

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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HENRY SCHEIN, INC., ET AL.,                     )  
  Petitioners,                     )  
                                v.                     ) No. 17-1272  
ARCHER AND WHITE SALES, INC.,                     )  
  Respondent.                     )  
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Pages: 1 through 70  
Place: Washington, D.C.  
Date: October 29, 2018

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v. ) No. 17-1272  
ARCHER AND WHITE SALES, INC., )  
Respondent. )  
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Washington, D.C.

Monday, October 29, 2018

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:06 a.m.

APPEARANCES:

KANNON K. SHANMUGAM, ESQ., Washington, D.C.; on behalf of the Petitioners.

DANIEL L. GEYSER, ESQ., Dallas, Texas; on behalf of the Respondent.

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1 P R O C E E D I N G S

2 (10:06 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear  
4 argument first this morning in Case 17-1272,  
5 Schein versus Archer and White Sales.

6 Mr. Shanmugam.

7 ORAL ARGUMENT OF KANNON K. SHANMUGAM

8 ON BEHALF OF THE PETITIONERS

9 MR. SHANMUGAM: Thank you, Mr. Chief  
10 Justice, and may it please the Court:

11 The Federal Arbitration Act requires  
12 courts to enforce arbitration agreements  
13 according to their terms. This case involves a  
14 straightforward application of that principle  
15 in the context of arbitrability, specifically  
16 where the parties have agreed to delegate to  
17 the arbitrator the authority to decide whether  
18 claims are subject to arbitration.

19 Where the parties have so agreed, the  
20 Arbitration Act requires a court to honor that  
21 agreement. A court does not have the power to  
22 decide the issue of arbitrability for itself  
23 and to short-circuit the arbitrator's ability  
24 to do so.

25 JUSTICE GINSBURG: Mr. Shanmugam, can

1 we back up and have you explain why we even get  
2 to a question, the question presented, because  
3 Schein has no arbitration agreement with  
4 Archer, so how -- what is this agreement? It's  
5 not between Archer and Schein. How does Schein  
6 get to claim the benefit of an agreement Schein  
7 did not make?

8 MR. SHANMUGAM: Justice Ginsburg,  
9 there is a question in the case concerning  
10 non-parties. The agreements in question are  
11 agreements with some of the defendants, not all  
12 of them.

13 And so, therefore, as to the  
14 non-signatory defendants, there is a question  
15 reserved by the court of appeals about the  
16 doctrine of equitable estoppel, and that would  
17 be an issue for the court of appeals to address  
18 on remand if this Court agrees with us on the  
19 question presented. That is obviously a  
20 discrete issue, not reached by the court of  
21 appeals in the decision below, and, again, an  
22 issue that would be open on remand.

23 But, on the question presented, I  
24 think our submission is quite straightforward.  
25 The "wholly groundless" exception on which the

1 court of appeals relied has no footing in the  
2 text of the Arbitration Act. Where the parties  
3 have agreed to delegate the issue of  
4 arbitrability to the arbitrator, the merits of  
5 that issue are for the arbitrator and wholly  
6 for the arbitrator to decide.

7 Sections 2, 3, and 4 of the  
8 Arbitration Act all point in the same  
9 direction: Where you have a valid delegation,  
10 that is treated, as this Court has indicated,  
11 like an antecedent agreement to arbitrate, and  
12 all there is for a court to do is to determine,  
13 first, that that provision is itself valid and,  
14 second, to determine whether the opposing party  
15 is, in fact, resisting the enforcement of that  
16 provision.

17 JUSTICE ALITO: How do we take this --

18 CHIEF JUSTICE ROBERTS: I'm not sure  
19 your answer to Justice Ginsburg is totally  
20 responsive. The -- the question of whether or  
21 not there is a valid arbitration agreement  
22 between the parties is antecedent to an order  
23 compelling arbitration. The court makes that  
24 decision.

25 And I wonder why this isn't a similar

1 question. I mean, your friend on the other  
2 side makes the argument that, well, parties  
3 would not have agreed to submit wholly  
4 groundless questions to the arbitrator. And so  
5 you should seek -- treat it as the same type of  
6 question.

7 MR. SHANMUGAM: So, Mr. Chief Justice,  
8 I think there are two parts to your question.  
9 First, to pick up on my response to Justice  
10 Ginsburg, we are certainly not disputing that  
11 the issue of equitable estoppel, the issue of  
12 which parties are bound, is an issue that goes  
13 to validity. It's an issue for the court to  
14 decide.

15 So, again, on remand, that would be a  
16 question for the court of appeals in the first  
17 instance. The court of appeals explicitly did  
18 not reach that question because of its holding  
19 on the "wholly groundless" exception. It said  
20 that the -- a requirement that arbitrability  
21 goes to the arbitrator was not enforceable as  
22 to anyone, even as to the signatories to the  
23 agreement.

24 I think, as to the second part of your  
25 question, again, we think that the question of

1 whether or not there is a valid agreement more  
2 generally is a question for the court. And so,  
3 if, for instance, there were some question  
4 about the validity of the delegation provision,  
5 say a question about whether the delegation  
6 provision is itself unconscionable, that would  
7 again be a question for the court to decide.

8 But I think that, on the issue of  
9 arbitrability, this Court has said time and  
10 again, most recently in the First Options case,  
11 that arbitrability can be delegated where there  
12 is a sufficiently clear delegation, and once  
13 the issue is delegated, it is for the  
14 arbitrator.

15 JUSTICE ALITO: But the question --

16 JUSTICE GINSBURG: But clear -- clear  
17 and unmistakable delegation, why can't it be  
18 both; that is, that the arbitrator has this  
19 authority to decide questions of arbitrability,  
20 but it is not exclusive of the court?

21 We have one brief saying that that is  
22 indeed the position that the Restatement has  
23 taken.

24 MR. SHANMUGAM: So all of the courts  
25 of appeals to have considered the issue have



1 held that this type of incorporated delegation  
2 meets this Court's requirements, and let me  
3 explain why that's true, even though, again,  
4 that's an issue outside the scope of the  
5 question presented. We certainly think it  
6 would be appropriate for this Court to provide  
7 guidance on that issue, but the Court certainly  
8 does not have to reach it if it so chooses.

9           What is going on in this case, if you  
10 look at the four corners of the delegation --  
11 of the arbitration agreement -- and I would  
12 point the Court in particular to page 58 of the  
13 Joint Appendix or to page 8 of our brief -- is  
14 that the arbitration agreement by its terms  
15 incorporates the rules of the American  
16 Arbitration Association and it does so very  
17 clearly. That is a quite common arrangement,  
18 particularly in commercial arbitrations like  
19 the one at issue here.

20           Then, if you take a look at the rules  
21 of the American Arbitration Association, those  
22 rules, and, in particular, Rule 7(a), clearly  
23 give the arbitrator the authority to decide  
24 arbitrability.

25           And under this Court's decision in

1 First Options, the relevant inquiry is whether  
2 or not the parties were willing to be bound by  
3 the arbitrator's determination on the issue in  
4 question.

5 And so, with all due respect to  
6 Professor Bermann and his amicus brief, the  
7 position that he propounds has been rejected by  
8 every court of appeals to have considered this  
9 issue. And if the Court has any interest in  
10 this issue, I would refer the Court to the very  
11 thoughtful opinion of the Tenth Circuit in the  
12 Belnap case, which discusses this issue in some  
13 detail.

14 Again, the Fifth Circuit, in the  
15 decision under review, ultimately did not  
16 decide that question. It did discuss that  
17 question, and I would respectfully submit that  
18 its discussion on that issue was somewhat  
19 confused.

20 The Fifth Circuit seemed to think that  
21 because there was a substantive carve-out from  
22 the scope of arbitration here, that's the very  
23 carve-out that's in dispute for actions for  
24 injunctive relief, that that -- that somehow  
25 had a bearing on the validity of the delegation

1 here.

2 But I think with all due respect --

3 JUSTICE GINSBURG: But the district  
4 court -- the district court made -- decided on  
5 alternative grounds, and wasn't the district  
6 court's first decision that this contract did  
7 not have a sufficiently clear and unmistakable  
8 delegation?

9 MR. SHANMUGAM: Yes, that is correct.  
10 And the Fifth Circuit then discussed the issue  
11 but ultimately did not rest on it. And once  
12 again, this is a discrete question. It's  
13 outside the scope of the question presented.

14 But I would respectfully submit that I  
15 think that the law on this issue is quite clear  
16 and that, in particular, to the extent that the  
17 district court discussed this issue, Justice  
18 Ginsburg, its reliance and Respondent's  
19 reliance on the substantive carve-out cannot be  
20 correct.

21 In other words, the Respondent's  
22 submission below, and really, I think,  
23 Respondent's only submission on this issue was  
24 that because there is a carve-out from the  
25 scope of arbitration, that somehow defeats the

1 incorporation of the AAA rules, which provide  
2 that arbitrability can be decided by the  
3 arbitrator.

