No. 19-963

In the Supreme Court of the United States

HENRY SCHEIN, INC.,

Petitioner,

v.

ARCHER AND WHITE SALES, INC.,

Respondent.

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

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the nation. The Chamber advocates for its members' interests before Congress, the executive branch, and the courts, and it regularly files *amicus* briefs in cases raising issues of importance to the business community. The Chamber frequently participates as *amicus curiae* in cases before this Court addressing questions involving the Federal Arbitration Act (the "Act")—including the prior iteration of this case, *Henry Schein, Inc.* v. *Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019) ("*Henry Schein I*").[1]

Many members of the Chamber and the broader business community have found that arbitration allows them to resolve disputes promptly and efficiently while avoiding the costs associated with traditional litigation. Accordingly, these businesses routinely include arbitration provisions containing so-called "delegation" provisions as standard features of their

[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its members, and its counsel made a monetary contribution to its preparation or submission. All parties have filed with the Clerk's office blanket consents to the filing of *amicus* briefs.

business contracts. Based on the policy reflected in the Federal Arbitration Act and this Court's consistent endorsement of arbitration, Chamber members have structured millions of contractual relationships around arbitration agreements.

Although this is a case that has businesses on both sides, in the Chamber's experience, the business community has a broad and overarching interest in ensuring that courts appropriately apply the Federal Arbitration Act and that businesses can rely upon settled arbitration precedent. The judgment below reflects a departure from that precedent and should be vacated.[2]

INTRODUCTION AND SUMMARY OF ARGUMENT

When the Court preciously considered this case, it presented the question whether a court may refuse to enforce parties' agreements to delegate questions of arbitrability to arbitrators if the court views the argument for the dispute's arbitrability as "wholly groundless." The Court unanimously held that "a court may not decide an arbitrability question that the parties have delegated to an arbitrator." *Henry Schein I*, 139 S. Ct. at 530.

On remand, the court of appeals nonetheless again declined to enforce the parties' delegation of arbitrability.

The court of appeals interpreted the agreement to contain a valid delegation, Pet. App. 8a, and the case comes before this Court on that premise. See

[2] As petitioner explains (Br. 40), vacatur rather than reversal is appropriate because respondent raised another argument below that the court of appeals did not reach.

Pet. Br. 15. But the court of appeals seized on the carve out from the arbitration agreement of "actions seeking injunctive relief," J.A. 114, to conclude that a court must determine for itself whether the action "seek[s] injunctive relief" before sending the case to an arbitrator to decide arbitrability.

There are at least two fundamental errors in that approach.

First, it conflates two separate issues: (1) *who decides* a question of arbitrability and (2) the question of arbitrability itself—*i.e.*, whether the claim or dispute at issue falls within the scope of the parties' arbitration agreement. This Court has long held that the two issues are distinct, and that parties are free to delegate threshold questions of arbitrability to the arbitrator for decision. See *Henry Schein I*, 139 S. Ct. at 527; *Rent-A-Center, West, Inc.* v. *Jackson*, 561 U.S. 63, 68-70 (2010); *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 943-44 (1995).

Second, the court of appeals flipped the order in which those two issues are resolved. Both logic and this Court's precedents make clear that an "agreement to arbitrate a gateway issue" of arbitrability is "an additional, *antecedent* agreement the party seeking arbitration asks the federal court to enforce." *Henry Schein I*, 139 S. Ct. at 529 (emphasis added) (quoting *Rent-A-Center*, 561 U.S. at 70).

For that reason, once a court finds that the parties entered into a valid delegation, the court has no further role in addressing arbitrability—that issue is for the arbitrator. The Federal Arbitration Act requires a court to enforce the arbitration agreement as written. This Court has repeatedly enforced that statutory requirement, holding that courts may not

refuse to enforce an agreement to arbitrate a particular question—including the question of arbitrability—based on the court's view of the merits of that question.

The interpretation of the carve-out by the court of appeals here to displace the parties' otherwise valid delegation of arbitrability conflicts with that settled principle. It also conflicts with the Federal Arbitration Act's mandate to resolve the scope of arbitrable issues in favor of arbitration. Moreover, allowing that approach to stand would undermine the predictability and certainty regarding the enforceability of arbitration agreements that Congress enacted the Federal Arbitration Act to provide.

