions of arbitrability "'include certain gateway matters, such as whether parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy.'" *Id.* (quoting *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452 (2003) (plurality opinion)). Although such gateway matters are presumptively for a court to decide, the Court has held that parties may delegate to an arbitrator not only questions about the merits of the underlying dispute but questions of arbitrability as well—at least if that delegation is made "clearly and

unmistakably." *See Rent-A-Center*, 561 U.S. at 69 n.1. Where a contract contains such a "delegation provision," this Court treats the clause as "simply an additional, antecedent agreement" to send certain gateway questions to an arbitrator along with questions about the underlying dispute. *Id.* at 69.[2]

The petitioners and their *amici* treat this case as if the sole question it raises is whether a court can look through that "antecedent agreement" and "independently analyze[] the merits of [a] movant's claim of arbitrability," even when that claim is wholly groundless. Pet. Br. 3; *see also* Br. of Chamber of Commerce, at 2 ("[C]ourts may not refuse to enforce an agreement to arbitrate a particular question—including the question of arbitrability—based on the court's view of the merits of that question."). In their view, this case deals only with the scope of an agreement's arbitration provision, and asks whether, if a dispute falls outside the scope of an underlying arbitration clause, courts can ignore the antecedent delegation provision.

But this case, and the "wholly groundless" doctrine more broadly, raise an antecedent issue that the petitioners and their *amici* spend little time on. That issue is how courts are supposed to interpret the scope of delegation provisions themselves. Where parties have adopted such an antecedent agreement to send arbitrability issues to an arbitrator, how are courts supposed to tell

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[2] To help distinguish between these two layers of agreements, this brief refers to a contractual agreement to arbitrate the merits of an underlying substantive claim as an "arbitration clause," and refers to an "additional, antecedent" contractual provision that delegates questions about arbitrability to an arbitrator as a "delegation provision."

whether that antecedent agreement covers a given situation?

It should be clear that courts are required to construe the scope of delegation provisions. As this Court has said, where parties include delegation provisions in contracts, "the FAA operates on this additional arbitration agreement just as it does on any other." *Rent-A-Center*, 561 U.S. at 70. So, when a party seeks to enforce a delegation provision via a stay or a motion to compel, the FAA requires that a court "be[] satisfied that the issue involved in such suit or proceeding is referable to arbitration" under the delegation provision, 9 U.S.C. § 3, or "be[] satisfied" that "the failure to comply" with the provision "is not in issue," *id.* § 4.

How, then, should courts interpret a delegation provision to ensure that it only delegates questions of arbitrability that the parties intended to submit to an arbitrator? The petitioners' answer appears to be that instead of engaging in any such interpretation, a court faced with a delegation clause must blindly enforce it. That follows from their belief that there is a clear "order of operations." Pet. Br. 21. First, they say, a court looks to see whether there is a "delegation of arbitrability"—that is, whether a valid delegation provision has been formed and entered into. *Id.* Then, if there is one, "the court must send the dispute to arbitration." *Id.* In the petitioners' view, there is no point at which the court must "be[] satisfied" that the dispute at issue is one whose arbitrability the parties intended to delegate. 9 U.S.C. §§ 3, 4.

But discarding the statutory text in this way would result in an absurdity. On this reading, a single valid delegation of arbitrability agreed to by two parties

becomes a delegation covering all disputes for life. To see why, consider the following scenario:

> Mr. Smith rents a car from Acme Car Rentals, and the rental agreement contains an arbitration clause governing "any dispute that arises out of the transaction." The rental agreement also contains a delegation provision delegating all issues of arbitrability to the arbitrator. Mr. Smith enjoys his car rental, returns the car, and no dispute arises. Six years later, Mr. Smith is walking down the road when he is hit and badly injured by a different car, rented from Acme by a stranger. It turns out that Acme had negligently maintained this car, so Mr. Smith sues Acme over its negligence. Acme moves to compel arbitration, pointing to the arbitration clause in its six-year-old rental agreement. It says that, because of the delegation provision, any dispute about the applicability of the clause must be sent to the arbitrator.