4 But that is the very issue that the  
5 parties agreed for the arbitrator to decide.  
6 And I think it would improperly conflate the  
7 question of what is subject to arbitration --

8 JUSTICE SOTOMAYOR: Could I -- could  
9 I --

10 MR. SHANMUGAM: -- with the question  
11 of who decides to say that that defeats  
12 arbitrability here.

13 JUSTICE SOTOMAYOR: You just said the  
14 parties agreed to have the arbitrator decide  
15 this issue.

16 Assume the Douglas -- facts of the  
17 Douglas case. Plaintiff, or Petitioner, signed  
18 a arbitration agreement over an account and the  
19 account was closed within a year, and years  
20 later sues the bank for -- for some malfeasance  
21 by a lawyer who took money from a different  
22 account or something like it.

23 I think I'm getting the facts of  
24 Douglas. And the court -- and the arbitrator  
25 there improperly assumes jurisdiction. There's

1       been a delegation.

2                   What are the -- what are the potential  
3       outs for the party who's now been stuck in an  
4       arbitration that legally is wholly groundless?

5                   MR. SHANMUGAM:    Sure.

6                   JUSTICE SOTOMAYOR:   The arbitrator  
7       made a mistake.

8                   MR. SHANMUGAM:    So, Justice Sotomayor,  
9       let me address, you know, both that and the  
10      related question of what remedies are available  
11      to the arbitrator and -- and to the opposing  
12      party more generally in the event that a truly  
13      frivolous claim of arbitrability is raised.

14                  JUSTICE SOTOMAYOR:   Exactly.

15                  MR. SHANMUGAM:    I think, to address  
16      your question directly first, I think in a case  
17      where an arbitrator reaches an improper  
18      conclusion on arbitrability, the remedies, if  
19      any, would be those provided for review of  
20      arbitral decisions more generally.

21                  And as this Court is well aware, there  
22      is a very live dispute in the lower courts  
23      about the extent to which courts can review the  
24      merits of arbitrators' decisions and whether  
25      they can be reviewed for manifest disregard.

1 That is an issue that this Court has left open.

2 But I think that that would  
3 potentially be available. And lower courts  
4 have said that that is available where an  
5 arbitrator reaches a wildly incorrect decision  
6 on arbitrability.

7 I think that, to the extent that the  
8 other side points to the Douglas case as sort  
9 of the flagship example of a meritless claim of  
10 arbitrability being raised and the dangers of  
11 getting --

12 JUSTICE SOTOMAYOR: Basically, you're  
13 telling me at least on the express terms of  
14 enforcing an arbitration award under the  
15 statute, there is no remedy for that Douglas  
16 party?

17 MR. SHANMUGAM: Well, there is  
18 potentially review --

19 JUSTICE SOTOMAYOR: If -- if --

20 MR. SHANMUGAM: -- for manifest  
21 disregard.

22 JUSTICE SOTOMAYOR: If we -- if we  
23 accept manifest disregard.

24 MR. SHANMUGAM: Yes.

25 JUSTICE SOTOMAYOR: We haven't done

1 that yet.

2 MR. SHANMUGAM: Which is to say --

3 JUSTICE SOTOMAYOR: But there's no  
4 statutory provision under the Act?

5 MR. SHANMUGAM: Which is to say that  
6 it's no different from review where an  
7 arbitrator reaches a wildly incorrect  
8 conclusion on the merits of an arbitral award.

9 In other words, arbitrability is in  
10 the same bucket as any other issue that is  
11 properly remitted to the arbitrator. Review --

12 JUSTICE SOTOMAYOR: Do you think that  
13 --

14 MR. SHANMUGAM: -- if any, would be  
15 under Section 10 of the Arbitration Act.

16 JUSTICE SOTOMAYOR: Do you think that  
17 it could be the arbitrator exceeding their  
18 powers?

19 MR. SHANMUGAM: Well, it could be.  
20 And I think that if you look at the lower  
21 courts that have reviewed arbitrability  
22 determinations, some of them have located  
23 review in exceeds powers in Section 10(a)(4),  
24 though even those courts have engaged in pretty  
25 deferential review.

1           I think, as a practical matter, it's  
2 basically the same review as manifest disregard  
3 review, and it certainly is not the sort of de  
4 novo review that Respondent seems to  
5 contemplate.

6           JUSTICE SOTOMAYOR: Can -- can you  
7 understand the common sense resistance to the  
8 idea that, if a party has not agreed to  
9 arbitrate a particular issue because it's  
10 wholly groundless, there is no way that an  
11 arbitrator could in good faith and without  
12 error reach a conclusion that arbitration was  
13 agreed to? It seems counterintuitive to  
14 believe that we're sending a party to  
15 arbitration, to potentially go through the  
16 expense of arbitration when something's wholly  
17 groundless, and then potentially not to have an  
18 avenue of relief when it comes to enforcing the  
19 arbitration award.

20           MR. SHANMUGAM: Justice Sotomayor --

21           JUSTICE SOTOMAYOR: That's why -- I'm  
22 sorry -- that's why I think one of the amici  
23 said the courts are not understanding that, at  
24 the core, this is always about have you agreed  
25 to arbitrate an issue? And, if you haven't,



1 you shouldn't be forced to.

2 MR. SHANMUGAM: Justice Sotomayor, I'm  
3 sorry to have interrupted, but two points in  
4 response to that.

5 First, I think it's important to the  
6 extent that we're talking about the parties'  
7 intent to recognize that the parties intended  
8 for the arbitrator to decide arbitrability.

9 There was no carve-out, explicit or  
10 implicit, for wholly groundless claims, which  
11 is to say that where, as here, you have a  
12 dispute of this variety, you have one party  
13 saying that the claim of arbitrability is  
14 wholly groundless. You have the other party  
15 saying not only is it not wholly groundless, we  
16 believe we have a valid argument about the  
17 construction of the carve-out.

18 The parties agreed to have the  
19 arbitrator be the decision-maker. And I don't  
20 think, with all due respect to Respondent, who  
21 faints in this direction, that there's any way  
22 to reform the incorporated delegation here to  
23 create a carve-out, to create a carve-out for  
24 wholly groundless claims to say that the  
25 parties somehow implicitly agreed that the

1 arbitrator would decide arbitrability unless  
2 the claim was somehow wholly groundless or that  
3 there would be some preliminary determination  
4 by the district court.

5 JUSTICE KAGAN: But why is that --

6 MR. SHANMUGAM: Now I do --

7 JUSTICE KAGAN: -- Mr. Shanmugam? I  
8 mean, if you look at First Options, First  
9 Options is a case where we said we're not going  
10 to treat these delegation clauses in exactly  
11 the same way as we treat other clauses.

12 And there was an idea that people  
13 don't really think about the question of who  
14 decides, and so we're going to hold parties to  
15 this higher standard, the clear and  
16 unmistakable intent standard.

17 And wouldn't the same kind of argument  
18 be true here, that the parties never really  
19 considered who was going to decide these  
20 groundless claims of arbitrability, or maybe,  
21 if they did consider it, they would have  
22 thought that it was a pretty strange system to  
23 send it to an arbitrator just so that the  
24 arbitrator could send it back to the court?

25 So that we are going to -- to -- you

1 know, to -- to say that there's a special rule  
2 in interpreting these kinds of clauses.

3 MR. SHANMUGAM: Justice Kagan, I -- I  
4 -- there is obviously an interpretive rule that  
5 requires clear and unmistakable evidence that  
6 the parties intended to delegate the issue.  
7 But I would respectfully submit that, once you  
8 have that evidence, that rule falls out of the  
9 equation.

10 And again, with --

11 JUSTICE GINSBURG: Why -- why do you  
12 have the evidence? When the -- the -- the  
13 model case is this Court's Rent-a-Car decision,  
14 and there the -- the clause said the  
15 arbitrator, not the court, has exclusive  
16 authority.

17 And, here, we -- we're missing both  
18 the arbitrator, to the exclusion of the court,  
19 and the arbitrator has exclusive authority.  
20 It's nothing like that.

21 MR. SHANMUGAM: I think, Justice  
22 Ginsburg, if you take a look at page 946 of  
23 this Court's opinion in First Options, it  
24 focuses on the willingness of the party to be  
25 bound by the arbitrator's decision.

1           And I think, with all due respect, we  
2     have that here. And I think that what you --  
3     what you cannot do, I would respectfully  
4     submit, is to say that the parties implicitly  
5     countenanced a regime where the district court  
6     would make a preliminary determination.

7           With respect, Justice Kagan, I think  
8     your question assumes that the claim of  
9     arbitrability is wholly groundless. That is  
10    the very merits dispute between the parties.

11           We believe that we have -- that the  
12    claims at issue are arbitrable, and Respondent  
13    disagrees with that. And, once that is true,  
14    this is a merits issue for the arbitrator to  
15    decide where the parties --

16           JUSTICE BREYER: What's wholly  
17    groundless? What's wholly groundless? Is --  
18    is he saying what's wholly groundless is the  
19    claim that arbitrability is to be decided by  
20    the arbitrator?