Countless businesses have entered into arbitration agreements containing delegation provisions—not just with other businesses, as in this case, but also with customers or employees—in order to avoid time-consuming litigation in court over the enforceability of arbitration agreements, litigation that can swallow the benefits of arbitration. Like the "wholly groundless" exception rejected by this Court in *Henry Schein I*, reading an agreement's carve out for certain claims or remedies to displace agreements delegating to the arbitrator threshold questions of arbitrability—including whether a claim falls within the carve-out provision—vitiates those contractual commitments. The Court should overturn the decision below and reaffirm that courts must enforce arbitration agreements, including delegation provisions, as written.

ARGUMENT

I. Courts Have No Authority To Resolve Questions Of Arbitrability Delegated To An Arbitrator.

A. The Federal Arbitration Act requires enforcement of delegation agreements.

The "principal purpose" of the Federal Arbitration Act, as this Court has held time and again, is to "'ensur[e] that private arbitration agreements are enforced according to their terms.'" *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 344 (2011) (quoting *Volt Information Sciences, Inc.* v. *Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989)); see also *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57-58 (1995) (same). By providing that arbitration agreements are "valid, irrevocable, and enforceable" (9 U.S.C. § 2), Congress sought to "ensure that commercial arbitration agreements, like other contracts, are enforced according to their terms and according to the intentions of the parties." *First Options*, 514 U.S. at 947 (citations and quotation marks omitted).

To that end, both Section 3 and Section 4 of the Act require courts to adhere to the terms of the parties' arbitration agreement. Section 3 provides that if the parties validly agreed to arbitrate, the court "shall * * * stay" any litigation pending the completion of an arbitration proceeding "in accordance with the terms of the agreement." 9 U.S.C. § 3. And Section 4 in turn provides that a party that proves the existence of an arbitration agreement encompassing the dispute in question is entitled to "an order directing that such arbitration proceed *in the manner pro-*

vided for in such agreement." 9 U.S.C. § 4 (emphasis added).

In short, as this Court recently observed, the Act not only requires courts to enforce agreements to arbitrate, but "also specifically direct[s] them to respect and enforce the parties' chosen arbitration procedures." *Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612, 1621 (2018) (citing Sections 3 and 4).

Under the Federal Arbitration Act, therefore, courts generally must enforce agreements to arbitrate—including agreements to arbitrate the threshold question of whether the underlying dispute is arbitrable. This Court explained in *First Options* that "the question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about *that* matter." 514 U.S. at 943. And an "agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other." *Henry Schein I*, 139 S. Ct. at 529 (quoting *Rent-A-Center*, 561 U.S. at 70).

Indeed, "procedure" is among the "many features of arbitration" that "the FAA lets parties tailor * * * by contract." *Hall Street Assocs., LLC* v. *Mattel, Inc.*, 552 U.S. 576, 586 (2008). That ability to tailor arbitration agreements includes the ability to choose whether disputes over arbitrability will be decided by a court or the arbitrator.[3]

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[3] If an arbitration agreement contains unfair procedural rules or unfair processes for selecting arbitrators, Section 2 of the Federal Arbitration Act provides that those unfair terms are

The decision below conflicts with the statutory framework. At bottom, the Fifth Circuit's decision rests on the notion that courts may decline to enforce a delegation agreement based on an assumption that the parties' carve out of certain claims from their underlying arbitration agreement invalidates the delegation of questions of arbitrability—including the critical question whether the parties' dispute falls within the carve-out provision.

The Federal Arbitration Act does not permit such second-guessing. A court's role under the Act is limited to determining whether the parties in fact agreed to delegate arbitrability questions to an arbitrator; if they did, as the court below held (Pet. App. 8a), then the Act requires that the agreement be enforced. As applied to this case, that means that the arbitrator, not the courts below, decides whether the underlying dispute is an "action[] seeking injunctive relief." J.A. 114.

B. There is no legitimate basis for a court to construe an arbitration agreement's carve-out provision to undermine an antecedent delegation agreement.

