No.

In the Supreme Court of the United States

ARCHER AND WHITE SALES, INC., CROSS-PETITIONER

v.

HENRY SCHEIN, INC.

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

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Cross-respondent wishes to present a question about delegation, but the arbitration agreement at issue here does not mention delegation at all. The only language that cross-respondent believes even *indirectly* creates delegation expressly carves out certain disputes, including "actions seeking injunctive relief," which this case does. And even ignoring those initial defects, cross-respondent is not a signatory to any agreement with respondent, much less an *arbitration* agreement; the only signatory to the arbitration agreement that cross-respondent (as a nonsignatory) seeks to enforce *settled* during briefing on petition's stay application, and is no longer a party to this case.

The question presented in the original petition therefore is:

Whether an arbitration agreement that makes no mention of delegation "clearly and unmistakably" delegates arbitrability with respect to actions that the agreement expressly carves out from both arbitration and any arguable delegation.

While that question is unworthy of review, the Court should also decide the following two predicate questions if it decides to take up this case at all:

1. Whether an arbitration agreement that identifies a set of arbitration rules to apply *if* there is arbitration clearly and unmistakably delegates to the arbitrator disputes about *whether* the parties agreed to arbitrate in the first place.

2. Whether an arbitrator or a court decides whether a nonsignatory to an arbitration agreement can enforce the arbitration agreement through equitable estoppel.

PARTIES TO THE PROCEEDING BELOW AND RULE 29.6 STATEMENT

Cross-petitioner 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.

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

RELATED PROCEEDINGS

United States District Court (E.D. Tex.):

Archer & White Sales, Inc. v. *Henry Schein, Inc.*, Civ. No. 12-572 (May 28, 2013) (order by magistrate judge on motion to compel arbitration and to stay proceedings)

Archer & White Sales, Inc. v. *Henry Schein, Inc.*, Civ. No. 12-572 (Dec. 7, 2016) (order on motion to compel arbitration and to stay proceedings after reconsideration)

United States Court of Appeals (5th Cir.):

Archer & White Sales, Inc. v. *Henry Schein, Inc.*, No. 16-41674 (Dec. 21, 2017)

Archer & White Sales, Inc. v. *Henry Schein, Inc.*, No. 16-41674 (Aug. 14, 2019) (decision on remand from this Court)

Supreme Court of the United States:

Henry Schein, Inc. v. *Archer & White Sales, Inc.*, No. 17-1272 (Jan. 8, 2019)

Henry Schein, Inc. v. *Archer & White Sales, Inc.*, No. 19-963 (pet. filed Jan. 31, 2020)

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CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

Archer and Whites Sales, Inc., respectfully cross-petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case. If the Court grants the petition in *Henry Schein, Inc.* v. *Archer & White Sales, Inc.*, No. 19-963, it should also grant this cross-petition. If the Court denies the petition in No. 19-963—as we respectfully submit it should—this cross-petition should also be denied.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 935 F.3d 274. The district court's opinion denying cross-respondent's motion to compel arbitration (Pet. App. 17a-36a) is unreported. A prior opinion of this

Court is reported at 139 S. Ct. 524, and a prior opinion of the court of appeals is reported at 878 F.3d 488.[1]

JURISDICTION

The judgment of the court of appeals was entered on August 14, 2019. A petition for rehearing was denied on December 6, 2019 (Pet. App. 42a-43a). The petition for a writ of certiorari in No. 19-963 was filed on January 31, 2020, and was placed on this Court's docket on the same date. This conditional cross-petition is being filed pursuant to Rule 12.5 of the Rules of this Court (and is otherwise timely under this Court's Rule 13.1). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS AND RULE INVOLVED

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

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

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[1] References to "Pet." and "Pet. App." refer to the petition for a writ of certiorari and the appendix in No. 19-963. All the material required by this Court's Rule 14.1(i) has been reproduced in the appendix to that petition. See S. Ct. R. 12.5.

Section 3 of the Federal Arbitration Act, 9 U.S.C. 3, provides:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

Section 4 of the Federal Arbitration Act, 9 U.S.C. 4, provides in pertinent part:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court * * * for an order directing that such arbitration proceed in the manner provided for in such agreement.

Rule R-7 of the AAA Commercial Arbitration Rules and Mediation Procedures provides:

> (a) The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim.
>
> (b) The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause

> shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause.
>
> (c) A party must object to the jurisdiction of the arbitrator or to the arbitrability of a claim or counterclaim no later than the filing of the answering statement to the claim or counterclaim that gives rise to the objection. The arbitrator may rule on such objections as a preliminary matter or as part of the final award.

* * * * *

INTRODUCTION

The petition for a writ of certiorari in No. 19-963 presents only a portion of the parties' arbitration delegation dispute. If the Court grants the petition, it should also grant this conditional cross-petition to decide two additional questions.

The first relates to implied delegation—whether the agreement delegates any arbitrability disputes—which is logically antecedent to cross-respondent's question presented. A conflict exists among the lower courts regarding whether and under what circumstances implied delegation is sufficient to satisfy this Court's "clear and unmistakable" delegation test. Given the number of agreements that select a set of arbitration rules that will apply to any arbitrable dispute, and that most sets of arbitration rules contain provisions allowing arbitrators to decide their own jurisdiction, this question is recurring and important. This case is an appropriate vehicle in which to resolve that question if the Court grants cross-respondent's petition, because cross-respondent's question presented *assumes* the propriety of implied delegation.