21           MR. SHANMUGAM: No. It's the claim  
22    that these substantive claims are subject to --

23           JUSTICE BREYER: Substantive.

24           MR. SHANMUGAM: -- arbitration. And  
25    that is an issue on which the magistrate judge

1 disagreed. The magistrate judge concluded that  
2 we had a plausible construction of this  
3 agreement --

4 JUSTICE BREYER: Okay. So --

5 MR. SHANMUGAM: -- but notwithstanding  
6 --

7 JUSTICE BREYER: -- so you say step 1.  
8 Is there clear and unmistakable evidence that  
9 an arbitrator is to decide whether a particular  
10 matter X is arbitrable? Is that right?

11 MR. SHANMUGAM: Yes. The --

12 JUSTICE BREYER: And step 2, the  
13 answer to the first question is yes, they did  
14 decide that clearly and unmistakably. And now  
15 we see if, why not send it to them, or it's  
16 totally groundless, we still won't send it to  
17 them. That's this case, right?

18 MR. SHANMUGAM: That is the regime --

19 JUSTICE BREYER: Okay.

20 MR. SHANMUGAM: -- that Respondent is  
21 advocating here.

22 JUSTICE BREYER: Yes.

23 MR. SHANMUGAM: And I would like to  
24 say a little bit about why we think that --

25 JUSTICE BREYER: Well, I have a

1 question about it.

2 MR. SHANMUGAM: Sure.

3 JUSTICE BREYER: You say when you get  
4 to step 2, once we're there, now there is no  
5 wholly groundless exception, go send it to the  
6 arbitrator. Is that right?

7 MR. SHANMUGAM: That is correct.

8 JUSTICE BREYER: Okay. Now suppose  
9 it's really weird. I mean, you want to say no  
10 exception at all? He says, my claim here is a  
11 Martian told me to do it. Okay?

12 (Laughter.)

13 JUSTICE BREYER: Are you saying no  
14 matter what, even if he has to read the word  
15 yes in the contract to mean no, never, under no  
16 circumstances, is there no exception no matter  
17 what?

18 MR. SHANMUGAM: Yes, and picking up on  
19 Justice --

20 JUSTICE BREYER: Yes? Yes, no  
21 exception no matter what?

22 MR. SHANMUGAM: There is no exception  
23 no matter what, but there are remedies  
24 available where a party makes a truly frivolous  
25 claim.

1 JUSTICE BREYER: What?

2 MR. SHANMUGAM: First, it is agreed  
3 that the arbitrator has the ability to impose a  
4 wide range of sanctions on a party that is  
5 making a frivolous argument. Those sanctions  
6 are comparable to the sanctions that a court  
7 can impose in litigation.

8 And it may also be true that a court  
9 --

10 JUSTICE BREYER: The arbitrator, by  
11 the way, loves Martians.

12 MR. SHANMUGAM: Well, what we contend  
13 --

14 JUSTICE BREYER: So -- so what they're  
15 worried about is they're going to get a bad  
16 decision on this ridiculous claim.

17 MR. SHANMUGAM: But going back to the  
18 very early days or the relatively early days of  
19 this Court's --

20 JUSTICE BREYER: Yeah.

21 MR. SHANMUGAM: -- FAA jurisprudence,  
22 this Court made clear in Shearson Lehman that  
23 we presume that arbitrators are fair, impartial  
24 decision-makers.

25 JUSTICE ALITO: Well, they may not --

1 JUSTICE KAGAN: Mr. Shanmugam --

2 JUSTICE ALITO: They may or may not  
3 love Martians, but do you think it's fair to  
4 say that they love arbitration, so they're not  
5 probably very much inclined to sanction parties  
6 who bring suit -- bring arbitrable disputes to  
7 them?

8 MR. SHANMUGAM: They actually do have  
9 specific and explicit remedies under their  
10 rules for providing -- for imposing sanctions,  
11 including cost and fee shifting and the like.  
12 And it may very well be that after an  
13 arbitrator makes his or her determination that  
14 a district court would have the ability to  
15 impose sanctions under Rule 11 where the  
16 requirements of that rule have been met.

17 JUSTICE KAGAN: Well, how can it do  
18 that? If the court can't even take a peek at  
19 the arbitrability question itself, how does the  
20 court all of a sudden have the power to  
21 sanction a motion to compel?

22 MR. SHANMUGAM: At least before  
23 remitting the issue to arbitration, I think  
24 there would be a conflict between Rule 11 and  
25 the Arbitration Act if a court were to make a



1 merits determination first. But I think, after  
2 an arbitrator makes a determination, when the  
3 parties are back before the district court, I  
4 think the district court would have the ability  
5 to make the determination that the petition to  
6 compel arbitration was frivolous or brought in  
7 bad faith.

8 JUSTICE BREYER: Now what is the  
9 advantage -- what is the advantage of this?  
10 Because remember step 1. Step 1 is we have to  
11 decide -- court, we're a court -- we have to  
12 decide whether there is a clear and  
13 unmistakable commitment to have this kind of  
14 matter decided in arbitration. Now, kind of  
15 matter.

16 Now you would have thought if you  
17 really have a Martian case, the judge would  
18 have found some way not to send it, and he  
19 would have said kind of matter. Well, not the  
20 Martian kind of matter.

21 There's no clear and unmistakable  
22 commitment to send that kind of matter. In  
23 other words, if it's weird enough, you don't  
24 have to get beyond step 1 because you can say  
25 there's no commitment to send this kind of

1 matter. And now what's the difference between  
2 that and what they did say, there's no  
3 commitment to send a groundless matter?

4 MR. SHANMUGAM: But the whole point of  
5 the principle that the parties can delegate  
6 arbitrability to the arbitrator --

7 JUSTICE BREYER: Yes.

8 MR. SHANMUGAM: -- is that the parties  
9 can make a decision about who decides and  
10 where --

11 JUSTICE BREYER: No, I understand  
12 that.

13 MR. SHANMUGAM: -- the parties' intent  
14 is sufficiently clear that the arbitrator --

15 JUSTICE BREYER: Yes.

16 MR. SHANMUGAM: -- decides, it's --

17 JUSTICE BREYER: Well, it's never  
18 sufficiently clear if the matter that they're  
19 deciding to arbitrate is a Martian matter,  
20 unless they really said Martians, which I don't  
21 think would ever happen.

22 In other words, if it is a totally  
23 ridiculous claim, shouldn't you have to find a  
24 clear and definite commitment to send a wholly  
25 ridiculous matter to the arbitrator?

1           MR. SHANMUGAM: That goes to the  
2 merits, and wherever you set the bar, the fact  
3 remains that it is still a merits  
4 determination.

5           And to the extent that this Court is  
6 concerned about this as a policy matter -- and  
7 I would respectfully submit that there is not a  
8 lot of evidence to indicate that this is a  
9 problem, perhaps not surprisingly, because  
10 often the defendants bear the cost of arbitral  
11 proceedings -- the regime that we are  
12 advocating is not only more faithful to the  
13 language of the Arbitration Act --

14           JUSTICE KAVANAUGH: Well, what  
15 about --

16           MR. SHANMUGAM: -- it is a much more  
17 efficient regime.

18           JUSTICE KAVANAUGH: -- what about  
19 Section 4 of the Act, which Respondent points  
20 to as the front-end equivalent of what you  
21 alluded to in response to Justice Sotomayor as  
22 the back-end Section 10 review?

23           MR. SHANMUGAM: As this Court made  
24 clear --

25           JUSTICE KAVANAUGH: The "failure to

1     comply therewith" language in particular which  
2     they focus on, what does that mean and what  
3     does that do?

4             MR. SHANMUGAM:    Sure.  As this Court  
5     made clear in *Prima Paint*, that language limits  
6     a court's role in ruling on a petition to  
7     compel arbitration to reviewing the making and  
8     the performance of the agreement.  And, here,  
9     the relevant agreement is the agreement to  
10    remit arbitrability to the arbitrator.

11            And there is a failure to comply when  
12    the opposing party, the party that does not  
13    want arbitration, is resisting arbitration.  
14    That is all that is required.

15            JUSTICE KAVANAUGH:  So what work --  
16    what work does that language do?

17            MR. SHANMUGAM:  All that it --

18            JUSTICE KAVANAUGH:  On performance.

19            MR. SHANMUGAM:  -- requires --

20            JUSTICE KAVANAUGH:  I -- what -- give  
21    me an example of when that would have some  
22    effect, if there is one.

23            MR. SHANMUGAM:  Well, I -- I think  
24    that all it requires a court to do -- and this  
25    is a pretty minimal function -- is to determine

1 that you have one party that wants arbitration  
2 and another party that does not.

3 JUSTICE KAVANAUGH: So that -- that's  
4 what I thought you'd say. And that means, in  
5 essence, I think, that that language in the  
6 statute does no work.

7 MR. SHANMUGAM: Well, there has to  
8 still be a -- a -- a dispute, which is to say  
9 you've got to have one party --

10 JUSTICE KAVANAUGH: That's covered by  
11 the beginning of the Section 4, though.

12 MR. SHANMUGAM: Well, I -- I don't  
13 think so. I mean, I think that that is the  
14 relevant -- the relevant failure to comply.