The court of appeals accepted that the parties agreed to delegate questions of arbitrability to the arbitrator, Pet. App. 8a, but treated the arbitration agreement's carve-out provision as an exception to this delegation—concluding that the agreement "del-

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subject to invalidation under generally applicable unconscionability principles. See *Marmet Health Care Ctr., Inc.* v. *Brown*, 565 U.S. 530, 533-34 (2012) (per curiam). But if the parties have validly agreed to delegate questions of arbitrability to an arbitrator, then any such unconscionability challenges are for the arbitrator to decide as well.

egates arbitrability * * * for all disputes *except* those under the carve-out," Pet. App. 11a.

Like the "wholly groundless" exception the Court rejected two Terms ago in this very case, the court of appeals' approach is barred by this Court's precedents. The court of appeals' approach is wrong for at least three reasons. *First*, it improperly empowers courts to evaluate the merits of the parties' arbitrability arguments. *Second*, it rests on circular reasoning that could apply to any agreement that makes certain disputes non-arbitrable—effectively overriding delegation agreements in all such cases. And *third*, it fails to honor the well-established presumption in favor of arbitration.

1. The Court has explained that "in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims." *AT&T Technologies, Inc.* v. *Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986). That is so "*even* if [a claim] appears to the court to be frivolous" (*id.* at 649-50 (emphasis added)), because a court's obligation is to require arbitration of all claims that the parties agreed to arbitrate, "'not merely those which the court will deem meritorious'" (*id.* at 650 (quoting *United Steelworkers of Am.* v. *Am. Mfg. Co.*, 363 U.S. 564, 568 (1960)).

The same analysis applies to disputes about whether a particular issue is subject to arbitration. Once a court has determined that the parties agreed to arbitrate issues of arbitrability, the court must enforce that agreement. To do otherwise would intrude into the merits of the question of arbitrability in a manner that is just as improper as the "frivolous[ness]" determination regarding the merits of the

underlying dispute that this Court rejected in *AT&T Technologies*. See *Henry Schein I*, 139 S. Ct. at 530.

As the Court explained in its prior decision in this case, "[w]e must interpret the Act as written, and the Act in turn requires that we interpret the contract as written. When the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract." *Henry Schein I*, 139 S. Ct. at 529. "Just as a court may not decide a merits question that the parties have delegated to an arbitrator, a court may not decide an arbitrability question that the parties have delegated to an arbitrator." *Id.* at 530.

That reasoning applies with equal force here.

2. Despite the clear holding of *Henry Schein I*, the court of appeals treated the arbitration agreement's carve out for "actions seeking injunctive relief" (J.A. 114) as a limitation on the parties' delegation of questions of arbitrability—requiring the court to determine whether a particular claim or action fell within the limitation before enforcing the delegation agreement.

That approach to delegation agreements is circular, and effectively nullifies the parties' agreement to have the arbitrator decide whether the dispute at issue falls within the scope of the arbitration agreement.

The text of the carve-out provision in this case addresses the "disputes" or "actions" excluded from arbitration. J.A. 114. It says nothing at all about the parties' inherently "antecedent agreement" to delegate threshold questions of arbitrability to the arbitrator. *Rent-A-Center*, 561 U.S. at 70; see Pet. Br. 9 (reproducing carve-out provision in full).

In rejecting a similar argument "that a carve-out provision in the parties' arbitration clause expresses their intent that a court would decide arbitrability," the Ninth Circuit correctly recognized that such an approach improperly "conflates the *scope* of the arbitration clause, *i.e.*, which claims fall within the carve-out provision, with the question of *who* decides arbitrability." *Oracle America, Inc.* v. *Myriad Group A.G.*, 724 F.3d 1069, 1076 (9th Cir. 2013); accord *Blanton* v. *Domino's Pizza Franchising LLC*, 962 F.3d 842, 844 (6th Cir. 2020).[4]

If, as the court below held, a delegation has force only after a court determines that the carve-out provision is inapplicable, then the delegation is no delegation at all. After all, the court will have already decided the arbitrability question—the very question the parties entrusted to the arbitrator—under the guise of determining whether the delegation provision applies in the first place. It defies common sense that parties would agree to nullify their own delegation by treating it as contingent on judicial interpretation of the arbitration agreement's scope.

3. The approach adopted by the court of appeals here runs afoul of the Federal Arbitration Act and this Court's precedents for an additional reason: it fails to honor the Act's mandate to resolve any doubts about the scope of arbitrable issues in favor of arbitration.

