No.

IN THE SUPREME COURT OF THE UNITED STATES

HENRY SCHEIN, INC., APPLICANT

v.

ARCHER AND WHITE SALES, INC.

APPLICATION FOR A STAY OF PROCEEDINGS
PENDING A PETITION FOR A WRIT OF CERTIORARI

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CORPORATE DISCLOSURE STATEMENT

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

Page

Cases -- continued:

STATUTES AND RULE

MISCELLANEOUS

Pursuant to 28 U.S.C. 2101(f) and Supreme Court Rule 23, Henry Schein, Inc., applies to stay proceedings in the district court pending a decision on applicant's forthcoming petition for a writ of certiorari.

INTRODUCTION

This case is no stranger to this Court. See Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524 (2019). It returns to the Court presenting a question that the Court left open in its earlier decision and that has divided appellate courts across the Nation. Earlier this year, the Court held that, under the Federal Arbitration Act, a court may not assess the merits of a question of arbitrability if the parties clearly and unmistakably delegated such questions to an arbitrator, even if the court believed that the argument in favor of arbitrability was "wholly groundless." See id. at 528. The Court remanded the case, however, for the court of appeals to determine in the first instance whether such a delegation was present in the parties' arbitration provision. See id. at 531.

On remand, the court of appeals yet again refused to compel arbitration. See App., infra, 1a-14a. It conceded that the parties had clearly and unmistakably delegated questions of arbitrability to the arbitrator. See id. at 6a-7a. But it then held that the presence of a contractual carve-out provision, which exempted certain claims from the scope of the arbitration provision,

negated the parties' otherwise clear and unmistakable intent. See id. at 9a-10a. Accordingly, the court concluded that it had to determine whether the claims at issue fell outside the scope of the arbitration provision -- a paradigmatic question of arbitrability -- in order to determine whether the parties had agreed to have an arbitrator decide that very question. See id. at 10a-13a.

The court of appeals' decision defies common sense and deepens a conflict among federal and state appellate courts regarding the effect of a contractual carve-out provision on an otherwise clear and unmistakable delegation of questions of arbitrability to an arbitrator. One federal court of appeals and one state court of last resort have held that, because the question of scope is itself a question of arbitrability, the arbitrator must decide that question if there is a clear and unmistakable delegation. By contrast, in addition to the court of appeals in the decision below, one other federal court of appeals and one state court of last resort have held that the presence of a carve-out provision necessarily requires a court to determine whether the claims at issue fall within the scope of the arbitration agreement before sending that very question of arbitrability to the arbitrator. As in many other recent cases, this Court's review is warranted to correct a lower court's erroneous application of the Arbitration Act and reaffirm

the "emphatic federal policy in favor of arbitral dispute resolution." Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 631 (1985).

This Court previously stayed proceedings in the district court, including a scheduled trial, pending the disposition of applicant's earlier petition for a writ of certiorari. That stay prevented the irreparable harm of applicant's being forever deprived of the right to resolve its claims efficiently, privately, and expeditiously through arbitration. The same risk of irreparable harm is present here: having initially stayed proceedings pending appeal, Judge Gilstrap has lifted the stay and scheduled a trial to begin on February 3, 2020.

Under these circumstances, a stay is amply justified. As a vehicle and on its merits, this case is an ideal candidate for certiorari. There is a significant possibility that, after granting review, this Court will reverse the court of appeals' erroneous decision. The harm that applicant will suffer from being compelled to litigate cannot be remedied by an order sending the case to arbitration after applicant has already tried its case before a jury and exposed its most sensitive business information to public scrutiny. And that harm plainly outweighs the harm to respondent from a brief additional delay. Applicant thus once again requests that the Court stay proceedings in the district court pending the disposition of its forthcoming petition for certiorari.

STATEMENT

A. Background

Congress enacted the Federal Arbitration Act to "reverse the longstanding judicial hostility to arbitration agreements." Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991). Section 2 of the Arbitration Act -- the Act's "primary substantive provision," Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24 (1983) -- guarantees that "[a] written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. 2. Section 2 reflects "both a liberal federal policy favoring arbitration and the fundamental principle that arbitration is a matter of contract." AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011) (internal quotation marks and citations omitted).