15 JUSTICE KAVANAUGH: A party aggrieved  
16 by the alleged failure or refusal to arbitrate.  
17 I'm -- I'm just trying to figure out what  
18 "failure to comply therewith" --

19 MR. SHANMUGAM: I think both sides  
20 agree that those two things are essentially  
21 reenforcing, which is to say that when you have  
22 a party that resists arbitration, the moving  
23 party is aggrieved. And I think that  
24 Respondent recognizes in a footnote in its  
25 brief that "aggrieved" does no independent work

1 beyond that.

2 But I do think that the regime that  
3 we're advocating is a more efficient regime  
4 precisely because, under Respondent's regime, a  
5 district court is supposedly making this  
6 threshold determination on whether or not the  
7 claim of arbitrability is wholly groundless.

8 If a district court concludes that the  
9 claim is not wholly groundless, presumably, the  
10 issue would then go to the arbitrator to make a  
11 plenary determination on that issue, and if the  
12 district court determines that the claim is  
13 wholly groundless, there will be appeals as of  
14 right immediately under Section 16 of the  
15 Arbitration Act.

16 And that will lead to the very  
17 inefficiency that we see in this case. This  
18 case is certainly an outlier because it has  
19 taken so long, but we are now six years down  
20 the road, still litigating the issue of  
21 arbitrability.

22 JUSTICE GINSBURG: But that was --  
23 that was the court's -- left for the court to  
24 decide whether the motion was for the  
25 magistrate judge to reconsider or for the

1 district court to review.

2 MR. SHANMUGAM: That explains three of  
3 the six years of the delay, Justice Ginsburg.  
4 But I really don't think it can be reasonably  
5 disputed that if the issue of arbitrability had  
6 gone to the arbitrator in the first instance,  
7 as it should have, that we probably would be  
8 entirely done with this case.

9 And, of course, our fundamental  
10 submission is that there is simply no footing  
11 in the text of the Arbitration Act for this  
12 exception. To the extent that the Court has  
13 questions about the delegation in this case,  
14 that is a discrete question that the Court need  
15 not reach here.

16 And so we submit that on the question  
17 presented, the answer is quite simple: The FAA  
18 does not permit this exception and, therefore,  
19 the judgment should be vacated.

20 I'll reserve the balance of my time  
21 for rebuttal.

22 CHIEF JUSTICE ROBERTS: Thank you,  
23 counsel.

24 Mr. Geyser.

25

1 ORAL ARGUMENT OF DANIEL L. GEYSER

2 ON BEHALF OF THE RESPONDENT

3 MR. GEYSER: Thank you, Mr. Chief  
4 Justice, and may it please the Court:

5 Petitioners' position is at odds with  
6 the FAA's plain language and the parties'  
7 obvious intent. Under Section 4 of the --

8 JUSTICE SOTOMAYOR: But your position  
9 is contrary to Rent-A- -- Rent-A-Center?

10 MR. GEYSER: I don't believe so, Your  
11 Honor.

12 JUSTICE SOTOMAYOR: So explain it to  
13 me, because I think Rent-A-Center said that  
14 that language is limited to was there an  
15 agreement between the parties and was there a  
16 delegation, and if there is, don't look to the  
17 merits.

18 MR. GEYSER: I -- I --

19 JUSTICE SOTOMAYOR: I don't see how  
20 determining whether something is wholly  
21 groundless is anything but a merits  
22 determination.

23 MR. GEYSER: Well, Your Honor, it's --  
24 it's what type of merits determination.  
25 Section 4's plain text authorizes the courts



1 and, in fact, instructs them to have a  
2 gatekeeping function in looking at the merits  
3 of whether there's a failure to comply with the  
4 arbitration agreement.

5 It says nothing at all about the  
6 failure to file a legitimate claim on the  
7 merits. So it draws a -- a textual --

8 JUSTICE SOTOMAYOR: I'm sorry. Was  
9 there an agreement? There was an agreement.

10 MR. GEYSER: But Rent-A-Center, again,  
11 the -- what they were talking about in that  
12 case is they're saying that if the underlying  
13 merits is -- is frivolous, the underlying  
14 merits of the case, the actual lawsuit --

15 JUSTICE SOTOMAYOR: No, Rent-A- --  
16 Rent-A-Center didn't say that at all.  
17 Rent-A-Center said don't look at the merits at  
18 all. It didn't carve out --

19 MR. GEYSER: Well, I --

20 JUSTICE SOTOMAYOR: -- a particular  
21 form of the merits.

22 MR. GEYSER: Well, I don't think  
23 Rent-A-Center, though, is saying that if  
24 there's only one possible outcome, then you  
25 should send it to the arbitrator anyway. And,

1 in fact, that would be inconsistent with what  
2 this Court did in Stolt-Nielsen. In  
3 Stolt-Nielsen, the parties expressly agreed  
4 that the arbitrator would decide if there's  
5 class arbitration.

6 And the court said the arbitrator  
7 applied the wrong analysis. And it did not  
8 send the case back to the arbitrator to do  
9 again. It said there is only one possible  
10 outcome and so proceeded to decide the issue on  
11 its own.

12 And that's consistent with general  
13 legal principles. If there is an absolutely  
14 futile claim that makes absolutely no sense,  
15 there is no conceivable possibility that the  
16 arbitrator will say that this case belongs in  
17 arbitration, there's not a bona fide dispute,  
18 there's no point to sending it to the  
19 arbitrator.

20 JUSTICE SOTOMAYOR: But doesn't --

21 JUSTICE BREYER: Well, that's the  
22 problem, isn't it? That's the problem with my  
23 prior suggestion. It's really what Justice  
24 Sotomayor says. Once you look beyond the first  
25 question, did the parties agree to send this

1 kind of dispute to arbitration, and then you  
2 start getting to the second question, did they  
3 mean this kind, that kind, you're really  
4 deciding arbitrability and courts will decide  
5 different things. Everybody will start making  
6 their arbitration argument. And even though  
7 it'll save time in a handful of cases, time  
8 will be lost overall.

9 So read it for what it says. It hands  
10 the decision to the arbitrator to make the  
11 arbitrability decision. What's wrong with  
12 that?

13 MR. GEYSER: The -- there are a number  
14 of problems with that, Justice Breyer. The  
15 first is a textual problem. If there's no  
16 chance that the arbitrator will conclude --  
17 it's the Martian example -- that this case is  
18 subject to arbitration, there's no possible  
19 failure to comply with the arbitration  
20 agreement. And that's what Section 4 says.

21 The court, before it can compel  
22 arbitration, it has to conclude there's a  
23 failure to comply. And if they look and there  
24 is no conceivable universe where this case  
25 belongs in arbitration, there's not a failure

1 to arbitrate by filing in court.

2 No one agreed to that. It's also  
3 inconsistent with the parties' obvious intent.

4 JUSTICE ALITO: But doesn't that  
5 depend on the -- the -- the nature of the --  
6 the agreement as to arbitrability? What did  
7 the parties agree to have the arbitrator  
8 decide?

9 Suppose you have an agreement that  
10 says the arbitrator has exclusive authority to  
11 decide all questions of arbitrability,  
12 regardless of whether the claim of  
13 arbitrability has any merit whatsoever. What  
14 would you say then?

15 MR. GEYSER: I -- I think that would  
16 be a highly unusual agreement.

17 JUSTICE ALITO: Yeah, but what would  
18 you say?

19 MR. GEYSER: If -- if the parties said  
20 that, then I think you would have a failure to  
21 comply with that agreement. But the reason we  
22 don't see that is because no one agrees to be  
23 subjected to a needless and needlessly  
24 expensive gateway arbitration.

25 JUSTICE ALITO: But that's a question

1 of -- that's not the question that's before us.  
2 That's the question of the interpretation of  
3 the -- of this contract and the scope of what  
4 was delegated to the arbitrator.

5 MR. GEYSER: Well, but the -- the  
6 scope of what was delegated, the question here  
7 is did the parties actually agree at the  
8 outset, is there a clear and unmistakable  
9 showing that they intended to have an  
10 arbitrator decide a wholly groundless claim  
11 that has only one possible outcome?

12 JUSTICE ALITO: Well, I thought the  
13 question we agreed to take was whether there's  
14 a wholly groundless exception when the parties  
15 have agreed that arbitrability will be decided  
16 by the arbitrator.

17 MR. GEYSER: Well, but I think there  
18 are two different things here, Justice Alito.  
19 One is, is there a general delegation clause,  
20 which, again, wasn't even found in this case.  
21 It comes to the court assuming that there is  
22 one.

23 And then the second is, if there is a  
24 general delegation clause, such as here it is  
25 incorporating the AAA rules, which, as

1 Professor Berman pointed out, is a pretty  
2 tenuous hook to, again, satisfy a clear and  
3 unmistakable standard, did the parties when  
4 they said nothing else about it really intend  
5 to be subjected to frivolous arbitration  
6 claims?

7 JUSTICE SOTOMAYOR: Mr. Geysler, the  
8 problem is that you're taking the position here  
9 that this was wholly groundless to consider a  
10 mixed injunctive relief and damages claim as  
11 being covered by this arbitration award.

12 The other side makes a very compelling  
13 argument that, no, there's actually a ground to  
14 -- to say that injunctive relief goes to the  
15 court, but damages go to arbitrators.