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[4] Similar to the agreement here, the arbitration agreement in *Oracle* excluded from arbitration "any dispute relating to [either] party's Intellectual Property Rights." 724 F.3d at 1069; *cf.* J.A. 114 (carving out "disputes related to trademarks, trade secrets, or other intellectual property of" the manufacturing company).

As noted above (at 9), the most that respondent can reasonably argue about the text of the carve-out provision in the arbitration agreement is that it is silent as to whether it limits the parties' delegation of questions of arbitrability to the arbitrator.

Yet as this Court recently reiterated, the Federal Arbitration Act "itself provide[s] the rule" for resolving any uncertainties "about the scope of an arbitration agreement"—namely, the Act mandates that such uncertainties "be resolved in favor of arbitration." *Lamps Plus, Inc.* v. *Varela*, 139 S. Ct. 1407, 1418-19 (2019) (citing *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985); *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)).

That rule applies in interpreting an agreement to delegate questions of arbitrability to an arbitrator.

To be sure, just as there is no presumption that applies in determining whether parties have entered into an arbitration agreement, there is also no presumption as to the *existence* of such a delegation, which instead must be established by "'clear and unmistakable' evidence." *Henry Schein I*, 139 S. Ct. at 530 (quoting *First Options*, 514 U.S. at 944). But the court of appeals concluded that this standard was satisfied, and that determination is not before the Court.

Once, as here, it is established the parties have agreed to arbitrate at least some threshold questions of arbitrability, the scope of that delegation, just like the scope of the underlying arbitration agreement, should be construed with a strong presumption in favor of arbitration. *Cf. Granite Rock* v. *Int'l Broth. of Teamsters*, 561 U.S. 287, 298 (2010) ("where, as here,

parties concede that they have agreed to arbitrate *some* matters pursuant to an arbitration clause, the law's permissive policies in respect to arbitration counsel that any doubts concerning the scope of arbitral issues should be resolved in favor of arbitration") (quotation marks omitted).

* * *

In short, the Fifth Circuit's judicially imposed limitation on the parties' delegation agreement conflicts directly with the text of the Federal Arbitration Act and this Court's precedents interpreting that statute. The Court should reject the court of appeals' flawed approach and adhere to its longstanding rule that the Act requires enforcement of arbitration agreements as written.

II. The Decision Below Contravenes The Federal Arbitration Act's Policy Favoring Predictability Of And Certainty About The Enforceability Of Arbitration Agreements.

The decision below is not only unsupportable as a matter of law; it is contrary to the congressional policies embodied in the Federal Arbitration Act. Permitting courts to interpret the scope of the underlying arbitration agreement in order to decide whether to enforce the parties' delegation of questions of arbitrability to an arbitrator would serve only to inject uncertainty into the enforcement of arbitration agreements and to facilitate just the sort of "judicial hostility to arbitration agreements" that the Act was meant to prevent.

A. Contracting parties have good reasons for agreeing to arbitrate questions of arbitrability—and the holding below creates significant uncertainty regarding the enforceability of such provisions.

Relying on this Court's precedents interpreting the Federal Arbitration Act, many businesses have entered into contracts with counterparties that seek to maximize the efficiencies of arbitration by delegating threshold questions of arbitrability to the arbitrator. These businesses have done so because they consider arbitration to be a fair and effective way to resolve a wide range of disputes, including questions of arbitrability, and because resolving these disputes in arbitration can help avoid a slow and costly detour through the courts.

In addition, and in keeping with the "fundamental principle that arbitration is a matter of contract," *Rent-A-Center*, 561 U.S. at 67, this Court has repeatedly recognized "that parties may agree to limit the issues subject to arbitration," *Concepcion*, 563 U.S. at 344 (citing *Mitsubishi Motors*, 473 U.S. at 628). Businesses routinely exercise that right under the Federal Arbitration Act, entering into arbitration agreements that "commonly exclude (or carve out) certain claims or remedies." Christopher R. Drazohal & Erin O'Hara O'Connor, *Unbundling Procedure: Carve-outs From Arbitration Clauses*, 66 Fla. L. Rev. 1945, 1950 (2014). That includes, as in this case, carve outs for certain injunctive relief or for disputes relating to intellectual property rights. See, *e.g.*, *Tompkins* v. *23andMe, Inc.*, 840 F.3d 1016, 1030-31 (9th Cir. 2016) (intellectual property); *Oracle*, 724 F.3d at

1069 (intellectual property); *Brennan* v. *Opus Bank*, 796 F.3d 1125, 1131 (9th Cir. 2015) (equitable relief); *Erving* v. *Virginia Squires Basketball Club*, 468 F.2d 1064, 1067 (2d Cir. 1972) (injunctive relief); *Baltazar* v. *Forever 21, Inc.*, 367 P.3d 6, 9 (Cal. 2016) (injunctive relief).

