No. 17-1272

In The
Supreme Court of the United States

HENRY SCHEIN, INC., *ET AL.*,

Petitioners,

v.

ARCHER AND WHITE SALES, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

AMICUS CURIAE BRIEF OF ANTHONY MICHAEL SABINO IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Federal Arbitration Act permits a court to decline to enforce an agreement delegating questions of arbitrability to an arbitrator if the court concludes the claim of arbitrability is "wholly groundless."

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

INTEREST OF *AMICUS CURIAE*

This *amicus curiae* is a law professor with expertise in arbitration generally, securities arbitration, commercial law, and commercial arbitration. Furthermore, this *amicus curiae* has represented parties in arbitration proceedings, frequently chairs arbitrations for the Financial Industry Regulatory Authority and other bodies, and regularly lectures on the precise topics found in the pending controversy. This case addresses the interpretation of the Federal Arbitration Act, implicates the enforcement of agreements to arbitrate, and, hence, the proper conduct of arbitration proceedings in a wide variety of fora. This *amicus curiae* has a professional and scholarly interest in the proper application and development of the law in this domain.[1]

STATEMENT

This *amicus curiae* respectfully adopts, in relevant part, the Statement of Facts set forth by the Petitioners herein, Henry Schein, Inc., *et al.* ("Petitioners").

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record received timely notice of the intent to file this brief, as required by Supreme Court Rule 37.3(a). Petitioners and Respondent timely filed blanket consents to the filing of any and all briefs of *amici curiae*, whether in support of either or neither party.

SUMMARY OF ARGUMENT

The question presented must be answered in the negative, for reason of the text of the Federal Arbitration Act, the strong federal policy favoring arbitration, and the lengthy and consistent line of precedents upholding that ideal. The "wholly groundless" theorem is unsupported by the statutory regime which empowers arbitration, it frustrates the strong federal policy favoring arbitration, and the doctrine cannot be reconciled with the Court's jurisprudence, which for decades now has robustly upheld the enforceability of agreements to arbitrate. As with other impediments to arbitration, the "wholly groundless" theorem should be eradicated or at least be subjected to a limiting principle.

ARGUMENT

I. THE "WHOLLY GROUNDLESS" THEOREM HAS NO BASIS IN THE TEXT OF THE FEDERAL ARBITRATION ACT.

Since 1925, arbitration has been regulated, and, moreover, encouraged, by the Federal Arbitration Act. 9 U.S.C. §§ 1, *et seq.* ("FAA"). The FAA explicitly directs the courts to enforce agreements to arbitrate, and empowers them to do so by a variety of means.

Foremost in the statutory scheme is Section 2, the "primary substantive provision of the Act." *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983). The statute mandates that

a written provision in a contract which calls for the arbitration of controversies "*shall* be valid, irrevocable, and enforceable." 9 U.S.C. § 2 (emphasis supplied). *See Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 474 (1989). It is noteworthy that the proviso is stated in the imperative "shall," and not the permissive "may" or similar.

Subsequent portions of the FAA also unmistakably work towards the goal of enforcing agreements to arbitrate. *See* 9 U.S.C. § 3 (providing for a stay of proceedings for a matter referable to arbitration), § 4 (supplying jurisdiction to compel arbitration), and § 9 (establishing a mechanism for confirming and enforcing an arbitration award). *See also Volt*, *supra*, 489 U.S. at 474 (analyzing Sections 2 and 4). In sum and substance, every aspect of the FAA supports the enforcement of agreements to arbitrate. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011) ("*Concepcion*").

The Court has repeatedly declared the aim of the FAA is to ensure private agreements to arbitrate are enforced according to their terms. *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995) (quotation omitted). The Court has frequently held the FAA places agreements to arbitrate on "an equal footing with other contracts." *Concepcion*, *supra*, 563 U.S. at 339 (quotations omitted), *citing Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006). *See also Volt*, *supra*, 489 U.S. at 474, 478.