Under the petitioners' theory, a court would be required to grant the motion to compel. The petitioners are quite clear about this: if two parties have entered into a valid delegation provision, they say, "the parties can be conceived to have entered into a freestanding antecedent agreement providing that, if *any dispute* arose between them, the arbitrator would decide whether the dispute must be resolved by arbitration." Pet. Br. 21 (emphasis added).

This is a stark departure from settled law. The FAA respects and enforces only "the wishes of the contract parties." *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 302 (2010) (quoting *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995)). As a result, it does not "override[] the principle that a court may

submit to arbitration only those disputes . . . that the parties have agreed to submit." *Id.* (internal quotation marks omitted). Yet that is the unavoidable consequence of the petitioners' proposed rule. It is highly implausible, to say the least, that when Mr. Smith signed the car rental agreement he agreed to pay for and submit to a round of arbitration in any future dispute—no matter how unrelated.

To require that a court blindly enforce the motion to compel in such a circumstance would also invert this Court's rule that "courts presume that the parties intend courts, not arbitrators, to decide . . . disputes about 'arbitrability.'" *BG Grp., PLC v. Republic of Argentina*, 572 U.S. 25, 34 (2014). To be sure, parties may overcome this presumption with a valid delegation provision that is clear and unmistakable. *See, e.g.*, *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002). But under the petitioners' theory, a single valid delegation provision in any contract between two parties would mean that, forevermore, any dispute between them in any context would have to first receive an arbitrator's approval to go to court. That makes no sense.

To avoid this outcome, courts must be able to interpret the scope of a delegation provision with some reference to the parties' expectations when they entered into the delegation provision. Doing that allows courts to construe the scope of delegation provisions like they do any other contract provision—by considering the terms of the contract in an effort to "give effect to the contractual rights and expectations of the parties." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682 (2010). Put another way: Courts may enforce the delegation of arbitrability to an arbitrator only to the extent that doing so would comport with the parties' intent.

Some doctrine like the "wholly groundless" doctrine is therefore necessary. That is because the problem of petitioners' desired all-encompassing delegation provision cannot be addressed by standard formation doctrines. In the above example, for instance, Mr. Smith and Acme have entered into a valid contract including a delegation provision. But after renting the car Mr. Smith could become an employee of Acme; or he could own land next to Acme; or he could be a business competitor of Acme's. In each of these cases, were a legal dispute to arise between Mr. Smith and Acme, it would be possible to ask "does this dispute relate to the contract Mr. Smith and Acme formed when he rented a car?" Any future dispute between Mr. Smith and Acme would generate such a gateway question. Prohibiting courts from examining gateway questions in any way therefore means that all future disputes would require an arbitrator's approval before Mr. Smith could proceed in federal court. But as the Fifth Circuit put it, the "mere existence of a delegation provision . . . cannot possibly bind" a party "to arbitrate gateway questions of arbitrability in *all* future disputes with the other party, no matter their origin." *Douglas v. Regions Bank*, 757 F.3d 460, 462 (5th Cir. 2014).

And make no mistake: such a scenario is not hypothetical. In *Douglas*, the plaintiff had opened a checking account with a bank and signed an agreement containing an arbitration clause and a delegation provision. *Id.* at 461. Her account closed less than a year later. *Id.* Several years after that, she was injured in an automobile accident, and one of her lawyers allegedly embezzled a portion of her settlement from that accident. *Id.* She sued to recover the funds, a suit that involved bringing negligence and conversion claims against the successor-in-interest of the bank that she used to have a checking

account with. *Id.* That bank then invoked the old delegation provision from the closed checking account agreement to try and force the arbitration of her entirely unrelated claims. *Id.*

Of course, some courts that have invoked a doctrine like the "wholly groundless" standard have framed the inquiry at times as whether the dispute "is within the scope of the arbitration provision," rather than as whether the dispute is within the scope of the delegation provision. *See, e.g.*, *Douglas*, 757 F.3d at 461, 463. But that just reflects the fact that two different inquiries may sometimes involve asking the same question. A court may ask "what is the underlying dispute about?" when it is trying to determine whether the dispute is subject to arbitration under an arbitration agreement; it can also ask the exact same question when it is trying to determine whether the dispute is the kind of dispute the parties expected to fall within the scope of a delegation provision.