Under the decision below, the combination of these two common-place circumstances—agreements to delegate questions of arbitrability and agreements that carve out certain claims or remedies from arbitration—would create uncertainty regarding the enforceability of the delegation agreement.

The court of appeals sought to cabin its decision by focusing on the "placement of the carve-out" in relation to the delegation provision. Pet. App. 11a. But that approach is unlikely to generate predictable answers. How close do the two provisions have to be in order to trigger the role of judicial interpretation? Is interpreting the scope of the carve-out provision permissible only when the provision is in the same sentence as the delegation provision? The same paragraph? The same section? Does the carve-out have to precede the delegation?

The court of appeals did not answer any of these questions, likely because it is impossible to articulate a clear and administrable rule that would avoid triggering the very kind of ancillary litigation over arbitrability that the parties' delegation agreement was intended to avoid.

The approach below thus threatens to make every dispute over arbitrability reviewable by courts under the guise of interpreting a carve-out provision. That result denies contracting parties the flexibility to delegate threshold questions of arbitrability to the

arbitrator and "breed[s] litigation from a statute that seeks to avoid it." *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 275 (1995). Before a dispute could proceed to arbitration, a party resisting arbitration would be able to instigate a judicial proceeding to determine whether the claim or action falls within the carve-out provision, which—depending on the nature of the arguments made—could involve formal hearings and time-consuming interlocutory appeals. Businesses that have entered into numerous contracts premised on "the relative informality of arbitration" and procedures "more streamlined than federal litigation" (*14 Penn Plaza LLC* v. *Pyett*, 556 U.S. at 269) would nonetheless be unable to avoid civil litigation.

This lawsuit is a case in point: despite having agreed with respondent to arbitrate questions of arbitrability, petitioner has been tied up in litigation over the threshold question of arbitrability for the better part of a decade, including two trips to this Court.

That result thwarts contracting parties' reasonable expectations under this Court's precedents. And it discourages the use of arbitration by depriving the parties of the informality and expediency they sought to achieve by agreeing to arbitrate. The consequent deterrence of the use of arbitration frustrates the Federal Arbitration Act's basic purpose.

B. Reading a carve-out provision to override a delegation of arbitrability allows courts hostile to arbitration to nullify valid arbitration agreements.

The Federal Arbitration Act embodies Congress's goal of "'overcom[ing] judicial hostility to arbitration

agreements.'" *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 118 (2001) (quoting *Allied-Bruce*, 513 U.S. at 272). That is why, under the Act, once a court determines that a dispute is arbitrable, it *must* stay any litigation in court and compel the parties to arbitration. 9 U.S.C. §§ 3, 4.

These statutory requirements are meant to ensure that valid agreements to arbitrate will be enforced even if a court might otherwise possess a hostile attitude toward arbitration—which was the prevailing judicial view when the Act became law in 1925. But like judicial application of the now-rejected "wholly groundless" exception, judicial determination of the scope of the arbitration agreement can provide a vehicle for even unintentional anti-arbitration animus by allowing courts to seize back issues of arbitrability despite the parties' "'clear and unmistakable'" delegation to an arbitrator. *Rent-A-Center*, 561 U.S. at 69 n.1 (quoting *First Options*, 514 U.S. at 944) (brackets omitted).

As explained above, the court of appeals' approach creates great uncertainty about whether a delegation agreement may be enforced—or whether the court will find that the exception to arbitrability is also an exception to the delegation agreement.

That makes it trivially easy for a court that is hostile to arbitration to assert that a carve-out provision undermines the parties' agreement to delegate questions of arbitrability to an arbitrator. As long as this end run around the Federal Arbitration Act is available, at least some courts will make use of it to frustrate the statute's purposes and avoid enforcing valid arbitration agreements.

CONCLUSION

The judgment of the court of appeals should be vacated.

Respectfully submitted.

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AUGUST 2020