The second question relates to whether, assuming delegation exists, that delegation extends to deciding whether a nonsignatory can invoke an arbitration agreement. Lower courts are in disagreement whether the court or the arbitrator decides that question.

Both questions are tied up in the larger delegation dispute between the parties. If the Court grants the petition for a writ certiorari—which cross-petitioner maintains it should not do—it should also resolve these questions to stop the continued piecemeal litigation of this case and decide these arbitration questions once and for all.[2]

STATEMENT

The relevant legal background, facts, and proceedings in this case are fully set forth in cross-petitioner's brief in

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[2] Cross-petitioner prevailed below under the Fifth Circuit's judgment, and it would prevail again here should the Court adopt its position that the mere incorporation of the AAA rules is not "clear and unmistakable" evidence that the parties agreed to delegate arbitrability. While a cross-petition is usually reserved for situations where a party seeks to alter the judgment, a cross-petition may be necessary if a party advances a new *rationale* that enlarges the party's rights. See, *e.g.*, Stephen M. Shapiro et al., *Supreme Court Practice* § 6.35, at 493 (10th ed. 2013) (reviewing decisions in which this Court required a cross-petition because respondent advanced "an argument that would have supported the judgment in [its] favor," but the argument's "logic would have led to the entry of a judgment that went further in [respondent's] direction").

In this case, a favorable ruling on the AAA incorporation issue would definitively establish, under this agreement, that *no* disputes (not just certain disputes) are subject to delegation. Because such a decision would go beyond the Fifth Circuit's strict holding, cross-petitioner is filing this conditional petition to ensure this predicate question is before the Court in the event that it grants review in No. 19-693—and elects to decide cross-respondent's fact-bound question about the proper reading of the "unique" language in cross-petitioner's agreement with a third party who is no longer a participant in this case. Pet. App. 23a, 26a.

opposition in No. 19-963 (at 4-9). The following limited set of facts is sufficient to frame the pure questions of law presented in this conditional cross-petition.

1. The arbitration agreement at issue does not contain an express delegation clause. It does not mention arbitrability at all, and does not address whether an arbitrator or a court shall decide any gateway questions. Instead, it merely states that any arbitration will be "in accordance with" the AAA rules:

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

Pet. App. 3a.

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

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

2. Although cross-petitioner is a signatory to the arbitration agreement, cross-respondent is not. Pet. App. 3a. The sole counter-signatory was "Pelton and Crane," who recently settled and is no longer a participant in this case. See D. Ct. Dkt. 497.

The current parties before the Court are competitors; they have no contractual relationship at all, much less a written arbitration agreement. Cross-respondent has nevertheless sought to invoke Pelton's arbitration clause as a nonsignatory through equitable estoppel. See, *e.g.*, Pet. App. 36a.

Because the district court and the court of appeals held that there was no obligation to arbitrate, neither court decided whether cross-respondent could compel cross-petitioner to arbitrate under a different party's agreement. Pet. App. 16a, 36a. Cross-respondent argued below, however, that if Pelton's contract had a valid delegation clause, controlling Fifth Circuit precedent would require the arbitrator, not the court, to decide the equitable-estoppel issue. See Cross-Resp. Supp. C.A. Br. 9 n.1.

REASONS FOR GRANTING THE PETITION

Cross-respondent seeks review over an insignificant question that reflects only one fraction of the parties' broader dispute over delegation—and, in fact, cross-respondent's petition is inevitably predicated on the two questions presented in this cross-petition. While there is no point in granting further review in this case at all (as cross-petitioner has explained in its accompanying brief in opposition), there is especially no point in granting

review unless the Court wishes to first decide these threshold issues. And, with some irony, the questions presented in this cross-petition are far better candidates for certiorari than the question in the original petition.

First, implied delegation has created confusion among the lower courts, and courts adopting implied delegation have provoked vehement disagreement from the ALI Restatement. This issue is important, because many agreements choose a set of arbitration rules that will apply to any arbitration under the agreement. The doctrine played a critical role in the decision below, because without implied delegation the carve-out is irrelevant. Yet implied delegation is inconsistent with the plain text of the AAA rules and the parties' intent, is contrary to this Court's repeated admonitions that courts and not arbitrators are presumed to decide the gateway issue of arbitrability, and it stretches the "clear and unmistakable" test past its breaking point. If this Court wishes to hear this case at all (rather than await a better vehicle where the question is outcome-determinative), it should take the opportunity to resolve the entrenched division over the question. And in doing so, it should reject the theory that merely incorporating a set of arbitral rules (to govern arbitrations generally) somehow clearly and unmistakably delegates the gateway issue to the arbitrator.

Second, the parties dispute *who* should decide whether cross-respondent, a nonsignatory, can invoke the arbitration agreement. An acknowledged split of authority exists between courts of appeals and state high courts on this issue. Because this is a question that goes to contract formation, the court must decide it in the first instance. This Court should make that clear.