Section 2 of the Arbitration Act requires courts to "place[] arbitration agreements on an equal footing with other contracts and . . . enforce them according to their terms." Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63, 67 (2010) (citations omitted). The requirement that courts rigorously enforce arbitration agreements according to their terms applies to disputes over "gateway" issues, such as whether a particular claim falls within the scope

of the arbitration provision or whether a nonsignatory to the agreement is required to participate in arbitration. See id. at 68-70. And it applies to disputes over an equally important antecedent question: who decides such gateway issues, the court or the arbitrator? See Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524, 529 (2019).

Although courts, not arbitrators, presumptively resolve gateway disputes, parties may supersede that general rule by "clear[ly] and unmistakab[ly]" agreeing to "arbitrate arbitrability." First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995). One way for parties to accomplish that result is by including a so-called "delegation provision" in their arbitration agreement. A delegation provision is "simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce"; the Arbitration Act "operates on this additional arbitration agreement just as it does on any other." Henry Schein, 139 S. Ct. at 529 (citation omitted). When parties include such a provision in their arbitration agreement, the delegation of authority to the arbitrator applies to virtually all gateway disputes, including disputes over "whether their [arbitration] agreement covers a particular controversy." Ibid. (citation omitted).

A contract need not contain an express delegation provision to satisfy the requirement that parties "clearly and unmistakably" delegate arbitrability questions to an arbitrator. As every court

of appeals to consider the question has held, an agreement incorporating rules that themselves assign questions of arbitrability to the arbitrator, like the rules of the American Arbitration Association (AAA), indicates equally clearly and unmistakably that the parties intend for an arbitrator, not the court, to resolve questions of arbitrability. See, e.g., Belnap v. Iasis Healthcare, 844 F.3d 1272, 1283-1284 (10th Cir. 2017)(collecting cases); AAA Commercial Rule R-7.

B. Facts And Procedural History

1. Applicant is a distributor of dental equipment. At the time of the complaint in this case, respondent distributed, sold, and serviced dental equipment. 17-1272 J.A. 26-28.

In 2012, respondent filed suit against applicant and other defendants in the United States District Court for the Eastern District of Texas, alleging violations of Section 1 of the Sherman Antitrust Act, 15 U.S.C. 1, and state antitrust law. 17-1272 J.A. 23-48. The complaint sought "tens of millions of dollars" in damages stemming from an alleged conspiracy to boycott respondent and to restrict respondent's sales territories under certain distribution agreements. Id. at 24, 25. The complaint also included a two-sentence request for unspecified injunctive relief:

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

Id. at 45, 47. The complaint contained no allegations tending to demonstrate that respondent could establish the requirements for obtaining injunctive relief; since initiating this suit, respondent has never sought any form of injunctive relief, preliminary or otherwise, and the distribution agreements at issue have terminated.

Applicant and the other defendants promptly moved to compel arbitration of respondent's claims. 17-1272 J.A. 12-13; see 9 U.S.C. 3, 4. The motions were based on respondent's distribution agreements, which defined how the parties were to resolve any disputes as follows:

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

17-1272 J.A. 58. Respondent opposed the motions to compel arbitration, claiming that the boilerplate request for injunctive relief in its complaint rendered the entire dispute triable to a jury rather than an arbitrator.

A magistrate judge -- to whom the case was assigned for all pretrial purposes -- ruled in favor of applicant, compelling arbitration and staying the litigation. 17-1272 Pet. App. 39a-44a. Respondent moved the district court to reconsider the magistrate

judge's order. More than three years later, Judge Gilstrap vacated the magistrate's order and denied the motions to compel arbitration. Id. at 18a-38a. Purporting to interpret the "[s]cope of [the] arbitration clause," id. at 26a, the court reasoned that the agreement's exception for "actions seeking injunctive relief" meant that respondent's inclusion of a perfunctory request for injunctive relief entitled it to go to court on its claims. Id. at 27a-28a. The court further concluded that any contrary reading of the agreements' arbitration clause would be "wholly groundless." Id. at 34a-37a.

2. The court of appeals affirmed. 17-1272 Pet. App. 1a-17a. It held that, "[i]f an assertion of arbitrability [is] wholly groundless, the court need not submit the issue of arbitrability to the arbitrator." Id. at 11a (internal quotation marks and citation omitted). The court determined, based on its own interpretation of "the four corners of the contract," that there was "no plausible argument that the arbitration clause applies here to an 'action seeking injunctive relief.'" Id. at 16a.