16 And when we have mixed claims, most  
17 courts will either send the matter to  
18 arbitration and stay the injunctive relief  
19 until the arbitration's over. If they  
20 determine that both can go simultaneously, they  
21 do it.

22 But there are plenty of cases with  
23 mixed questions that courts handle all the  
24 time. My difficulty is that I don't know where  
25 to draw that line. I don't know where what's

1 wholly frivolous to you may not be to someone  
2 else. And if there's been a true delegation,  
3 why shouldn't that go to the arbitrator?

4 Don't go to the facts of this case.  
5 Let's assume a clear delegation. Because I  
6 know you're making arguments about the ABA, but  
7 we didn't grant cert on that.

8 MR. GEYSER: I agree. Let's assume a  
9 clear delegation. But let's also assume a  
10 completely frivolous, baseless, maybe even  
11 abusive claim because --

12 JUSTICE SOTOMAYOR: No. Are you  
13 claiming -- because you're arguing that this  
14 case is wholly groundless, because that's the  
15 ground that arbitration was not ordered by the  
16 court below.

17 This is the quintessential case where  
18 most of these cases are on the margin. And  
19 I've actually gone and had the library do  
20 research. The number of wholly groundless  
21 cases is very small.

22 MR. GEYSER: It -- it -- it is.

23 JUSTICE SOTOMAYOR: So, you know,  
24 mistakes are made even by judges. So the fact  
25 that the four or five arbitrators who make a

1 mistake, I don't know if that's statistically  
2 different than judges making mistakes.

3 MR. GEYSER: Your Honor, the wholly  
4 groundless doctrine is a very modest inquiry.  
5 All you need to do to satisfy it, in respect to  
6 my friend, it is not asking the court to decide  
7 the arbitrability determination. It's asking  
8 them to decide is there a dispute over  
9 arbitrability, a bona fide dispute? Is it --

10 JUSTICE GINSBURG: But the court has  
11 to decide wholly groundless. So where do you  
12 draw the line between merely incorrect,  
13 groundless, and wholly groundless?

14 JUSTICE GORSUCH: Good question.

15 MR. GEYSER: I think the -- where the  
16 line is drawn is where the courts of appeals  
17 have drawn it. Is there a bona fide dispute?  
18 If a court cannot identify any plausible or  
19 legitimate argument, it can be exceedingly  
20 weak, then it goes to the arbitrator because  
21 that's what the parties agreed.

22 CHIEF JUSTICE ROBERTS: But you're  
23 just --

24 JUSTICE SOTOMAYOR: That's my problem  
25 with this case.



1           MR. GEYSER: Well, but, again, my  
2 friend, though -- my --

3           JUSTICE SOTOMAYOR: It may be  
4 extremely weak, and I'm not sure that's true,  
5 but --

6           MR. GEYSER: Your Honor, respectfully,  
7 though, Petitioners sought review on one  
8 question, not two. They took -- it was their  
9 strategy. They did an all-or-nothing  
10 categorical attack saying there is no wholly  
11 groundless doctrine under any circumstances.

12           They could have added a second  
13 question saying, if there is a wholly  
14 groundless doctrine, we don't think it was met  
15 here. But they didn't -- they didn't raise  
16 that question.

17           JUSTICE GORSUCH: Well, Mister --

18           CHIEF JUSTICE ROBERTS: You seem to be  
19 just, you know, slicing the baloney a little  
20 thin. It's not just groundless, it's wholly  
21 groundless. And when you say, well, what's  
22 wholly groundless, you say, well, there's no  
23 bona fide dispute.

24           You know, the -- the answers about  
25 what the content of it is just sort of

1 substitute one adjective for another, which I  
2 think highlights the problem, which is that, I  
3 mean, do you think there's a difference between  
4 groundless and wholly groundless?

5 MR. GEYSER: I -- I think that the  
6 difference is, is there a legitimate or  
7 plausible argument? Is there any argument on  
8 the other side of the bound -- of the ledger?  
9 And, if there is, then the courts compel  
10 arbitration.

11 CHIEF JUSTICE ROBERTS: So what  
12 standard should we say: Wholly groundless or  
13 no bona fide dispute?

14 MR. GEYSER: I would say if there's  
15 not a bona fide dispute, then it goes to the  
16 arbitrator. I think that effectively, even  
17 though courts have used different  
18 articulations, that's where each standard  
19 points to.

20 JUSTICE GORSUCH: But -- but what does  
21 even that mean? Clearly, there's a bona fide  
22 dispute when two parties are litigating all the  
23 way to the United States Supreme Court.

24 (Laughter.)

25 MR. GEYSER: Well, but --

1                   JUSTICE GORSUCH: Right? And so I  
2 know it's a small exception today, but the  
3 experience of this Court has been when it  
4 creates small exceptions, they tend to become  
5 larger ones with time.

6                   And -- and the whole point of  
7 arbitration, of course, is to try and  
8 streamline things. And -- and having  
9 litigation all the way up and down the federal  
10 system over wholly groundless, only to wind up  
11 in arbitration, ultimately seems highly  
12 inefficient.

13                   Isn't your real complaint here the  
14 first one, Justice Breyer's, in that there's  
15 just maybe a really good argument that clear  
16 and unmistakable proof doesn't exist in this  
17 case of -- of a desire to go to arbitration and  
18 have the arbitrator decide arbitrability?

19                   And why doesn't that take care of  
20 90 percent of these kinds of cases?

21                   MR. GEYSER: It -- it -- it may take  
22 care of a lot of them. And it will take care  
23 of it in this case. The Fifth Circuit all but  
24 concluded that there's -- they're not --

25                   JUSTICE GORSUCH: So why -- so why do

1 we need to go down the baloney slicing road, to  
2 mix my metaphors?

3 MR. GEYSER: Well, we -- we -- we  
4 suggested that the Court not grant review  
5 precisely because this is not a good vehicle  
6 for it because there's not a clear and  
7 unmistakable showing in any possible way, but  
8 --

9 JUSTICE GORSUCH: So are you -- are  
10 you -- are you now saying we -- we don't need  
11 to answer the question presented --

12 MR. GEYSER: Oh, no.

13 JUSTICE GORSUCH: -- and you give up  
14 and go back to the court of appeals on the  
15 first one?

16 MR. GEYSER: Absolutely not, Your  
17 Honor.

18 JUSTICE GORSUCH: I didn't think so.  
19 (Laughter.)

20 MR. GEYSER: Absolutely not. Now --  
21 and just to show how little of a problem this  
22 causes in practice, this doctrine has existed  
23 for decades in multiple circuits, and it's  
24 rarely invoked because courts can understand  
25 the difference between something that is like a

1 Rule 11 sanctionable argument and something  
2 that's a legitimate argument.

3 And they've applied it faithfully.  
4 The -- the Federal Circuit in Qualcomm, the  
5 Fifth Circuit in Kubala, they've made it  
6 absolutely clear you do not invade the province  
7 of the arbitrator. You make sure that there is  
8 literally no argument that supports it.

9 Now maybe you disagree, looking at the  
10 facts of this case, whether the standard was  
11 met. But the fact is that we didn't brief this  
12 because it's outside the question presented.

13 The Texas district judge looked at it.  
14 Three Fifth Circuit judges looked at it. And  
15 they all said there is no possible scenario  
16 where this will end up in arbitration.

17 JUSTICE SOTOMAYOR: Well, we have a  
18 magistrate judge who disagreed and we have  
19 other courts in other circuits, I'll bet, but  
20 we have other courts who have read it exactly  
21 the way they read it. And so it can't be  
22 wholly frivolous when you have so many people  
23 split on an issue.

24 MR. GEYSER: Well, no, Your Honor.  
25 And just to be very clear on two things. The

1 magistrate judge recognized that Petitioners'  
2 construction of the actual language of the  
3 agreement was problematic. That's at page 41a  
4 of the petition appendix. It said problematic.

5 It rewrote the agreement to -- to --  
6 to match what the magistrate judge thought  
7 would be a better arbitration clause.

8 That's exactly what this Court has  
9 said that arbitrators can't do, and I don't see  
10 any license for a magistrate judge to be able  
11 to do it either. You have to apply the  
12 agreement as written.

13 And for the other circuits that have  
14 looked at other clauses and said we can divide  
15 it up between injunctive relief and cases on  
16 the merits, those involved very different  
17 arbitration clauses. The language of those  
18 clauses were written in very different terms.

19 They typically divided up one general  
20 delegation where everything goes to the  
21 arbitrator and then in a separate section or  
22 separate sentence at least, it carved out  
23 specific claims that sought injunctive relief.

24 Here, you have a parenthetical that  
25 says that if it's an action, not a claim, but

1 an action seeking injunctive relief, it's --  
2 it's excluded.

3 JUSTICE GINSBURG: Well, what -- what  
4 injunctive relief does Archer seek? We're told  
5 that what Archer wants most of all is money  
6 damages.

7 MR. GEYSER: Well, and -- and the  
8 courts could have, or the parties could have --  
9 and at least the ones that had the arbitration  
10 clause -- could have written this to say that  
11 the predominant relief is damages. It goes to  
12 the arbitrator. That's not what they wrote.