The Fifth Circuit resolved this case correctly below, and there is little point in reviewing its case-specific, fact-bound reading of the "unique" language in a single

contract. But if cross-respondent's petition is nonetheless granted, this conditional cross-petition should be granted as well.

I. THE ISSUE OF IMPLIED DELEGATION WARRANTS THIS COURT'S REVIEW

A. "Implied Delegation" Has Created Confusion And Disagreement Among Courts

According to the Fifth Circuit, a simple reference to the AAA rules (which serves an obvious purpose having nothing to do with delegation) somehow supplies clear and unmistakable evidence that parties intended to delegate the gateway issue away from the courts and to an arbitrator.

This question plainly warrants further review. Although the federal courts of appeals have all endorsed the Fifth Circuit's position, their reasoning is thin, and even those courts cannot agree on the particulars of the doctrine. The majority position has been squarely rejected by the authoritative ALI Restatement of the U.S. Law of International Commercial and Investor-State Arbitration. The issue has further divided the lower courts, and the doctrine has been rejected by the highest courts of multiple States—including those where the regional circuit has reached the opposite conclusion. If any question plainly warrants review in this case, this one is undoubtedly it.

1. In the decision below, the Fifth Circuit found that the agreement delegated at least some arbitrability disputes to the arbitrator because "an arbitration agreement that incorporates the AAA Rules 'presents clear and unmistakable evidence that the parties agreed to arbitrate arbitrability.'" Pet. App. 7a (quoting *Petrofac, Inc.* v. *Dyn-McDermott Petrol. Ops. Co.*, 687 F.3d 671, 675 (5th Cir. 2012)). The Fifth Circuit had adopted that rule because "most of [its] sister circuits" had done so. *Petrofac*, 687 F.3d at 675 (citing *Fallo* v. *High-Tech Inst.*, 559 F.3d 874,

878 (8th Cir. 2009); *Qualcomm Inc.* v. *Nokia Corp.*, 466 F.3d 1366, 1372-73 (Fed. Cir. 2006); *Terminix Int'l Co. LP* v. *Palmer Ranch Ltd. P'ship*, 432 F.3d 1327, 1332-33 (11th Cir. 2005); *Contec Corp.* v. *Remote Solution Co.*, 398 F.3d 205, 208 (2d Cir. 2005); *Apollo Comput., Inc.* v. *Berg*, 886 F.2d 469, 472 (1st Cir. 1989)).

Though the courts of appeals superficially agree about the *concept* of implied delegation, some courts have indicated potential disagreement about the particulars. For example, the Ninth Circuit suggested that implied delegation might be effective only "between sophisticated parties to commercial contracts." *Oracle Am., Inc.* v. *Myriad Grp. A.G.*, 724 F.3d 1069, 1075 (9th Cir. 2013). The Fourth Circuit similarly suggested its holding might be limited to sophisticated parties. *Simply Wireless, Inc.* v. *T-Mobile US, Inc.*, 877 F.3d 522, 529 (4th Cir. 2017) ("[W]e hold that when, as here, two sophisticated parties expressly incorporate into a contract JAMS Rules that delegate questions of arbitrability to an arbitrator, then that incorporation constitutes the parties' clear and unmistakable intent to let an arbitrator determine the scope of arbitrability.").

Although the Ninth Circuit has embraced the concept generally (with scant reasoning), it refused to resolve the question as to unsophisticated parties on three separate occasions. See *Oracle*, 724 F.3d at 1075; *Brennan* v. *Opus Bank*, 796 F.3d 1125, 1131 (9th Cir. 2015) ("[W]e need not decide nor do we decide here 'the effect [if any] of incorporating [AAA] arbitration rules into consumer contracts' or into contracts of any nature between 'unsophisticated' parties." (quoting *Oracle*, 724 F.3d at 1075 & n.2)); *Galilea, LLC* v. *AGCS Marine Ins. Co.*, 879 F.3d 1052, 1061 (9th Cir. 2018). Without appropriate guidance, district courts have split on that issue. Compare *Ingalls* v. *Spotify USA, Inc.*, 2016 U.S. Dist. LEXIS 157384, at *8-*10 (N.D. Cal. Nov. 14, 2016) (holding that incorporation of AAA

rules in agreement between "two ordinary consumers" does not clearly and unmistakably delegate arbitrability disputes), with *Miller* v. *Time Warner Cable Inc.*, 2016 U.S. Dist. LEXIS 179444 (C.D. Cal. Dec. 27, 2016) (holding that even where one party is unsophisticated, "the incorporation of AAA's rules clearly and unmistakably shows the parties' intent to delegate the issue of arbitrability to the arbitrator").[3]

2. Despite the majority of courts of appeals giving credence to some form of implied delegation, the ALI Restatement of the U.S. Law of International Commercial and Investor-State Arbitration examined those decisions and rejected the concept of implied delegation. Restatement § 2-8 reporter's note b(iii) (Tentative Draft No. 4, 2015).[4] The Restatement's authors concluded that "there is little evidence to suggest that [arbitral rules] were specifically intended to render exclusive the competence of arbitral tribunals to make jurisdictional determinations." *Ibid.* Thus, they "reject[ed] the majority line of cases as based on a misinterpretation of the institutional rules being applied." *Ibid.*