The petitioners ignore this distinction, and argue that any inquiry into the relationship between a dispute and the underlying contractual agreement is forbidden. But in doing so, they essentially apply the delegation provision to itself, arguing that, because the provision prohibits courts from analyzing the scope of the parties' arbitration agreement, it also prohibits them from analyzing the scope of the delegation clause. That is not how the FAA works. Courts cannot abdicate their obligation to construe the intended scope of a delegation provision because it might involve asking questions that would also be asked in an inquiry regarding the merits of the arbitrability issue. Instead, the FAA requires courts to "be[] satisfied" that the parties intended an arbitration agreement to cover a given dispute. 9 U.S.C. §§ 3, 4. That

applies to delegation clauses just like any other agreement; this Court should decline the petitioners' invitation to construe valid delegation clauses to have limitless scope. Ultimately, where a dispute arises in which it is entirely implausible to believe the parties intended themselves to be bound by the delegation clause, courts should not turn a blind eye to the parties' intent and enforce those clauses.

II. When a court interprets a delegation clause, it should consider explicit carveouts from arbitration as evidence of the parties' intent.

As the previous section established, the FAA requires courts to interpret the scope of delegation provisions, which in turn requires an inquiry into the nature of the underlying agreement to which the delegation provision applies. This inquiry proceeds according to the familiar principle that contractual agreements must be "interpreted as a whole." *Mastrobuono*, 514 U.S. at 69 (quoting the Restatement (Second) of Contracts § 202(2) (1979)). When a court examines a contract to determine the scope of a delegation provision, explicit carveouts from arbitration like those in the contract at issue in this case are particularly relevant to the question of how best to understand a delegation provision.

This follows, in part, from the "heightened standard" this Court applies to purported delegations of arbitrability. *Rent-A-Center*, 561 U.S. at 69 n.1. As this Court has said, "unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator." *Id.* (quoting *AT&T Techs., Inc. v. Commc'ns Workers*, 475 U.S. 643, 649 (1986)). This "'clear and unmistakable' requirement . . . pertains to the parties' manifestation of intent, not the agreement's validity." *Id.*

(emphasis omitted). Courts, in other words, "should not assume that the parties agreed to arbitrate arbitrability unless there is 'clear and unmistakable' evidence" of the parties' intent to do so. *Id.* (quoting *First Options of Chicago*, 514 U.S. at 944) (internal brackets omitted).

In some situations, of course, parties to a contract will exclude certain kinds of disputes from arbitration clauses but include a delegation provision that clearly leaves the arbitrability of those disputes to the arbitrator. Under *Rent-A-Center*, those delegation provisions must be honored. 561 U.S. at 70. But there will be many contracts in which an explicit carveout from arbitration either directly demonstrates that the parties did *not* intend to delegate arbitrability for a given set of disputes, or at least weighs heavily against a court finding clear and unmistakable evidence that they did so intend. Consider, for instance, the following scenario:

> A large employer, responding to increased social awareness of sexual harassment following the #MeToo movement, decides to modify the arbitration clause in its employment agreements by inserting a parenthetical exception. The modified employment agreements state: "Any dispute arising under or related to this Agreement (except for claims of sexual harassment or sexual assault) shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association."

As the petitioners note, courts frequently interpret an invocation of the American Arbitration Association's rules to be a delegation of arbitrability. Pet. Br. 6–7 (collecting cases). But a straightforward reading of the modified employment agreement here indicates that the parties intended that the AAA's rules should not be

applied to "claims of sexual harassment or sexual assault." It would thus be a mistake to construe any delegation of arbitrability implied by invoking the AAA's rules as extending to claims that are explicitly exempted from those rules. At the very least, it is far from clear that the parties "clearly and unmistakably" intended for a delegation of arbitrability to extend so far. *Rent-A-Center*, 561 U.S. at 69 n.1.

The petitioners' theory also ignores the basic principle of textual interpretation that "specific terms and exact terms are given greater weight than general language." Restatement (Second) of Contracts § 203(c) (1981). This theory, too, reflects the goal of giving effect to the parties' intent. As the Restatement puts it, "[a]ttention and understanding are likely to be in better focus when language is specific or exact, and in case of conflict the specific or exact term is more likely to express the meaning of the parties with respect to the situation than the general language." *Id.* cmt. e. As described in the example above, specific exclusions from arbitration are often inserted for a reason. To give priority to a broad, general delegation provision in the presence of a specific exclusion may thwart whatever reason the parties had for inserting the exclusion.