Most recently, the Court has declared that the FAA safeguards arbitral accords from "judicial interference." *Epic Systems Corp. v. Lewis*, 584 U.S. ___, ___, *slip op*. at 3 (No. 16-285) (May 21, 2018). *See also Prima Paint Corp. v. Flood & Conklin Mfg. Co*., 388 U.S. 395, 404 (1967) (the plain language of the Act evinces a clear legislative intent to prohibit judicial obstructionism to arbitration). As the most recent addition to the pantheon of the Court's arbitration jurisprudence, *Epic* confirms that the statutory components of the FAA constitute a cohesive scheme which "require[s] courts to respect and enforce agreements to arbitrate." *Epic*, *supra*, *slip op*. at 5.

Quite telling is the closing paragraph of *Epic*, wherein the Court characterizes the statutory regime as a solemn command from Congress "that arbitration agreements . . . must be enforced as written." *Id*., *slip op*. at 25.

One final aspect of the FAA must be considered for purposes of the case at bar. Section 2 of the FAA contains a "savings" clause, which can render an agreement to arbitrate unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. This subpart leaves intact generally applicable defenses to contract enforcement, such as fraud, duress, and unconscionability, as proper grounds for declining to enforce an arbitration agreement. *Concepcion*, *supra*, 563 U.S. at 339 (quotation and citation omitted). The savings clause is consistent with the law's intent to place arbitral accords on the same footing as ordinary contracts. *See id*.

To be certain, the Court has carefully cabined Section 2's savings clause, ruling that it does not evince any intent to preserve judicial constructs "that stand as an obstacle to the FAA's objectives." *Id*. at 343 (invalidating a state law rule purporting to make agreements to arbitrate unenforceable). Doctrines which apply solely to agreements to arbitrate or derive their meaning from the fact that the underlying pact calls for arbitration are not salvaged by this statutory subcomponent. *Id*. at 339. *See also Epic*, *supra*, *slip op*. at 1-2 (Thomas, J., concurring) (the sole basis for setting aside an agreement to arbitrate are those defenses concerning the formation of the underlying arbitral accord).

In consideration of all the above, the "wholly groundless" theorem finds no support within the FAA. It is unmoored from the statutory text. Indeed, the doctrine is antithetical to the statutory regime, for it undercuts the overriding legislative command that agreements to arbitrate *shall* be valid, irrevocable, and enforceable.

Nor does the "wholly groundless" theorem find support within the Court's precedents expounding upon the text of the FAA. Indeed, the doctrine constitutes the very type of judicial meddling which the Court has repeatedly, and even recently, declared is forbidden by the statutory regime.

Lastly, the "wholly groundless" theorem finds no refuge in the savings clause of Section 2. The doctrine is not a traditional contract defense preserved by the

statutory caveat. In truth, it is the type of judicial mechanism which the Court's precedents have excluded from Section 2's safe harbor.

It is respectfully submitted by this *amicus* that the "wholly groundless" theorem has no basis in the FAA. Lacking foundation in the statutory scheme, the doctrine should be eliminated or at least be subjected to a limiting principle.

II. THE "WHOLLY GROUNDLESS" THEOREM NULLIFIES CONTRACTUAL TERMS, AND DEPRIVES PARTIES OF THE BENEFIT OF THEIR BARGAIN.

It is a "fundamental principle that arbitration is a matter of contract." *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 67 (2010). *See also American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, 233 (2013). In relation thereto, it has long been a bedrock principle of this Court's jurisprudence that arbitration is a matter of consent, not coercion. *Stolt-Nielsen S.A. v. AnimalFeeds International Corp*., 559 U.S. 662, 681 (2010), *quoting Volt*, *supra*, 489 U.S. at 479 (quotations omitted). Precisely for these reasons, the Court's arbitration landmarks have long affirmed that "the FAA requires courts to honor parties' expectations." *Concepcion*, *supra*, 563 U.S. at 351.

Agreements to arbitrate must therefore be rigorously enforced. *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985). As with any other contract, the parties' intentions control. *Mitsubishi Motors Corp. v.*

Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985). The proper role of the courts is to "give effect to the contractual rights and expectations of the parties," as gleaned from the arbitral accord. *Volt*, *supra*, 489 U.S. at 479.