3. Applicant sought a stay of further proceedings in the district court while the appeal was pending. 17-1272 J.A. 21. The district court denied applicant's motion, id. at 21-22, and the court of appeals (after carrying the stay motion with the merits) did the same, 17-1272 Pet. App. 45a.

4. Applicant applied to this Court for a stay of the lower court proceedings pending a decision on a forthcoming petition for a writ of certiorari. See 17A859 Appl. 1 (Feb. 12, 2018). Justice Alito referred the stay application to the full Court, and the Court granted the stay without recorded dissent. Applicant then filed a petition for a writ of certiorari, which the Court granted. See 138 S. Ct. 2678 (2018).

5. On the merits, the Court vacated the judgment of the court of appeals, holding that "the 'wholly groundless' exception is inconsistent with the text of the Act and with [the Court's] precedent." 139 S. Ct. at 529. The Court reasoned that, "[w]hen the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract." Ibid. As the Court explained, "[t]hat is true even if the court thinks that the argument that the arbitration agreement applies to a particular dispute is wholly groundless." Ibid.

Of particular relevance here, the Court noted that the court of appeals had not decided whether the parties had actually delegated the arbitrability question to the arbitrator. See 139 S. Ct. at 531. The Court therefore remanded for further proceedings. See ibid.

6. On remand, the district court initially granted applicant's request for a further stay of proceedings pending the court of appeals' decision. See App., infra, 15a-18a. The parties

submitted supplemental briefing to the court of appeals, and it subsequently held oral argument.

On August 14, 2019, the court of appeals once again affirmed the district court's denial of the motions to compel arbitration. See App., infra, 1a-14a. The court of appeals acknowledged that "[i]t is undisputed that the [arbitration agreement] incorporates the AAA rules" and thus "delegate[s] the threshold arbitrability inquiry to the arbitrator for at least some category of cases." Id. at 6a-7a. The court nevertheless proceeded to interpret the scope of the arbitration agreement, deciding that "[t]he plain language incorporates the AAA rules -- and therefore delegates arbitrability -- for all disputes except those under the carve-out" for actions seeking injunctive relief. Id. at 9a-10a. In so holding, the court rejected applicant's argument that it should apply the rule adopted by the Ninth Circuit: namely, that, "when a tribunal decides that a claim falls within the scope of a carve-out provision, it necessarily decides arbitrability." Oracle America, Inc. v. Myriad Group A.G., 724 F.3d 1069, 1076 (2013); see App., infra, 8a. The court concluded that respondent's claim constituted an "action seeking injunctive relief" and was therefore exempt from arbitration. See App., infra, 10a-13a.

7. On August 28, 2019, applicant filed a petition for rehearing. On October 1, 2019, the district court lifted its stay and scheduled trial to begin on February 3, 2020. App., infra,

19a-20a. On December 6, 2019, shortly after applicant notified the court of appeals of the district court's decision to schedule the trial, the court of appeals denied the petition for rehearing. Id. at 24a-25a.

8. On December 27, 2019, applicant filed a motion in the district court for a stay of proceedings pending this Court's decision on a forthcoming petition for a writ of certiorari. On January 3, 2020, the district court denied applicant's motion, noting that "should the Supreme Court feel a stay is warranted, a mechanism for [applicant] to seek such a stay from the Supreme Court exists and is open to it." App., infra, 21a-22a.

9. On January 6, 2020, applicant filed a motion in the court of appeals seeking a stay of the district court's proceedings pending this Court's decision on certiorari (and requesting a re-call of the mandate for the limited purpose of entering such a stay). On January 7, the court of appeals denied the motion in a summary order. App., infra, 23a.

Should the Court grant a stay, applicant intends to file a petition for a writ of certiorari by no later than January 31, 2020 -- well before the current due date -- so as to ensure that the Court has ample time to consider the petition before the summer recess.