13 JUSTICE GINSBURG: But what kind of  
14 injunctive relief? Just let's take this down  
15 to the ground.

16 MR. GEYSER: Sure. They're seeking an  
17 injunction of anticompetitive conduct that has  
18 been investigated now by multiple state and  
19 federal agencies and that we allege is ongoing  
20 today.

21 So what they'd like to have happen is  
22 the -- the anticompetitive conduct to stop.  
23 Now, if that goes to the arbitrator, that will  
24 multiply proceedings because an arbitrator  
25 can't enforce their own award. They don't have

1 an army. You need to get an award from the  
2 arbitrator saying we'll grant an injunction and  
3 get that enforced in court, where surely there  
4 will be more litigation in court.

5 So it makes perfectly good sense that  
6 parties thinking in advance that they might  
7 need injunctive relief would not want to  
8 include to -- to arbitration an action seeking  
9 injunctive relief.

10 But to -- to bring this back to the  
11 actual text of the statute, I --

12 JUSTICE KAVANAUGH: On the text of the  
13 statute, you hang almost everything on the  
14 "failure to comply therewith" language. And  
15 you heard Mr. Shanmugam's response to that,  
16 that that's very much a minimal bar that is  
17 merely designed to ensure that someone's  
18 opposing the referral or opposing arbitration.  
19 What's your response to him?

20 MR. GEYSER: I -- respectfully, I -- I  
21 think he's mistaken. I -- when -- when the  
22 plain language of the statute, which is  
23 imposing a direct gatekeeping function on the  
24 court, say they have to be satisfied, there's  
25 been a failure to comply with the arbitration



1 agreement. So, from a common sense  
2 perspective, does anyone think that you fail to  
3 comply with an arbitration agreement when the  
4 only conceivable outcome is a case belongs in  
5 court?

6 It's effectively like saying a party  
7 has to go to the arbitrator and seek  
8 preclearance before they can file their claim,  
9 even if it's the Martian example, where there's  
10 no conceivable chance that the arbitrator, if  
11 they're genuinely construing the agreement,  
12 will say this belongs in arbitration.

13 And that respectfully just makes no  
14 sense. It especially makes no sense looking at  
15 the statutory design. Congress under  
16 Section 10 -- and we do think Section 10  
17 provides a back-end safeguard here, that if an  
18 arbitrator takes the Martian case and they  
19 absolutely exceed their powers, they've  
20 adjudicated a dispute that the parties did not  
21 grant authority for the arbitrator to resolve,  
22 that would be an excess of authority.

23 It makes no sense when Congress has  
24 that specific substantive check on the back  
25 end, they've authorized the same judges to read

1 the same agreement and make the same "wholly  
2 groundless" type determination, that they say  
3 let's just do it on the back end and not on the  
4 front end before we can save this huge and  
5 colossal waste of time and resources.

6 JUSTICE BREYER: Is -- just follow me  
7 here -- is -- Professor Bermann, I thought, was  
8 writing an amicus brief on your side which says  
9 there isn't a clear and unmistakable commitment  
10 to arbitration. But is that issue in front of  
11 us?

12 MR. GEYSER: The -- it's -- I think  
13 it's assumed in this case that there is even  
14 though he didn't quite --

15 JUSTICE BREYER: There is? So we'd --  
16 so his -- so we'd say that that point he makes  
17 might be a good point, but that's not in the  
18 case. So it's not in the case that there is --  
19 whether there is a clear and unmistakable  
20 arbitration. It's not in the case whether this  
21 was wholly groundless. And we're taking this  
22 case -- assuming that there is such a thing as  
23 the unmistakable and assuming also that it is  
24 not wholly -- it is wholly groundless, then is  
25 there an exception for the wholly groundless?

1                   So I'm not making an argument. I just  
2                   want to be sure I'm right.

3                   MR. GEYSER: We -- you -- that is, in  
4                   fact, what the Court I believe is doing. And  
5                   we would warmly --

6                   JUSTICE BREYER: It's pretty  
7                   theoretical. And that's an argument.

8                   MR. GEYSER: We -- we would warmly  
9                   invite a DIG if the Court would like to -- to  
10                  DIG the case.

11                  (Laughter.)

12                  JUSTICE BREYER: Yeah.

13                  MR. GEYSER: But, at the same time,  
14                  though, we -- we do think there is, in fact, a  
15                  "wholly groundless" doctrine just as there has  
16                  been one for decades in the lower courts  
17                  without any meaningful frustration of  
18                  legitimate rights to arbitrate.

19                  JUSTICE KAGAN: Mr. Geyser, can I go  
20                  back to Justice Kavanaugh's textual question,  
21                  because, when I stare at this language, "the  
22                  failure to comply therewith" language, it seems  
23                  to me I can read it two ways, neither of which  
24                  is yours.

25                  So the first way is Mr. Shanmugam's

1 minimalist way. It doesn't mean very much of  
2 anything at all.

3 The second way suggests that we've  
4 gone wrong in -- in prior cases. It's the  
5 maximalist approach, which is what this  
6 language was meant to do was assign  
7 arbitrability issues to the courts, but we've  
8 -- we've pretty much -- we've -- we've gone by  
9 that -- that understanding of the language.

10 What I can't understand is how you can  
11 read the language to create this halfway house  
12 position.

13 MR. GEYSER: Sure. And -- and,  
14 Justice Kagan, first of all, I do think that,  
15 actually, the most faithful interpretation of  
16 this text is that it does assign to the courts  
17 the responsibility to decide the gateway issue.  
18 But that -- that ship has somewhat sailed.

19 JUSTICE KAVANAUGH: You can't do that?

20 MR. GEYSER: But -- but -- I'm sorry?

21 JUSTICE KAVANAUGH: Keep going.

22 JUSTICE KAGAN: The ship has sailed.  
23 We're agreeing that the ship has sailed.

24 MR. GEYSER: The ship has sailed. But  
25 I do think, though, just if you read the

1 language sensibly, both looking at -- at the  
2 actual text and looking at Section 10,  
3 understanding that there will be this review on  
4 the back end, it only makes sense to say that  
5 there's not a failure to comply with an  
6 arbitration agreement if what the parties  
7 agreed is that if there's a legitimate dispute,  
8 there's a bona fide dispute, it goes to the  
9 arbitrator. If there's not a bona fide  
10 dispute, then there's no failure to comply by  
11 filing it in court.

12           And I do think that you can't read  
13 that into the language of -- of an ordinary  
14 agreement. We -- looking at all the contracts  
15 and all the cases that came up in this, I  
16 didn't see a single example where people said:  
17 We'll have a delegation provision but no  
18 frivolous claims or no sham allegations. No  
19 one writes that into an agreement because it's  
20 presumed.

21           JUSTICE KAVANAUGH: But you -- you  
22 seem to agree with Justice Kagan, I think, that  
23 the statute doesn't, most naturally read,  
24 create a "wholly groundless" exception with  
25 that language. It may have suggested the court

1 should decide questions of arbitrability. So  
2 we've -- the Court's rejected that. So why  
3 create -- I guess I'm repeating Justice Kagan's  
4 question, but why create this new thing out of  
5 language that was not designed to do that?

6 MR. GEYSER: Well, Justice Kavanaugh,  
7 I don't think it's new at all. I -- I think  
8 that the -- it's -- it's very hard to say --

9 JUSTICE KAVANAUGH: It's new in the  
10 statute, is what I'm saying, in the sense that  
11 you had an all-or-nothing question, I think,  
12 with the statutory language, as Justice Kagan  
13 said, and the court decided that.

14 MR. GEYSER: Well, I think -- I think  
15 there are two ways to look at it, and one is a  
16 statutory hook, which I still do think is the  
17 best way to read this language. It's very hard  
18 to understand how something is a failure to  
19 comply with an arbitration agreement if the  
20 arbitration agreement is saying if there's a  
21 bona fide dispute over arbitrability, then it  
22 goes to the arbitrator. If there's not a bona  
23 fide dispute over arbitrability, then you don't  
24 fail to comply by filing it in court.

25 So it is, in fact, I think the "wholly

1 groundless" doctrine that it's -- it's tapping  
2 on an intuition that's already there. It's  
3 just giving this language some sort of reading  
4 that makes sense and that's consistent with the  
5 parties' intent. And that --

6 JUSTICE ALITO: But that goes, again,  
7 to the interpretation of the delegation of  
8 arbitrability. As I understand your argument,  
9 you're saying that implicit in any provision of  
10 the contract that says arbitrability is for the  
11 arbitrator, there's the exception for -- for  
12 this type of dispute.

13 MR. GEYSER: There -- there is --

14 JUSTICE ALITO: That's the argument,  
15 right?

16 MR. GEYSER: That -- that is -- that  
17 is part of the argument, Your Honor, and the  
18 reason I think it's correct is that no one  
19 anticipates being dragged into an absolutely  
20 frivolous dispute. Good faith is inherent in  
21 every contract. That's a matter of North  
22 Carolina contract law, which is what this  
23 agreement is subjected to, and general contract  
24 principles.