Reflecting that arbitral pacts are just like ordinary contracts, it has long been acknowledged that parties are generally free to shape their agreements to arbitrate as they see fit. *Mastrobuono*, *supra*, 514 U.S. at 57. *See also Concepcion*, *supra*, 563 U.S. at 344 ("The point of affording parties discretion in designing arbitration processes" is that it empowers them to adopt the rules and procedures they deem best suited to their particular needs.). Thus, in yet another hallmark of the Court's arbitration jurisprudence, it is well known that parties may categorize the controversies they wish to submit to the arbitrator for resolution. *See generally Mitsubishi Motors*, *supra*, 473 U.S. at 628 (parties may choose to include or exclude statutory claims from arbitration, but are bound to that choice, once it is made).

The "wholly groundless" theorem cannot stand before these precedents, both generally and in the context of the instant case. As a general matter, the doctrine upsets the maxim that, like any contract, an agreement to arbitrate is to be rigorously enforced. Contrary to the axioms set forth above, the "wholly groundless" theorem substitutes judicial intervention for contract stipulations, consent, and the expectations of the parties.

Specific to the matter before the Court, the salient (and, arguably, dispositive) contractual language at the heart of the instant controversy unequivocally states that "[a]ny dispute arising under or related to this Agreement . . . shall be resolved by binding arbitration." The sole exemptions from this plainspoken directive are actions for injunctive relief or disputes relating to intellectual property. *Archer and White Sales, Inc. v. Henry Schein, Inc.*, 878 F.3d 488, 491 (5th Cir. 2017) (case below). *See also* Petition for a Writ of *Certiorari* at 6 (March 2018). The original action alleged violations of the antitrust laws, not intellectual property rights. The request for unspecified injunctive relief was apparently overwhelmed by a demand for money damages amounting to tens of millions of dollars. Petition for a Writ of *Certiorari* at 5-6 (March 2018). It would appear the controversy underlying the case at bar falls squarely within the ambit of the directive to arbitrate *any* dispute.

Furthermore, certain aspects of the arbitral accord described above are likely beyond question. The first is the agreement to arbitrate was arrived at by consent; it was not imposed by coercion. Second, the signatories contracted to arbitrate *any* dispute (the aforementioned exceptions aside). Third and last, no doubt the parties expected a court to honor the terms of their accord.

The "wholly groundless" theorem confounds both the terms of that arbitral pact and the parties' expectations. The doctrine sets aside the words agreed to, and imposes new terms, hitherto unknown to the

parties. The "wholly groundless" theorem reinvests a court with adjudicative power, contrary to the more limited role apparently contracted for and expected by the parties. The doctrine irrevocably alters what disputes are cognizable in arbitration, and therefore the procedures by which they will be resolved.

A final point: "any dispute" means "*any* dispute" or at least it should. Those plain words, found at the heart of the instant case, were cancelled out by lower tribunal's application of the "wholly groundless" theorem, thereby usurping the terms of the relevant contract, and frustrating the expectations of the parties.

It is respectfully submitted by this *amicus* that the "wholly groundless" theorem is contrary to the arbitration jurisprudence of this Court, including, but not limited to, the principles that arbitration is a matter of contract, contracts to arbitrate must be enforced according to their terms, and the expectations of the contracting parties are to be honored. The doctrine violates those maxims, and therefore the "wholly groundless" theorem should be overridden or at least be subject to a limiting principle.

III. THE "WHOLLY GROUNDLESS" THEOREM IS CONTRARY TO THE STRONG FEDERAL POLICY FAVORING ARBITRATION.

A long and unbroken line of this Court's arbitration landmarks informs us that, well into the opening decades of the Twentieth Century, there was widespread judicial hostility towards arbitration as an

alternative to traditional litigation. Most recently, the Court reminds that once upon a time "courts routinely refused to enforce agreements to arbitrate" or found other means to reduce their effectiveness. *Epic*, *supra*, *slip op*. at 5.