ARGUMENT

Under 28 U.S.C. 2101(f), this Court may stay proceedings in the district court pending the disposition of applicant's forthcoming petition for a writ of certiorari. In reviewing such a stay application, this Court considers whether there is (1) "a reasonable probability that certiorari will be granted," (2) "a significant possibility that the judgment below will be reversed," and (3) "a likelihood of irreparable harm (assuming the correctness of the applicant's position) if the [proceedings are] not stayed." Barnes v. E-Systems, Inc. Group Hospital Medical & Surgical Insurance Plan, 501 U.S. 1301, 1302 (1991) (Scalia, J., in chambers); see also Deaver v. United States, 483 U.S. 1301, 1302 (1987) (Rehnquist, C.J., in chambers). "In close cases," the Court will further "balance the equities and weigh the relative harms to the applicant and to the respondent." Hollingsworth v. Perry, 558 U.S. 183, 190 (2010) (per curiam).

This case satisfies each of those criteria. The court of appeals erroneously decided an important question of law that has divided federal and state appellate courts. This case is an optimal vehicle for review. As this Court presumably recognized in granting an earlier stay when this case was in a materially identical posture, if proceedings in the district court are not stayed, applicant will lose the right to arbitrate, face disclosure of its most sensitive business information, and suffer irreparable harm.

And the balance of the equities weighs strongly in applicant's favor. The application for a stay should be granted.

I. THERE IS A REASONABLE PROBABILITY THAT THIS COURT WILL GRANT CERTIORARI

This case presents an important and recurring question involving the Federal Arbitration Act that has divided appellate courts across the Nation and that the Court left open when this case was last before it. There is an entrenched conflict on the question whether a court may decline to enforce a clear and unmistakable agreement delegating questions of arbitrability to an arbitrator whenever the arbitration agreement contains a carve-out exempting certain claims from the scope of the agreement.

One federal court of appeals and one state court of last resort have held that, because the question of scope is itself a question of arbitrability, the arbitrator must decide that question if there is a clear and unmistakable delegation. By contrast, in addition to the court of appeals in the decision below, one other federal court of appeals and one state court of last resort have held that the presence of a carve-out provision necessarily requires a court to determine whether the claims at issue fall within the scope of the arbitration agreement before sending that very question of arbitrability to the arbitrator. Only the Court can resolve that intractable conflict, and this case is an optimal

vehicle in which to do so. There is therefore a reasonable probability that certiorari will be granted.

A. The Decision Below Deepens A Conflict Among The Federal Courts Of Appeals And State Courts Of Last Resort

The court of appeals' decision deepens an existing conflict among federal and state appellate courts on the question whether a court may decline to enforce a clear and unmistakable agreement delegating questions of arbitrability to an arbitrator whenever the arbitration agreement contains a carve-out for certain claims. That conflict -- which other courts have expressly recognized, see Oracle America, Inc. v. Myriad Group A.G., 724 F.3d 1069, 1076-1077 (9th Cir. 2013); Ally Align Health, Inc. v. Signature Advantage, LLC, 574 S.W.3d 753, 756-758 (Ky. 2019) -- plainly warrants the Court's review.

1. The decision below conflicts with decisions of the Ninth Circuit and the Kentucky Supreme Court.

In Oracle, supra, the Ninth Circuit considered whether the question of arbitrability of a copyright dispute between two software companies was delegated to the arbitrator under the companies' licensing agreement. 724 F.3d at 1071. The arbitration clause at issue applied generally to "[a]ny dispute arising out of" the agreement, but it also contained a carve-out provision exempting from arbitration "any dispute relating to" the parties' intellectual-property rights or a particular sublicense. See ibid. The

agreement further incorporated arbitration rules that, like the AAA rules, permitted the arbitrator to determine the tribunal's jurisdiction. See id. at 1072-1073.

The Ninth Circuit held that the gateway question of arbitrability before it -- whether the claims fell within the scope of the carve-out provision -- was for the arbitrator to decide. See Oracle, 724 F.3d at 1075-1077. The court determined that the incorporation of the arbitration rules unmistakably delegated questions of arbitrability to the arbitrator, and it rejected the argument that the carve-out provision negated that delegation. See ibid. That argument, the court of appeals explained, "conflates the scope of the arbitration clause, i.e., which claims fall within the carve-out provision, with the question of who decides arbitrability." Id. at 1076. "[W]hen a tribunal decides that a claim falls within the scope of a carve-out provision," the court explained, "it necessarily decides arbitrability." Ibid. The court concluded that it had no license to resolve that issue, because the parties had "clearly and unmistakably delegated [it] to the arbitrator." Ibid. The court recognized that the Delaware Supreme Court had reached the opposite conclusion regarding the effect of a carve-out provision on a delegation provision, see pp. 17-18, infra, but it rejected that decision as an outlier based on faulty reasoning, see Oracle, 724 F.3d at 1076-1077.