Contracting parties can, of course, delegate the issue of excluded disputes to arbitration if they truly intend to do so. A contract like the one above could say, for instance, that "all disputes about whether a claim falls within the exception for sexual harassment or sexual assault shall themselves be subject to binding arbitration." That would be a clear and unmistakable indication about the intended scope of the delegation.

In contrast, the petitioners' theory would create a trap for the unwary. Parties like the employer and

employee in the above hypothetical could reasonably assume that they have excluded claims from arbitrability *and* arbitration alike by explicitly writing a carveout like the one above. If courts construe "arbitration in accordance with the arbitration rules of the American Arbitration Association" to be both an arbitration clause and a delegation provision, it would be entirely reasonable for contracting parties to think that explicit language excluding certain claims from "arbitration in accordance with the arbitration rules of the American Arbitration Association" would exclude those claims from both the arbitration clause and the delegation provision as well. But the petitioners disclaim any serious attempt to examine the contract and discern the parties' intent; instead, they simply say that as long as there is a valid delegation provision, the parties "can be conceived" to have agreed to send "any dispute" to arbitration. Pet. Br. 21.

The petitioners' theory thus sweeps in to arbitration many parties who have specifically contracted to avoid such a result, and it does so for no reason that is necessary to benefit parties who do, in fact, wish to reach that result. The effect is that, for many disputes, one party will get unintended and unbargained-for leverage: the ability to force the other party into at least one round of arbitration on any dispute.

The petitioners argue that some arbitrators have procedures for summary disposition, and so such a round of arbitration *could* be resolved relatively quickly. Pet. Br. 35–36. But there is no guarantee that such procedures would exist for any given arbitration, or that if they exist they would be used. This is particularly true for cases in which a doctrine like the "wholly groundless" doctrine might apply, as a party seeking to send such a case to arbitration is almost surely intending to cause delay.

Even though arbitration is often invoked as a cheaper or faster alternative to litigation, that does not mean that, in absolute terms, it is always cheap and fast. Empirical studies of arbitration point to a "chorus of concern over the excessive length and cost of commercial arbitration in the United States," noting that arbitration's increasing complexity also results in increased delay and expense. Thomas J. Stipanowich, *Reflections on the State and Future of Commercial Arbitration: Challenges, Opportunities, Proposals*, 25 Am. Rev. Int'l Arb. 297, 341–42 (2014). Even when the issue to be arbitrated is simply a gateway issue, arbitrators can call for witnesses, allow parties to conduct discovery, or require motions practice that results in many billed hours. Or, as the respondent points out, an arbitrator may decide to wait to rule on the arbitrability issue until after conducting an inquiry into the underlying dispute more fully. Resp. Br. 30. Arbitrators are often paid by the hour, which creates a financial incentive for them to keep cases, or at least to extend the time taken to decide whether to keep them. *See, e.g.*, Deborah Rothman, *Trends in Arbitrator Compensation*, Disp. Resol. Mag., Spring 2017, at 8–11. And arbitrators, like any adjudicator, can get things wrong—resulting in a case staying in arbitration that should not have gone to arbitration at all. These risks and expenses drive up the costs of potential arbitration *ex ante*, giving a party to a contract a meaningful threat if it can force a detour to arbitration on any possible dispute.

More broadly, the petitioners provide no good reason that such risk and waste should be *mandatory* features of every arbitration agreement containing a delegation provision. Courts should at least be able to consider whether there is any reason whatsoever to think that a given dispute was one that the parties would have in-

tended to be covered by their delegation provision. Explicit exclusion terms are meaningful evidence of the parties' intent, and parties who truly intend to delegate the arbitrability of would-be-excluded disputes have the means to do so without the broad rule that the petitioners seek. This Court should stick to the terms of the FAA, require courts to examine the scope of delegation clauses before enforcing them, and permit courts to look to explicit exclusions contained within contracts that indicate the parties' intent.

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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