The strong federal policy validating arbitration closed that unfortunate chapter in American law. *Moses H. Cone*, *supra*, 460 U.S. at 24. *See also* Anthony Michael Sabino, "Awarding Punitive Damages in Securities Industry Arbitration: Working For A Just Result," 27 *U. of Richmond L. Rev.* 33, 34-39 (1992) (summarizing the then-extant landmarks announcing the strong federal policy favoring arbitration). Consonant with that mandate, for many decades now the Court has repeatedly and consistently put aside obstacles to the fulfillment of the robust policy favoring arbitration. *See generally Epic*, *supra*, *slip op*. at 16 ("In many cases over many years, this Court has heard and rejected efforts to conjure conflicts between the Arbitration Act and other federal statutes.").

The "wholly groundless" theorem is untethered from the strong federal policy favoring arbitration. In contravention of the legislative mandate pronounced nearly one hundred years ago, the doctrine diverts controversies from arbitration, and redirects them to litigation. The "wholly groundless" theorem thwarts contractual terms providing for arbitration, and thereby frustrates the expectations of the parties to such arbitral accords. The net result is inapposite to the strong federal policy favoring arbitration.

It is respectfully submitted by this *amicus* that the "wholly groundless" theorem is at odds with the strong federal policy favoring arbitration, and therefore the doctrine must be erased or at least strictly cabined.

IV. THE "WHOLLY GROUNDLESS" THEOREM IS A JUDICIAL CONSTRUCT WHICH IMPERMISSIBLY FRUSTRATES ARBITRATION.

Consistently and without hesitation, the Court has, time and again, put to the side judge-made law which frustrates agreements to arbitrate. *See Concepcion*, *supra*, 563 U.S. at 340-41. In dismantling one such obstacle to arbitration, that one emanating from a state tribunal, the Court warned that judicial hostility towards arbitration "manifest[s] itself in a great variety of devices and formulas." *Id*. at 342 (quotations and citations omitted). Given that *Concepcion*'s most powerful lessons have already been well illustrated in the arguments preceding this one, there is no need to regurgitate them here.

The salient point to be made at this juncture is that the axiom announced in *Concepcion* held no ambiguity. It pronounced that whenever judicial constructs from whatever source prohibit or impede arbitration, "the analysis is straightforward: The conflicting rule is displaced by the FAA." *Id*. at 341. *Concepcion* provides the rule for decision in the case at bar, as it has in other, recent arbitration landmarks. *See*

American Express, *supra*, 570 U.S. at 238 ("Truth to tell," *Concepcion* "all but resolves" the question.).

The "wholly groundless" theorem found in the instant case is little different from the state court construct disavowed in *Concepcion*. The former suffers from the same flaws as the latter: it is antithetical to the strong federal policy favoring arbitration; it usurps the contractual terms of the parties' arbitral accord; and it defeats the parties' expectations.

Refuting the "wholly groundless" theorem extant in the case at bar is required, not merely for the present, but with a view towards the future. Even as the FAA approaches its centennial, "remnants of [a] 'litigation only' ideology occasionally crop up" in the form of judicially crafted obstacles to arbitration. Anthony M. Sabino & Michael A. Sabino, "Law of the Land: U.S. Supreme Court Upholds Arbitration Agreements, Despite State Court Resistance," 61 *Nassau Lawyer* at 3, cl. 2 (December 2011).

Small wonder, then, that near the conclusion of its last term, the Court reaffirmed its obligation to guard against "new devices" intended to confound agreements to arbitrate. *Epic*, *supra*, *slip op*. at 9, *quoted* by Michael A. Sabino & Anthony M. Sabino, "'Epic' Decision by Supreme Court Orders Arbitration, Prohibits Class Action," 259 *New York Law Journal* at 4, cl. 4 (June 6, 2018).

The instant matter is the latest test of the Court's commitment to the ideals exemplified in its arbitration jurisprudence. Negating the "wholly groundless"

theorem in the case at bar is imperative, not merely for the sake of today, but to also assure that judicial manifestations yet to be conceived cannot survive the Court's scrutiny.

It is respectfully submitted by this *amicus* that the "wholly groundless" theorem is yet another judicial construct irremediably opposed to the text of the FAA, and the strong federal policy favoring arbitration. Just as the Court nullified its predecessors, the "wholly groundless" doctrine must be set aside or at least made subject to a limiting principle.