The Kentucky Supreme Court followed suit in Ally Align Health, supra. There, the plaintiff brought suit against the administrator of its insurance plan for breach of contract and other claims, seeking damages, rescission, restitution, and injunctive relief. See 574 S.W.3d at 755. The defendant moved to compel arbitration under the parties' contract, which incorporated the AAA rules but also preserved the parties' "right to seek equitable relief[] in a court of competent jurisdiction." Ibid.

Recognizing that the Ninth Circuit in Oracle had "dealt with the same issue" of arbitrability, the Kentucky Supreme Court explained that "whether [the plaintiff] asserts a true claim for equitable relief or such assertion is a facade to avoid arbitration[,] is a determination to be made by the arbitrator per the contract's adoption of the AAA's [r]ules so stating." Ally Align Health, 574 S.W.3d at 757. According to the court, "[a] carve-out provision for certain claims to be decided by a court does not negate the clear and unmistakable mandate of the AAA's [r]ules." Id. at 758. "To the contrary, the effect of the carve-out provision is to state that[,] if an arbitrator determines that [the plaintiff] has asserted a claim for equitable relief . . . , then the arbitrator must refer that claim to a court." Ibid. Like the Ninth Circuit, the Kentucky Supreme Court rejected the opposite conclusion from the Delaware Supreme Court as "mistake[n]." Id. at 757-758.

2. In addition to the court of appeals in the decision below, the Second Circuit and the Delaware Supreme Court have held that a court may decline to enforce a clear and unmistakable agreement delegating the question of arbitrability to an arbitrator when the arbitration agreement contains a carve-out provision exempting certain claims from arbitration.

In the first of those decisions, James & Jackson, LLC v. Willie Gary, LLC, 906 A.2d 76 (Del. 2006), one of the owners of a cable-television business filed a lawsuit against his co-owner seeking injunctive relief. See id. at 78. The defendant moved to compel arbitration and stay the litigation, citing an arbitration provision in the business's operating agreement. See id. at 78-80. That arbitration provision applied to "[a]ny controversy or claim arising out of or relating to" the agreement, except that it permitted the parties to seek injunctive relief or specific performance in court. See id. at 79-80. Like the agreements here, the agreement incorporated the AAA rules. See ibid.

The Delaware Supreme Court held that the court, and not the arbitrator, must resolve arbitrability disputes under the agreement. See 906 A.2d at 80-81. The court agreed that "reference to the AAA rules evidences a clear and unmistakable intent to submit arbitrability issues to an arbitrator." Id. at 80. Of particular relevance here, however, the court further reasoned that the agreement's carve-out for claims for injunctive relief and specific

performance negated the otherwise clear and unmistakable evidence provided by the incorporation of the AAA rules. See id. at 80-81. The court ultimately held that the dispute was not arbitrable and affirmed the denial of the motion to compel arbitration. See id. at 81-82.

The Second Circuit adopted a similar approach in NASDAQ OMX Group, Inc. v. UBS Securities, LLC, 770 F.3d 1010 (2014). The dispute there arose from a demand by an investment bank to arbitrate certain claims against a stock exchange under an agreement between the parties. See id. at 1016-1017. The arbitration agreement applied to "all claims, disputes, controversies, and other matters" between them, "[e]xcept as may be provided" in the exchange's rules and regulations (among other things). See id. at 1016. The parties' arbitration agreement also incorporated the AAA rules. See ibid. After receiving the arbitration demand, the stock exchange filed a declaratory-judgment action against the bank, contending that one of the exchange's rules precluded the bank's claims and thus rendered the dispute not arbitrable. See id. at 1017, 1033-1034.