3. Additionally, the Supreme Courts of Montana, New Jersey, and South Dakota have rejected implied delegation arguments.

In *Global Client Solutions, LLC* v. *Ossello*, 367 P.3d 361 (Mont. 2016), the Montana Supreme Court rejected the argument "that reference in the arbitration clause to the 'American Arbitration Association' constitutes a delegation provision." *Id.* at 369. The court held that it could

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[3] Contributing to the confusion, some courts have held that incorporation of AAA rules is sufficient to show clear and unmistakable delegation of arbitrability disputes *except* those regarding the availability to class arbitrability. See *Chesapeake Appalachia, LLC v. Scout Petrol., LLC*, 809 F.3d 746, 764-66 (3d Cir. 2016).

[4] *Approved*, http://2015annualmeeting.org/actions-taken.

not conclude that "mere reference to administering an arbitration pursuant to AAA rules constitutes a substantive agreement * * * to forego the general rule that arbitrability is to be decided by the court." *Ibid.*

Similarly, in *Flandreau Public School District #50-3* v. *G.A. Johnson Construction, Inc.*, 701 N.W.2d 430 (S.D. 2005), the Supreme Court of South Dakota held that the mention of AAA rules "does not support a per se finding of intent to arbitrate arbitrability based solely upon the incorporation of AAA Rule 8[5] in the agreement." *Id.* at 437 n.6; see also *Morgan* v. *Sanford Brown Inst.*, 137 A.3d 1168, 1181-82 (N.J. 2016) (holding that the "arbitration provision [did] not explain, in broadly worded language or any other manner, that plaintiffs are waiving their right to seek relief in court for a breach of the [contract] or for a statutory violation").

3. The disagreement and confusion will persist without this Court's intervention. The federal courts of appeals are now adopting implied delegation without analysis, based purely on the fact that other circuits have accepted it. See *Petrofac*, 687 F.3d at 675 (adopting implied delegation because "most of [its] sister circuits" had done so). Nevertheless, disagreement remains regarding the specifics of how broadly implied delegation can apply, if at all. If this Court should decide to undertake review of the convoluted record and circumstances presented by this case, it should resolve the confusion about delegation and lay out a clear rule.

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[5] The AAA Construction Industry Arbitration Rules were at issue in that case. AAA Construction Rule 8 as it existed at that time is analogous to AAA Commercial Rule 7(a) at issue here, which gives the arbitrator power to decide jurisdiction. *Flandreau*, 701 N.W.2d at 432, 437 n.6.

B. The Validity Of Implied Delegation Is Important

Implied delegation is at least as important as cross-respondent's question presented. Arbitration agreements often contain provisions selecting the set of arbitration rules that the parties want to apply to any arbitration. Christopher R. Drahozal & Peter B. Rutledge, *Contract and Procedure*, 94 Marq. L. Rev. 1103, 1126-1127 (2011). All the major arbitration organizations have rules allowing arbitrators to decide their own jurisdiction. See *ibid.*; Restatement § 2-8 reporter's note b(iii) (Tentative Draft No. 4, 2015) (citing provisions from UNCITRAL, AAA, CPR, ICC, LCIA, and SCC). Thus, if choosing a set of arbitration rules constitutes "clear and unmistakable" delegation, it affects numerous arbitration agreements. If that is the law, this Court should make that clear so parties can organize their affairs and structure their agreements knowing what effect the language they are selecting will have on any future arbitration.

Indeed, arbitration is so important that, as cross-respondent writes, "this Court routinely grants certiorari even where a circuit conflict is shallow (or non-existent) when the question presented concerns the interpretation of the Arbitration Act." Pet. 25. If that is true for cross-respondent's question presented (where there is no conflict), it is doubly true for the implied-delegation question (where there is a conflict). Unlike cross-respondent's question presented regarding the effect of carve-outs, implied delegation actually does present a pure question of law likely to have broad and significant effects in other cases.

C. This Case Is An Appropriate Vehicle In Which To Address Implied Delegation

If the Court grants cross-respondent's petition on the effect of a carve-out, this case is an appropriate vehicle in which to address implied delegation. Cross-respondent's

question presented assumes that the agreement at issue clearly and unmistakably delegates arbitrability. See Pet. i (assuming "an otherwise clear and unmistakable delegation"). It bases that assumption, as did the court below, solely on the agreement's reference to AAA rules. See Pet. App. 7a. Thus, cross-respondent's question presented is relevant only if the implied-delegation doctrine is cognizable. If the Court is going to grant at all, it should decide the implied-delegation question first.