V. THE "WHOLLY GROUNDLESS" THEOREM DEPRIVES PARTIES OF THEIR PREROGATIVE TO DELEGATE "QUESTIONS OF ARBITRABILITY" TO THE ARBITRATOR.

It is a basic tenet of the Court's arbitration jurisprudence that "questions of arbitrability" are ordinarily for a court to decide. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002). Yet the Court issued a contemporaneous warning that this postulation is to be applied narrowly, and then solely to prevent the injustice of forcing arbitration upon a party that had never consented to same. *Id*. at 83-84 (cautioning that not every threshold or "gateway" controversy amounts to a "question of arbitrability").

The foregoing is offset by a rule of equal efficacy; parties to an arbitral accord "may choose *who* will resolve specific disputes." *Stolt-Nielsen*, *supra*, 559 U.S. at 683 (emphasis supplied). Accordingly, parties to an

arbitral pact enjoy the liberty of delegating questions of arbitrability to the arbitrator, provided they do so in clear and unmistakable terms. *Howsam*, *supra*, 537 U.S. at 83, *quoting AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 649 (1986) (quotation omitted). *See also Rent-A-Center*, *supra*, 561 U.S. at 68-69 ("We have recognized that parties can agree to arbitrate 'gateway' questions of 'arbitrability.' ").

It is not surprising that precedent allows parties to override the ostensible norm, and delegate "questions of arbitrability" to the arbitrator. For decades now, the Court has looked on with approval as parties have entrusted arbitrators with the power to decide issues arising under solemn and complex statutory schemes, such as the federal securities laws, *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 238 (1987), the Racketeer Influenced and Corrupt Organizations Act, *id*. at 242, and the federal antitrust laws. *American Express*, *supra*, 570 U.S. at 233-34. *See also Epic*, *supra*, *slip op*. at 16 (summarizing the above and additional precedents "reject[ing] efforts to conjure conflicts" between the FAA and other federal statutes). Provided it is clearly and unmistakably stated, the parties' delegation of "questions of arbitrability" to the arbitrator is indistinguishable from these other, far reaching assignments of adjudicative authority to arbitrators.

Who determines questions of arbitrability turns upon "what the parties agreed to about *that* matter." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938,

943 (1995) (emphasis in the original). *See also AT&T Technologies, Inc.*, *supra*, 475 U.S. at 649-50 (parties may agree to submit the question of arbitrability to the arbitrator, and not a court). The primacy accorded to the choice of the parties is firmly grounded in "the fact that arbitration is simply a matter of contract," *First Options*, *supra*, 514 U.S. at 943, and arbitral pacts, "like other contracts, are enforced according to their terms." *Id*. at 947 (quotations and citations omitted).

In sum, the Court's arbitration jurisprudence clearly requires that the first priority is to determine what the parties agreed to with regard to who decides "questions of arbitrability." If it appears the parties delegated questions of arbitrability to the arbitrator, the next step is to assure that such delegation was expressed in clear and unmistakable terms.

The "wholly groundless" theorem is irreconcilable with the foregoing. For one, the doctrine unnecessarily superimposes itself upon existing rules which more than adequately define a cogent process for determining who answers "questions of arbitrability." Next, the "wholly groundless" theorem increases the opportunity for judicial intervention with respect to the arbitrability question, while undermining the parties' freedom to conform the arbitral process to their wishes. Lastly, the precepts discussed above sit in counterpoise. The "wholly groundless" theorem upsets that balance, tipping it toward a judge's discretion and away from the parties' choices.

It is respectfully submitted by this *amicus* that the "wholly groundless" theorem misunderstands the Court's arbitration jurisprudence regarding who determines questions of arbitrability, fails to recognize the prerogatives of parties to contractually delegate such issues to the arbitrator, and unjustifiably elevates a judge's discretion in matters of arbitrability. For these reasons, the "wholly groundless" doctrine must be set aside or at least be delimited.

CONCLUSION

Respectfully, for all the reasons set forth above, the "wholly groundless" theorem should be eradicated or at least be subjected to a limiting principle, and the question presented answered in favor of the Petitioners.

Respectfully submitted,

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