The Second Circuit held that the arbitrability dispute before it -- whether the exchange's rule in fact precluded the bank's claims -- presented a question for the court and not the arbitrator. See 770 F.3d at 1032. In the Second Circuit's view, the "broad arbitration clause" in the parties agreement did not provide

clear and unmistakable evidence of their intent to delegate questions of arbitrability to an arbitrator, despite the incorporation of the AAA rules, because "the parties subjected [the clause] to a carve-out provision." Ibid. The presence of the carve-out provision, the court reasoned, "delays application of AAA rules until a decision is made as to whether a question does or does not fall within the intended scope of arbitration, in short, until arbitrability is decided." Ibid. The Second Circuit proceeded to conclude that the exchange's rules did preclude arbitration of the bank's claims. See id. at 1032-1035.

3. There can be little doubt that there is a substantial conflict on the question that will be presented in applicant's petition for certiorari. That question is ripe for the Court's review, and decisions from five appellate courts have developed the arguments on both sides of the question. Without this Court's intervention, it is highly unlikely that the conflict will resolve itself.

B. The Question Presented Is Important And Warrants Review In This Case

The question presented in this case is a recurring one of substantial legal and practical importance. The Court's intervention is necessary to safeguard the Arbitration Act's commitment to the enforceability of commercial arbitration agreements and to provide clarity and uniformity in the law. This case, which

cleanly presents the question, is an optimal vehicle for the Court's review.

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

Like the "wholly groundless" exception just rejected by this Court, the court of appeals' approach disserves the interest in efficiency that leads parties to select arbitration in the first place. Under that approach, a court could preclude arbitration whenever it concludes, based on its own parsing of the arbitration agreement, that the parties' dispute falls outside the scope of the delegation provision. That possibility would clearly incentivize any party with a colorable argument against arbitration to ignore the parties' agreement to arbitrate issues of arbitrability and bring claims in court instead. The creation of such an incentive would have widespread consequences, as arbitration agreements routinely carve out particular claims or remedies. See Christopher R. Drahozal & Erin O'Hara O'Connor, Unbundling Procedure: Carve-Outs from Arbitration Clauses, 66 Fla. L. Rev. 1945,

1949-1950 (2014). The predictable result of the court of appeals' approach would be to unleash a wave of potentially protracted mini-trials over arbitrability that would "unnecessarily complicat[e] the law and breed[] litigation from a statute that seeks to avoid it," Allied-Bruce Terminix Co. v. Dobson, 513 U.S. 265, 275 (1995), followed by an interlocutory appeal as of right under 9 U.S.C. 16 -- in other words, precisely what has occurred here. As the Court previously cautioned in this case, court proceedings on arbitrability would be a "time-consuming sideshow" in comparison to delegating the question of arbitrability to the arbitrator in the first instance. Henry Schein, 139 S. Ct. at 531.

In addition, the conflict among appellate courts on the effect of carve-out provisions on otherwise clear and unmistakable delegations will "encourage and reward forum shopping." Southland Corp. v. Keating, 465 U.S. 1, 15 (1984). As matters currently stand, indisputably valid delegation provisions in arbitration agreements with carve-out provisions are always enforceable in some jurisdictions, but only sometimes enforceable in others. Courts in the latter jurisdictions (including the Eastern District of Texas, where this case is being litigated) will accordingly become the forums of choice for plaintiffs seeking to capitalize on "judicial hostility to arbitration agreements." Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991).

Disuniformity of that sort is intolerable under the Arbitration Act, which was intended to establish nationwide standards for the enforcement of arbitration agreements. Indeed, this Court routinely grants certiorari even where a circuit conflict is shallow (or non-existent) when the question presented concerns the interpretation of the Arbitration Act. See American Express Co. v. Italian Colors Restaurant, 570 U.S. 228 (2013); AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011); Stolt-Nielsen S.A. v. AnimalFeeds International Corp., 559 U.S. 662 (2010). This case, which presents a clear and important conflict involving multiple federal and state appellate courts, once again cries out for the Court's review.

2. This case is an excellent vehicle in which to decide the question presented. That question is a pure question of law, and it formed the sole basis for the court of appeals' decision below. Numerous courts have analyzed the arguments concerning whether a court may decline to enforce a clear and unmistakable agreement delegating questions of arbitrability to an arbitrator whenever the arbitration agreement contains a carve-out exempting certain claims from the scope of the agreement, and those courts have reached differing conclusions after substantial analysis of that question. The forthcoming petition for certiorari in this case will provide the Court with an ideal opportunity to consider and resolve the question presented.