D. Implied Delegation Is Inconsistent With Precedent And Parties' Expectations

Unlike an agreement to arbitrate the merits of a dispute, "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clear[] and unmistakabl[e]' evidence that they did so." *First Options of Chi., Inc.* v. *Kaplan*, 514 U.S. 938, 944 (1995) (quoting *AT&T Techs., Inc.* v. *Commc'ns Workers*, 475 U.S. 643, 649 (1986)). "The question whether parties have submitted a particular dispute to arbitration, i.e., the question of arbitrability, is an issue for judicial determination unless the parties clearly and unmistakably provide otherwise." *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002). There is a "strong pro-court presumption as to the parties' likely intent." *Id.* at 86. A party seeking to compel arbitration can overcome that presumption only with "clear[] and unmistakabl[e]" evidence. *AT&T Techs.*, 475 U.S. at 649. Requiring the proponent of arbitration to identify such evidence is important, because the issue of who should decide arbitrability is "rather arcane," and failure to meet that standard "might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide." *First Options*, 514 U.S. at 945.

The agreement at issue in this case does not expressly delegate arbitrability. It is far different from other

agreements that this Court has found sufficient to delegate arbitrability. For example, the arbitration agreement in *Rent-A-Center* stated: "The Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this [Arbitration] Agreement including, but not limited to any claim that all or any part of this [Arbitration] Agreement is void." *Rent-A-Center, West, Inc.* v. *Jackson*, 561 U.S. 63, 66 (2010). This Court determined that such language delegated arbitrability. See *id.* at 67.

Here, by contrast, the agreement does not state that the arbitrators will have authority to resolve arbitrability disputes, much less that they will have the *exclusive* authority to do so. Instead, applicant hangs its hat on a provision stating that any arbitration between the parties will be governed by AAA rules, and AAA rules give the arbitrators authority to decide their own jurisdiction –- "implied delegation."

First, merely choosing a set of arbitration rules that will apply *if* the parties have an arbitrable dispute is not "clear and unmistakable" evidence that the parties agreed to allow an arbitrator to decide *whether* they have an arbitrable dispute. "It is doubtful that many people read the small print in form contracts, let alone the small print in arbitration rules that are cross-referenced by such contracts, however explicit the cross-reference." *Awuah* v. *Coverall N. Am., Inc.*, 554 F.3d 7, 12 (1st Cir. 2009). "Incorporation by reference of an obscure body of rules to show a clear and unmistakable intent to adhere to one rule specifically is preposterous." *Ashworth* v. *Five Guys Ops., LLC*, 2016 U.S. Dist. LEXIS 177407 (S.D. W. Va. Dec. 22, 2016).

In sum, "incorporating forty pages of arbitration rules into an arbitration clause is tantamount to inserting

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

Second, even if the parties expected arbitration rules to apply to non-arbitrable disputes, such rules do not give arbitrators the *exclusive* right to determine their own jurisdiction. See Restatement § 2-8 reporter's note b(iii) (Tentative Draft No. 4, 2015). So even by incorporating those rules, the parties did not agree to divest courts of their traditional power to decide arbitrability. At best, the rules indicate that the arbitrator and the court both equally have that power.

Third, most arbitration agreements choose a set of arbitration rules to govern their disputes. See *Bernardino* v. *Barnes & Noble Booksellers, Inc.*, 2017 U.S. Dist. LEXIS 192814, at *35 (S.D.N.Y. Nov. 20, 2017) ("[I]t is common for arbitration agreements to include reference to AAA procedures or other procedures that will govern any potential dispute."). AAA rules are the most popular choice, but even if the parties choose a different set of rules, most have a rule analogous to AAA's rule giving arbitrators authority to decide their own jurisdiction. Christopher R. Drahozal & Peter B. Rutledge, *Contract and Procedure*, 94 Marq. L. Rev. 1103, 1126-27 (2011) ("[T]he AAA is the most common provider specified in domestic arbitration agreements in the United States. A wider array of providers (not surprisingly) is specified in international arbitration agreements; most, however, have a rule like Rule 7(a) of the AAA Commercial Rules."); Christopher R. Drahozal, *"Unfair" Arbitration Clauses*, 2001 U. Ill. L. Rev. 695, 728 ("[V]irtually all [of the clauses in the

study sample] selected the American Arbitration Association (AAA) to administer the arbitration, with the Commercial Arbitration Rules of the AAA generally chosen to govern the conduct of the arbitration."). Holding that the mere mention of a set of arbitration rules in an arbitration agreement demonstrates clear and unmistakable evidence of delegation would result in nearly every arbitration agreement delegating arbitrability, flipping the presumption against delegation on its head.

Fourth, accepting the concept of implied delegation would lead to odd results that conflict with the bedrock principle that arbitration is a matter of contract and consent. For example, many sets of arbitration rules apply the rules as they exist at the time the arbitration is filed. See, *e.g.*, AAA Commercial Arb. R-1(a) ("These rules and any amendment of them shall apply in the form in effect at the time the administrative requirements are met for a Demand for Arbitration or Submission Agreement received by the AAA."). If two parties sign an arbitration agreement selecting a set of arbitration rules, but then the arbitration rules are amended to allow arbitrators to decide their own jurisdiction, implied delegation would mean the parties retroactively delegated arbitrability disputes without taking any action.[6] That is not clear and unmistakable delegation.