25 JUSTICE ALITO: But is that -- is that

1 generally true when parties agree by contract  
2 on a particular decision-maker? What if it's a  
3 forum selection clause? Is there an exception  
4 to that for wholly groundless disputes?

5 MR. GEYSER: No, I think a forum  
6 selection clause would be slightly different  
7 because someone has to adjudicate the -- the  
8 underlying merits, whether it's this judge or a  
9 judge in a different district.

10 That's not true, though, with a wholly  
11 groundless arbitration demand. This is  
12 generating a pointless process. This is what  
13 happens when you file an wholly groundless  
14 arbitration demand. Either it goes to the  
15 arbitrator, who wastes time and money, and it's  
16 -- it's far more than my friend suggests. It  
17 can take weeks or months, and it can take tens  
18 of thousands of dollars to get this predicate  
19 threshold issue resolved.

20 And then they send it right back to  
21 the court, or even worse, they make a  
22 catastrophic error -- and sometimes people make  
23 mistakes -- they keep the case, and then the  
24 court vacates it at the end of the day under  
25 Section 10.



1           And, respectfully, that -- that is not  
2           a sensible system. And to the extent my friend  
3           suggests that ways to police that are the  
4           arbitrator could send --

5           JUSTICE SOTOMAYOR: Sorry, but is this  
6           a sensible system where, even though we only  
7           have five cases over a long period of time in  
8           which courts have denied arbitration on wholly  
9           frivolous grounds, we're now inviting this  
10          fight in every motion to compel arbitration --

11          MR. GEYSER: I --

12          JUSTICE SOTOMAYOR: -- and that itself  
13          will multiply expenses? Maybe not in your  
14          individual case but as a burden on courts.

15          MR. GEYSER: No --

16          JUSTICE SOTOMAYOR: So it's not clear  
17          to me that your solution is more efficient in a  
18          meaningful way.

19          MR. GEYSER: I think our -- our  
20          solution is far more efficient, Your Honor, and  
21          if -- if I could explain why.

22          JUSTICE SOTOMAYOR: Only if you win.

23          MR. GEYSER: Well -- well, if we win,  
24          then I -- I think --

25          JUSTICE SOTOMAYOR: If you win in

1 court.

2 MR. GEYSER: Well, no, I think  
3 plaintiffs have -- have an incentive to have  
4 their cases adjudicated. They're not the ones  
5 that are trying to invite protracted side  
6 litigation over issues. It's only the  
7 plaintiffs who actually think the arbitration  
8 demand is wholly groundless that will spend the  
9 resources to resist on that level.

10 And I also think it's far more  
11 efficient for the court to decide this than the  
12 arbitrator. The court already has to look at  
13 the arbitration clause. It has to do that.  
14 Whatever Section 4 means, we can all agree that  
15 it does impose a gatekeeping function; the  
16 court -- the courts do have to look at  
17 something. So they're looking at the dispute  
18 already.

19 All they need to do to resolve the  
20 "wholly groundless" inquiry is say, is there a  
21 dispute? They don't need to decide it.  
22 They're not resolving arbitrability. They say,  
23 is there any legitimate argument here that any  
24 reasoned decision-maker could credit? If they  
25 identify that argument, they send it to the

1 arbitrator.

2           That is far more efficient than asking  
3 the parties to initiate a needless and  
4 needlessly expensive gateway arbitration when  
5 everyone knows the only two possible outcomes  
6 is they send it right back so you can start  
7 over in court months later, you know, possibly  
8 tens of thousands of dollars in the hole, or  
9 months or years later if the arbitrator makes a  
10 mistake and keeps it.

11           So I -- I don't think that is an  
12 efficient system. And I think, again, this  
13 doctrine has existed in courts, multiple  
14 courts, for decades without any noticeable  
15 effect on parties' legitimate arbitration  
16 rights.

17           JUSTICE KAGAN: Could I go back?  
18 Beyond your saying it's not an efficient  
19 system, are you saying essentially that the --  
20 that the basis for this rule is that we don't  
21 believe that a delegation clause includes this,  
22 that we don't believe that the parties intended  
23 for a general delegation clause to include  
24 these kinds of groundless questions? Is that  
25 basically the idea?

1 MR. GEYSER: That -- that is certainly  
2 --

3 JUSTICE KAGAN: The contractual idea.

4 MR. GEYSER: Exactly. That -- that is  
5 the core of the idea.

6 JUSTICE KAGAN: Yes. So -- but -- but  
7 -- so, I mean, that might be a rule of -- of  
8 the -- of contract interpretation here, but  
9 you're trying to say that the FAA, specifically  
10 Section 4, sets up as a kind of substantive  
11 interpretive rule that we're going to interpret  
12 these contracts in a certain way.

13 And that seems like a strange thing  
14 for us to think about the FAA.

15 MR. GEYSER: Oh, I -- I don't think  
16 that's strange at all, Your Honor. In -- in  
17 First Options and -- and in -- in Oxford, or in  
18 Stolt-Nielsen, the Court specifically says that  
19 it crafts interpretive rules in the setting to  
20 match the parties' likely intent.

21 So, if the court thinks that when  
22 parties are silent about what do you do with a  
23 wholly groundless, frivolous dispute, and,  
24 again, the doctrine, this is an all-or-nothing  
25 challenge to it, so the Court has to think what

1 about the truly frivolous arbitration demand.

2 And I -- I think it's perfectly  
3 sensible to say that parties did not agree to  
4 have non-bona fide disputes sent to an  
5 arbitrator. I -- I don't think that's an  
6 unreasonable proposition.

7 Again, I have not seen a single  
8 contract that says we reserve wholly frivolous,  
9 abusive arbitration demands.

10 CHIEF JUSTICE ROBERTS: Well, but you  
11 phrase it that way. But you could phrase it  
12 differently. What if there's a party that has  
13 historically not done well in court and  
14 whatever -- whatever comes up, they say I don't  
15 want a court to do it, I want an arbitrator to  
16 do it.

17 What's wrong with that?

18 MR. GEYSER: I -- I think if the party  
19 is clear and unmistakable in saying that, even  
20 if the dispute has absolutely no conceivable  
21 merit, and everyone knows it's going to be back  
22 in court whether the parties like it or not,  
23 then, if they make that sufficiently clear,  
24 then debatably --

25 JUSTICE BREYER: A work --

1 MR. GEYSER: -- there's a failure  
2 under Section 4.

3 JUSTICE BREYER: But there's a work  
4 contract lawyer, labor, one of them says I'll  
5 tell you what I want arbitrated. Who owns  
6 Crimea? Okay? What's the judge supposed to  
7 do? The contract has nothing to do with this.  
8 So what's the judge supposed to do?

9 MR. GEYSER: The -- well, I -- I think  
10 if it -- so if it's a wholly groundless --

11 JUSTICE BREYER: It has nothing to do  
12 with this contract. He wants something  
13 arbitrated, nothing to do with it.

14 MR. GEYSER: Again, I think the answer  
15 if the Court looks at it and says there's  
16 nothing for the arbitrator to do, then there's  
17 not a failure to comply by not filing an  
18 arbitration demand.

19 JUSTICE BREYER: No failure to comply.  
20 Okay. So that's the basis of this groundless  
21 business. Okay. So he has the -- I have the  
22 same question. Okay.

23 MR. GEYSER: So I think -- and that's  
24 also consistent just with general litigation  
25 norms. My friend suggests effectively that the

1 FAA carves an exception to Rule 11 principles.  
2 And I don't see that anywhere in the text of  
3 the FAA.

4 On the contrary, this Court construes  
5 the FAA as creating sort of an equal treatment  
6 rule. All arbitration agreements are treated  
7 just the same as any other agreement. And  
8 normally, when a party files a frivolous and  
9 abusive claim in court, they're sanctioned.  
10 They don't -- they don't win.

11 And I don't think it makes any sense  
12 to say that someone can file a frivolous claim,  
13 then you can -- you -- you reward the claim,  
14 you send it to the arbitrator, and then, after  
15 the arbitrator gets done saying, yeah, that was  
16 frivolous, then you sanction them under Rule  
17 11. That's --

18 JUSTICE GINSBURG: If you -- if we --  
19 if we don't accept your argument, can you tell  
20 us, there are many, many open questions in this  
21 case, right?

22 MR. GEYSER: There are many open  
23 questions in this case.

24 JUSTICE GINSBURG: So -- that the  
25 Fifth Circuit didn't decide?

1           MR. GEYSER: That's correct. The --  
2           the -- it comes to the Court where the Fifth  
3           Circuit almost decided. It explained why  
4           Petitioners' argument that there is a  
5           delegation clause was wrong but then didn't  
6           actually enter a holding on that, which, again,  
7           is why we think that, in a way, this is an  
8           academic decision in this particular case.

9           Again, it's outside the question  
10          presented, so we didn't -- we didn't brief the  
11          substance of that.

12          JUSTICE SOTOMAYOR: It's not academic  
13          because our answer has a consequence. If we  
14          agree with him that there is no statutory  
15          provision for wholly groundless exceptions,  
16          then all the other questions have to go back  
17          and be actually answered.