II. THERE IS A SIGNIFICANT POSSIBILITY THAT THIS COURT WILL REVERSE THE COURT OF APPEALS' DECISION

Should the Court grant review, there is a significant possibility -- indeed, a high likelihood -- that this Court will reverse the court of appeals' decision. As the Court made clear when this case was last before it, courts may not decide gateway questions of arbitrability themselves when an arbitration agreement provides clear and unmistakable evidence that the parties intended to delegate such questions to an arbitrator. See Henry Schein, 139 S. Ct. at 529-530. While the Court left open the question whether the agreement at issue met that standard, see id. at 531, the court of appeals resolved that question on remand in a way that allows it and other courts to decide questions of arbitrability themselves, no matter how clear and unmistakable the parties' intent. That holding cannot stand.

A. "[A]rbitration is simply a matter of contract between the parties." First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 943 (1995). Consistent with that principle, "parties may agree to have an arbitrator decide not only the merits of a particular dispute but also gateway questions of arbitrability, such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." Henry Schein, 139 S. Ct. at 529 (internal quotation marks and citation omitted). "Just as the arbitrability of the merits of a dispute depends upon

whether the parties agreed to arbitrate that dispute, so the question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about that matter." First Options, 514 U.S. at 943. As long as there is "clear and unmistakable evidence" that the parties agreed to arbitrate questions of arbitrability, "the courts must respect the parties' decision as embodied in the contract." Henry Schein, 139 S. Ct. at 529, 531.

A court, in turn, "possesses no power to decide" a question of arbitrability if the parties have agreed to arbitrate disputes regarding those questions. Henry Schein, 139 S. Ct. at 529. "Just as a court may not decide a merits question that the parties have delegated to an arbitrator, a court may not decide an arbitrability question that the parties have delegated to an arbitrator." Id. at 530. Once the court determines that a valid delegation agreement exists, the court's only task is to enforce that agreement as written. See ibid.

B. Despite this Court's clear holding that parties are free to delegate threshold disputes of arbitrability to an arbitrator, the court of appeals once again refused to enforce the delegation at issue in this case. The court accepted that the incorporation of the AAA rules in the parties' arbitration provision provided the requisite clear and unmistakable evidence that the parties intended to delegate questions of arbitrability to an arbitrator. See App., infra, 6a-7a. But the court then concluded that the

presence of a carve-out provision exempting certain claims from the scope of the arbitration provision negated that otherwise clear and unmistakable evidence. See id. at 9a-10a. In particular, the court concluded that the carve-out for "actions seeking injunctive relief" exempted such actions not only from the broader arbitration provision but also from the incorporation of the AAA rules -- and thus from the delegation. See ibid. Based on that reasoning, the court of appeals concluded that it had to assess whether this case involves an "action[] seeking injunctive relief" in order to determine whether the parties' delegated the dispute over that very question to the arbitrator. See id. at 10a-13a.

The court of appeals' logic is deeply flawed. To begin with, it conflates the question of who decides arbitrability with the question of whether the dispute is arbitrable -- questions that this Court made clear are analytically distinct. See Henry Schein, 139 S. Ct. at 529-530. The principal purpose of a delegation provision is to have an arbitrator, and not the court, determine whether the plaintiff's claim falls inside or outside the scope of the arbitration agreement. See, e.g., Ally Align Health, 574 S.W.3d at 758. But by deciding whether "a claim falls within the scope of a carve-out provision," a court "necessarily decides arbitrability." Oracle, 724 F.3d at 1071. In fact, the entire premise of the court of appeals' argument is that the presence of

a carve-out provision "delays application" of the delegation "until arbitrability is decided." NASDAQ, 770 F.3d at 1032.

That reasoning renders even the clearest and most unmistakable delegation ineffective. No matter how plain the contractual language, a court facing a carve-out provision would need to determine whether the dispute was arbitrable before determining whether to send the question of arbitrability to the arbitrator. Yet once that question is resolved, there would be no role left for the arbitrator with respect to arbitrability. That result defies common sense: the very purpose of a delegation is for the arbitrator, and not the court, to determine whether the claims at issue fall within the scope of the arbitration agreement. Any approach that permits courts to override such a delegation is impossible to square with the Court's command that a court may not decide questions of arbitrability that the parties have agreed to arbitrate. See Henry Schein, 139 S. Ct. at 530.