Some of these serious concerns led the ALI Restatement of the U.S. Law of International Commercial and Investor-State Arbitration to reject the concept of implied delegation. Restatement § 2-8 reporter's note b(iii) (Tentative Draft No. 4, 2015). This Court previously had the

[6] To avoid finding delegation, the court would have to make a special exception by applying the jurisdictional rule that existed at the time the parties signed the agreement, but the rules that exist at the time of the arbitration for everything else.

opportunity to adopt implied delegation when the petitioner in *Howsam* advocated for that rule, on which the court below had relied. Pet. Br. 33-34, *Howsam*, No. 01-800 (2002). This Court declined. Instead, it decided the case on narrower grounds, holding that the particular dispute at issue was not about gateway arbitrability that would require clear and unmistakable delegation. See *Howsam*, 537 U.S. at 85-86.

Because implied delegation is doctrinally unsound and inconsistent with this Court's precedents requiring clear and unmistakable delegation, the Court should take this opportunity to reject it.

II. THE ISSUE OF WHO DECIDES WHETHER A NONSIGNATORY CAN INVOKE AN ARBITRATION CLAUSE WARRANTS THIS COURT'S REVIEW

A. A Conflict Exists Regarding Who Decides Whether A Nonsignatory Can Invoke An Arbitration Clause

Assuming that any delegation exists at all, there is an acknowledged circuit conflict regarding whether the court or the arbitrator decides whether a non-signatory can invoke the arbitration (and delegation) agreement. See *De Angelis* v. *Icon Entm't Grp., Inc.*, 364 F. Supp. 3d 787, 796 (S.D. Ohio 2019) (describing the split). The Ninth, Tenth, and Federal Circuits, one panel of the Second Circuit, and the Texas Supreme Court have held that notwithstanding delegation language, the court must decide whether a nonsignatory can invoke an arbitration agreement. By contrast, the First, Fifth, and Eighth Circuits, a different panel of the Second Circuit, and the Alabama Supreme Court have held that the arbitrator can decide whether a nonsignatory can invoke the agreement.

1. The Ninth, Tenth, and Federal Circuits, one panel of the Second Circuit, and the Texas Supreme Court have

held that the court, not the arbitrator, decides whether a nonsignatory can enforce an arbitration agreement.

In *Jody James Farms, JV* v. *Altman Group, Inc.*, 547 S.W.3d 624 (Tex. 2018), a case very similar to the one at hand, the Texas Supreme Court held that the court must decide whether a nonsignatory could invoke the arbitration clause. There, as here, the agreement incorporated AAA rules. While that may have been sufficient to delegate "disputes between signatories to an arbitration agreement," the court explained that "the analysis is necessarily different when a dispute arises between a party to the arbitration agreement and a non-signatory." *Id.* at 631-632. Thus, "questions related to the existence of an arbitration agreement with a non-signatory are for the court, not the arbitrator." *Id.* at 632. "The question is not whether [the signatory] agreed to arbitrate with someone, but whether a binding arbitration agreement exists between [the signatory] and [the nonsignatory]." *Ibid.* The court acknowledged some circularity in that question, but determined that the clear and unmistakable standard resolved that question. *Ibid.* "A contract that is silent on a matter cannot speak to that matter with unmistakable clarity, so an agreement silent about arbitrating claims against non-signatories does not unmistakably mandate arbitration of arbitrability in such cases." *Ibid.*

The Ninth Circuit reached a similar conclusion in *Kramer* v. *Toyota Corp.*, 705 F.3d 1122 (9th Cir. 2013). There, the court held that "the district court had the authority to decide whether the instant dispute is arbitrable," despite the presence of an express delegation clause, because there was an "absence of clear and unmistakable evidence that Plaintiffs agreed to arbitrate arbitrability *with nonsignatories*." *Id.* at 1125, 1127 (emphasis added). The court explained that "Plaintiffs only agreed to arbitrate arbitrability—or any other dispute—with the [signatory]

Dealerships." *Id.* at 1128. In making that determination, the Ninth Circuit rejected not only the nonsignatories' argument that the text of the agreement extended to nonsignatories, but also its equitable estoppel argument. See *id.* at 1134.

Similarly, in *Belnap* v. *Iasis Healthcare*, 844 F.3d 1272 (10th Cir. 2017), the Tenth Circuit held that the arbitration agreement at issue clearly and unmistakably delegated arbitrability by incorporating JAMS rules. *Id.* at 1284. It therefore ordered arbitration of the dispute between the signatories to the agreement. *Ibid.* But the court then went on to undertake its own analysis of whether *nonsignatories* could compel arbitration and concluded that they could not in that circumstance. *Id.* at 1293, 1298. It did not leave that decision to the arbitrator. See also *Microchip Technology Inc. v. U.S. Philips Corp.*, 367 F.3d 1350, 1358 (Fed. Cir. 2004) ("[T]he question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator."); *Republic of Iraq* v. *BNP Paribas USA*, 472 F. App'x 11, 13 (2d Cir. 2012) (summary order) (holding that the arbitration agreement did not "provide clear and unmistakable evidence that the particular question of arbitrability at issue here—whether [a nonsignatory] may invoke the arbitration clause as a third-party beneficiary of the contract—should be decided by arbitrators").

2. By contrast, the First, Fifth, and Eighth Circuits, a different panel of the Second Circuit, and the Alabama Supreme Court have held that the arbitrator must decide whether a nonsignatory can enforce the arbitration agreement, though they have applied differing tests.