18          MR. GEYSER: Yes -- yes. No, I'm --  
19          I'm not suggesting that there's not  
20          jurisdiction to resolve the question. I'm just  
21          saying that in this case it -- it is highly  
22          unlikely to have any effect on the ultimate  
23          outcome.

24          JUSTICE SOTOMAYOR: Well, that's only  
25          because you intend to win all the other



1 questions.

2 (Laughter.)

3 MR. GEYSER: Well, we -- that's  
4 certainly our intent, Your Honor.

5 JUSTICE SOTOMAYOR: I can't tell you  
6 that.

7 MR. GEYSER: Yeah. But -- but, again,  
8 though, the -- the way it comes to the Court is  
9 it's saying, even for the most frivolous and  
10 abusive arbitration demand imaginable, if there  
11 is a delegation clause, are the courts actually  
12 powerless where they have -- their only option  
13 is to send it to the arbitrator, where they  
14 already know the answer.

15 And that's inconsistent with what this  
16 Court did in Stolt-Nielsen. Stolt-Nielsen  
17 specifically looked -- and this is at page 676  
18 and 677 of the court's opinion -- and said if  
19 there is only one possible outcome, even where  
20 the parties, as they did in that case,  
21 expressly agreed that this is a determination  
22 for the arbitrator, then you do not send it  
23 back to the arbitrator because it's pointless.  
24 You decide it yourself.

25 And that's exactly what the wholly

1 groundless doctrine is doing, and it's doing it  
2 sensibly on the front end when you look at an  
3 arbitration demand and you can either say the  
4 parties didn't clearly and unmistakably intend,  
5 when you have a frivolous dispute that has  
6 nothing at all to do with the contract, to send  
7 it to the arbitrator, it's enforcing the  
8 parties' intent, and I think it's consistent  
9 with Section 4.

10 If the Court has no further questions.

11 CHIEF JUSTICE ROBERTS: Thank you,  
12 counsel.

13 Four minutes, Mr. Shanmugam.

14 REBUTTAL ARGUMENT OF KANNON K.

15 SHANMUGAM ON BEHALF OF THE PETITIONERS

16 MR. SHANMUGAM: Thank you, Mr. Chief  
17 Justice.

18 Respondents' argument today really  
19 assumes the answer to the inquiry when  
20 Respondent argues that the parties never would  
21 have wanted to arbitrate wholly groundless  
22 claims of arbitrability.

23 The exact same argument could be made  
24 where the underlying substantive claims are  
25 frivolous. The argument could be made that the

1 parties would never have wanted for that to go  
2 to the arbitrator and would have instead wanted  
3 a court to short-circuit that inquiry.

4 But this Court in AT&T Technologies  
5 made clear that, even if a court thinks that a  
6 claim is not arguable, it is still obligated to  
7 send that claim to arbitration, where the  
8 parties have so intended.

9 JUSTICE KAGAN: It is a little bit  
10 different, though, Mr. Shanmugam, because in --  
11 in the case that you said, if it's really  
12 groundless, you expect that the arbitrator will  
13 get rid of it just as fast as the court will  
14 get rid of it.

15 What makes this case a little bit  
16 different from that is that, here, all the  
17 arbitrator is going to do is to send it back to  
18 the court. And you might think: Well, what  
19 sense does that make?

20 MR. SHANMUGAM: But the arbitrator  
21 will make that determination presumably  
22 efficiently, will do so at the outset of the  
23 proceedings, and, of course, we're assuming  
24 here that the parties contracted to have the  
25 arbitrator make that determination presumably

1 for the same reason that parties arbitrate --  
2 parties agree to have arbitrators make merits  
3 determinations, because they conclude that that  
4 will be a more efficient and cheaper way of  
5 resolving the relevant issue.

6 And Respondent has no answer for  
7 Justice Sotomayor's question about this Court's  
8 decision in Rent-A-Center, which provides that,  
9 where the parties have remitted the issue of  
10 arbitrability to the arbitrator, it should be  
11 treated just like any other issue.

12 And what Respondent is asking this  
13 Court to do is to allow courts to make merits  
14 determinations on the issue of arbitrability  
15 even in the face of a delegation.

16 And that brings me --

17 JUSTICE SOTOMAYOR: Assuming for sake  
18 of argument only, hypothetically, that we  
19 disagree with you, there -- there, in fact, can  
20 be a wholly groundless ground -- pardon the pun  
21 -- do you lose --

22 MR. SHANMUGAM: Well --

23 JUSTICE SOTOMAYOR: -- under your  
24 question presented? Assuming that I thought,  
25 again, presuming only, that you had an arguable

1 claim.

2 MR. SHANMUGAM: We -- we continue to  
3 believe that we have a valid claim of  
4 arbitrability and certainly not a wholly  
5 groundless one. And if this Court vacates and  
6 this case gets to the arbitrator on that issue,  
7 we will make that argument.

8 And I would note parenthetically --

9 JUSTICE SOTOMAYOR: But you don't  
10 under the question presented if I -- if we  
11 disagree with you?

12 MR. SHANMUGAM: We didn't present a  
13 question concerning the application of the  
14 wholly groundless exception. To be sure,  
15 that's obviously a case-specific determination.  
16 But I do think that this case illustrates the  
17 danger of the wholly groundless exception.

18 There would be a dangerous pliability  
19 to that standard regardless of what words this  
20 Court puts on a page. And this case  
21 illustrates that.

22 And so, in addition to the  
23 inefficiency of this standard, I would point to  
24 that pliability as reasons why this Court as a  
25 policy matter should not adopt this exception,

1 an exception that, as you point out, Justice  
2 Sotomayor, has been applied in only a very  
3 small number of cases since the Federal Circuit  
4 of all people first recognized this exception  
5 about a decade ago.

6 And so it simply would not be worth  
7 the candle to filter out the truly frivolous  
8 claims, particularly where there are remedies  
9 available, sanctions remedies available for  
10 Justice Breyer's Crimea hypothetical and any  
11 other hypothetical one might imagine.

12 And I think it's very hard to look at  
13 the --

14 JUSTICE BREYER: Yes, but in the law,  
15 I mean, normally, in the law, when a judge has  
16 something frivolous, he says so. So -- so you  
17 have your thing on the one side. So it's like  
18 a forum selection clause. But on the other  
19 side is a natural reluctance, when you have  
20 something absolutely frivolous, not to say.

21 MR. SHANMUGAM: There are certainly  
22 cases in the law more generally --

23 JUSTICE BREYER: It's not just  
24 arbitration. It's all over the place.

25 MR. SHANMUGAM: I -- I recognize that,

1 for instance, in the context of administrative  
2 law there are cases that stand for the  
3 proposition that, where an administrative  
4 agency concludes that it would be futile to  
5 have a hearing, the agency has the power not to  
6 hold the hearing.

7 But this case is different from any of  
8 those cases because what Respondent is arguing  
9 is that, where the parties have agreed to have  
10 one decision-maker make a determination,  
11 another decision-maker has the power to  
12 short-circuit that determination.

13 And, after all, the fundamental policy  
14 of the FAA is to enforce arbitration agreements  
15 according to their terms. The wholly  
16 groundless exception would create a way around  
17 that policy.

18 And we would respectfully submit that  
19 the judgment should, therefore, be vacated.

20 CHIEF JUSTICE ROBERTS: Thank you,  
21 counsel. The case is submitted.

22 (Whereupon, at 11:05 a.m., the case  
23 was submitted.)

24

25

## Official - Subject to Review

<b>1</b>	<b>addition</b> <sup>[1]</sup> 68:22 <b>address</b> <sup>[3]</sup> 4:17 12:9,15 <b>adjective</b> <sup>[1]</sup> 41:1 <b>adjudicate</b> <sup>[1]</sup> 55:7 <b>adjudicated</b> <sup>[2]</sup> 48:20 57:4 <b>administrative</b> <sup>[2]</sup> 70:1,3 <b>adopt</b> <sup>[1]</sup> 68:25 <b>advance</b> <sup>[1]</sup> 47:6 <b>advantage</b> <sup>[2]</sup> 24:9,9 <b>advocating</b> <sup>[3]</sup> 20:21 26:12 29:3 <b>agencies</b> <sup>[1]</sup> 46:19 <b>agency</b> <sup>[2]</sup> 70:4,5 <b>aggrieved</b> <sup>[3]</sup> 28:15,23,25 <b>ago</b> <sup>[1]</sup> 69:5 <b>agree</b> <sup>[11]</sup> 28:20 33:25 35:7 36:7 38:8 52:22 55:1 57:14 60:3 63:14 67:2 <b>agreed</b> <sup>[20]</sup> 3:16,19 5:3 6:3 11:5, 14 15:8,13,24 16:18,25 22:2 33:3 35:2 36:13,15 39:21 52:7 64:21 70:9 <b>agreeing</b> <sup>[1]</sup> 51:23 <b>agreement</b> <sup>[38]</sup> 3:21 4:3,4,6 5:11, 21 6:23 7:1 8:11,14 11:18 20:3 27: 8,9,9 31:15 32:4,9,9 34:20 35:6,9, 16,21 45:3,5,12 48:1,3,11 49:1 52: 6,14,19 53:19,20 54:23 62:7 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