The court of appeals attempted to cabin its decision to the facts of this case by focusing on the particular "ordering of words" in the delegation provision at issue. App., infra, 9a. But the court of appeals' reasoning would apply no matter where the carve-out provision was placed -- or even to arbitration agreements without carve-out provisions -- as long as the agreement had some limitation on its scope. After all, a party resisting arbi-

tration could always argue that, because certain claims fall outside the scope of the agreement, the delegation does not apply to those claims, and thus questions concerning arbitrability as to those claims have not been delegated to the arbitrator. That reasoning is entirely circular: it would effectively mean that "a court must always resolve questions of arbitrability and that an arbitrator never may do so." Henry Schein, 139 S. Ct. at 530. As this Court noted in its earlier decision in this case, however, "that ship has sailed." Ibid.

Carried to its logical end, the court of appeals' decision would replace the "wholly groundless" exception that this Court rejected with what is effectively an expanded version of that same doctrine. Previously, a court could refuse to delegate questions of scope only if a party's proposed interpretation was near frivolous. But under the court of appeals' view, a court need only disagree with a party's interpretation of the scope of the agreement before refusing to delegate questions of arbitrability. There is no basis in law or logic for that result, especially in light of the "liberal federal policy favoring arbitration agreements" embodied in the Arbitration Act. Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24 (1983). The court of appeals' decision was erroneous, and applicant is likely to succeed on the merits should the Court grant review.

III. ABSENT A STAY, APPLICANT WILL SUFFER IRREPARABLE HARM

There can now be no serious dispute that, absent a stay of proceedings in the district court, applicant will suffer irreparable harm. Indeed, the case is in a materially identical procedural posture as it was when the Court granted applicant's earlier request for a stay after the initial ruling by the court of appeals. A trial in this matter is currently scheduled to begin on February 3, 2020. Without a stay, the parties' dispute will likely be litigated on the merits in a federal court before a jury, not resolved before an arbitrator. Applicant will accordingly be denied the right to arbitrate that it has now spent years seeking to vindicate.

Unlike the potential harm to respondent, moreover, the deprivation of applicant's right to arbitration cannot be fully remedied by an order compelling arbitration following an appeal. If the proceedings in the district court are not stayed while applicant seeks review in this Court, applicant will have to undergo a full trial before receiving a definitive ruling on whether applicant was legally obligated to participate in the trial.

The severity of the harm to applicant from being deprived of its right to arbitrate is magnified by the nature of the claims in this case. Respondent alleges that applicant engaged in an anticompetitive conspiracy to harm respondent's business. To support those allegations, respondent requested and received enormous

amounts of applicant's most sensitive business documents and data, including growth plans, sales projections, potential acquisition targets, selection criteria for distributors, and competitive intelligence. While this case has been pending, those confidential materials have continued to be protected from disclosure by a protective order. But the protection that order will offer during a public trial is necessarily far more limited, making it highly likely that at least some of applicant's most valuable secrets will be exposed. Should the Court then rule in applicant's favor on the merits -- which, as set forth above, is likely -- the confidentiality of applicant's business information will have been destroyed for no reason. That irreparable harm warrants the entry of a stay.

IV. THE EQUITIES FAVOR A STAY

Finally, as was true at the time of applicant's earlier stay request, the equities continue to weigh heavily in favor of a stay of the district court proceedings. Respondent's complaint has now been pending for more than seven years. The slight delay that will occur while this Court considers applicant's petition will not harm respondent, let alone to a degree that exceeds the harm applicant will suffer if a stay is denied. In the event that a trial ultimately takes place, any pretrial preparations respondent has already made should be able to withstand a short postponement.

Indeed, respondent has effectively confirmed that it faces no prospect of "irreparable" injury in this case, because it has not sought preliminary injunctive relief since it filed its complaint over seven years ago. What is more, the distribution agreements at issue have terminated, further diminishing the possibility of injury to respondent. And any marginal additional harm to respondent can be remedied by an award of damages, the only relief respondent is actively pursuing.

This Court has already issued a stay and then unanimously vacated the judgment of the court of appeals in this case. In light of the court of appeals' continued refusal to compel arbitration and the impending trial in the district court, a stay is amply warranted.

CONCLUSION

The application for a stay of proceedings pending a petition for a writ of certiorari should be granted.

Respectfully submitted,

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