The Second Circuit, for example, created a "sufficient relationship" test to determine whether the court or the arbitrator decides if a nonsignatory can enforce an arbitration agreement. In *Contec Corp. v. Remote Solution*

Co., 398 F.3d 205 (2d Cir. 2005), the court held that an arbitrator must decide whether the nonsignatory could compel arbitration. The court "recognize[d] that just because a signatory has agreed to arbitrate issues of arbitrability with another party does not mean that it must arbitrate with any non-signatory." *Id.* at 209. But it explained that if the court determines that "the parties have a sufficient relationship to each other and to the rights created under the agreement," then the remainder of the issue is for the arbitrator. *Ibid.* The court determined that the requisite relationship existed in that case given that the nonsignatory was a successor to the signatory and the parties continued to conduct themselves subject to the contract containing the arbitration agreement even after the change in corporate form. *Ibid. Contec* recognized that its decision was in "direct contrast" to the Federal Circuit's holding in *Microchip Technology*. *Id.* at 210.

The Fifth Circuit found *Contec* "instructive" in reaching its own decision on this issue, but did not apply the "sufficient relationship" test. In *Brittania-U Nigeria, Ltd.* v. *Chevron USA, Inc.*, 866 F.3d 7 (5th Cir. 2017), the Fifth Circuit held that even though the "agreement does not explicitly state that it binds nonsignatories to the agreement, it does explicitly bind Brittania-U." *Id.* at 715. Therefore, the court concluded, "the language of the agreement clearly and unmistakably delegates arbitrability, even with regard to Brittania-U's dispute with" nonsignatories. *Ibid.* In reaching that conclusion, the court said nothing about *Contec*'s "sufficient relationship" test and instead relied solely on the fact that the arbitration agreement was being enforced against a signatory.

Other courts have reached similar conclusions. *See Anderton* v. *Practice-Monroeville, P.C.*, 164 So. 3d 1094, 1102 (Ala. 2014) (holding that "the question whether an arbitration provision may be used to compel arbitration

between a signatory and a nonsignatory" is a "threshold issue" that must be decided by "[t]he arbitrator, not the court"); *Eckert/Wordell Architects, Inc.* v. *FJM Properties of Willmar, LLC*, 756 F.3d 1098, 1100 (8th Cir. 2014); *Apollo Computer v. Berg*, 886 F.2d 469 473-474 (1st Cir. 1989) ("By contracting to have all disputes resolved according to the Rules of the ICC," the parties clearly and unmistakably agreed that "[t]he arbitrator should decide whether a valid arbitration agreement existed between [the plaintiff] and the [nonsignatory] defendants under the terms of the contract between [the signatories].").

3. Courts have recognized and acknowledged the split of authority. See *Contec*, 398 F.3d at 210 (acknowledging that its decision was consistent with *Apollo*, but in "direct contrast" to *Microchip Technology*); *De Angelis*, 364 F. Supp. 3d at 796 (describing the split). The split of authority is entrenched, with decisions stretching as far back as 1989, with no signs of resolving itself without guidance from this Court. The only hope of resolving this conflict rests with this Court.

B. Who Decides Whether A Nonsignatory Can Invoke An Arbitration Agreement Is Question Of Great Importance

As cross-respondent acknowledges, the Federal Arbitration Act was intended to establish nationwide standards for the enforcement of arbitration agreements. Pet. 25. That goal is being thwarted so long as the courts disagree whether a court or an arbitrator decides whether a nonsignatory can enforce an arbitration agreement to which it is a stranger.

The split among the courts is untenable and will "encourage and reward forum shopping." *Southland Corp.* v. *Keating*, 465 U.S. 1, 15 (1984). In some fora, plaintiffs can ensure that courts will decide whether a nonsignatory can enforce an arbitration agreement. In others,

nonsignatories can force needless and time-consuming detours to arbitration. Plaintiffs will be more likely to file suit where they know nonsignatories cannot do so. That problem is particularly acute where a state (Texas) and the circuit in which the state is located (the Fifth Circuit) are in disagreement such that the outcome will depend on whether a party can artfully plead the case into state or federal court. If this Court chooses to consider this case on cross-respondent's question presented, despite all of the vehicular problems that it presents, then it should also take the opportunity to resolve this entrenched conflict about deciding equitable estoppel.

C. This Case Is An Appropriate Vehicle

This case is an appropriate vehicle by which to resolve the equitable-estoppel question, at least if the Court grants review of the other questions presented. The question is a legal issue cleanly presented on the facts of this case. The only party seeking arbitration is not a signatory to the agreement. The parties dispute whether the nonsignatory is entitled to invoke the arbitration agreement. The question is who decides that issue.

If the Court finds delegation and remands without resolving this question, cross-respondent will argue (as it did previously) that controlling Fifth Circuit precedent requires the arbitrator to decide the equitable estoppel issue. Pet. Supp. C.A. Br. 9 n.1. If the Fifth Circuit accepts that argument, cross-petitioner would be forced to seek further review on that issue. This case is already before this Court a second time. If the Court grants the original petition, but fails to address these underlying issues, then it will likely be before the Court a third time. There is no reason that the parties should have to make a third trip to this Court, with all the expenditure of time and resources that would entail. Although there are certainly simpler vehicles for addressing the important questions in this

cross-petition (such as those where the petitioner did not prevail on alternative grounds below), should the Court grant review at all, it should decide these key delegation issues at the same time.

D. Cross-Respondent's Approach Is Incorrect, Because A Court Must Decide Whether a Nonsignatory Can Invoke An Arbitration Agreement

Only a court can decide that a nonsignatory can invoke an arbitration agreement. Any other conclusion violates the fundamental principle that arbitration is a matter of contract. A court cannot order arbitration before concluding that a party is bound to arbitrate with the nonsignatory.

1. The text of the Federal Arbitration Act requires the court to make a preliminary finding regarding whether a nonsignatory can invoke the arbitration agreement before ordering arbitration of any issue. The Act allows courts to stay a suit pending arbitration only "upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration." 9 U.S.C. 3. But a court cannot be "satisfied" that the issue is "referable to arbitration" until it decides if the nonsignatory can enforce the arbitration agreement at all.

Similarly, Section 4 allows "[a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration" to move to compel arbitration. 9 U.S.C. 4. But a party who is a nonsignatory cannot be "aggrieved" if it has no right to enforce the arbitration agreement in the first place. In other words, the court finding that a nonsignatory can properly invoke the arbitration agreement is a prerequisite to the court ordering arbitration or staying the litigation. Without that preliminary finding, the court has no power to order arbitration.

2. This Court's decisions are consistent with the understanding. Arbitration is a matter of contract. "[B]efore referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement exists." *Henry Schein, Inc.* v. *Archer & White Sales, Inc.*, 139 S. Ct. 524, 530 (2019). "The duty to arbitrate being of contractual origin, a compulsory submission to arbitration cannot precede judicial determination that the * * * agreement does in fact create such a duty." *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543, 547 (1964). A party "cannot be compelled to arbitrate if an arbitration clause does not bind it at all." *Ibid.*

This Court's "precedents hold that courts should order arbitration of a dispute only where the court is satisfied that neither the formation of the parties' arbitration agreement *nor* (absent a valid provision specifically committing such disputes to an arbitrator) its enforceability or applicability to the dispute is in issue." *Granite Rock Co.* v. *Int'l Bhd. of Teamsters*, 561 U.S. 287, 299 (2010). "Where a party contests either or both matters, 'the court' must resolve the disagreement." *Id.* at 299-300; *id.* at 297 ("[T]he court must resolve any issue that calls into question the formation or applicability of the specific arbitration clause that a party seeks to have the court enforce.").

While a party can agree to delegate "enforceability or applicability" to the arbitrator, it can do so only if there is "clear and unmistakable evidence" that "the parties agreed to arbitrate arbitrability." *First Options*, 514 U.S. at 944. When the parties have no agreement between them at all, it is hard to imagine *any* "clear and unmistakable" agreement to arbitrate—much less one addressing the obscure topic of arbitrating arbitrability.

3. Adopting cross-respondent's rule that an arbitrator can decide whether a nonsignatory can enforce an arbitration agreement would lead to unexpected and inequitable

results, delay, and increased litigation costs, which is contrary to the primary purposes of arbitration in the first place.

First, that rule would incentivize a defendant to search for *any* arbitration agreement the plaintiff signed so the defendant could force the dispute into arbitration for an initial decision on whether the nonsignatory could invoke the agreement. The court would be powerless to reject that argument, even if the nonsignatory's argument was wholly groundless. *Schein*, 139 S. Ct. at 531. Even if the defendant's gambit ultimately is unsuccessful, it will have succeeded in driving up costs and delaying the case.

Second, allowing an arbitrator to decide whether a nonsignatory can enforce the arbitration agreement puts the cart before the horse by effectively allowing the nonsignatory to enforce the agreement before that decision is made. But this Court has "never held that [the policy favoring arbitration] overrides the principle that a court may submit to arbitration 'only those disputes . . . that the parties have agreed to submit.'" *Granite Rock*, 561 U.S. at 302 (quoting *Volt Info. Scis., Inc.* v. *Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989)). A party could not have contemplated that by signing an arbitration agreement with one party, it was bound to arbitrate (at least initially) with literally anyone else in the future.

4. Finally, as the Supreme Court of Texas has noted, even if an agreement of some type theoretically could delegate the "nonsignatory" issue to an arbitrator, it would require far more than mere reference to AAA rules. See *Jody James Farms*, 547 S.W.3d at 632-33. Whatever the parties intended by incorporating those rules into their agreement, they could not seriously have intended that decision to allow nonsignatories to force all disputes into arbitration. That theory stretches both implied delegation and equitable estoppel past their breaking points. This is

exactly the kind of "rather arcane" issue that parties "reasonably would have thought a judge, not an arbitrator, would decide." *First Options*, 514 U.S. at 945.

CONCLUSION

If the petition for a writ of certiorari in No. 19-963 is granted, this cross-petition should also be granted. If the Court denies the petition in No. 19-963 (as it should), this cross-petition should be denied.

Respectfully submitted.

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