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

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

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

INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 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 ("FAA")—including *Rent-A-Center, West, Inc.* v. *Jackson*, 561 U.S. 63 (2010), the Court's last case addressing agreements to delegate particular issues to an arbitrator.[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. The parties' blanket consents to *amicus* briefs have been filed with the Clerk's office.

business contracts. Based on the legislative policy reflected in the FAA and this Court's consistent endorsement of arbitration for the past half-century, Chamber members have structured millions of contractual relationships around arbitration agreements. Although this is a case that has businesses on both sides of the "v.", in the Chamber's experience, the business community has a broad and overarching interest in ensuring that the FAA is appropriately applied and that businesses can rely upon settled arbitration precedent.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents the question whether a court may refuse to enforce parties' agreements to delegate questions of arbitrability to arbitrators if the court perceives that the argument for the dispute's arbitrability is "wholly groundless." The FAA, and this Court's precedents interpreting it, supply a clear answer: a court may not overturn the parties' choice that the issue of arbitrability shall be decided by the arbitrator.

The FAA is unequivocal on this point: it requires a court to enforce the arbitration agreement as written, not to rewrite the agreement as the court sees fit. 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 "wholly groundless" exception to the FAA's text implied by the court of appeals here conflicts with this settled principle. Moreover, allowing that exception to stand would undermine the predictabil-

ity and certainty regarding the enforceability of arbitration agreements that Congress enacted the FAA to provide.

Countless businesses have entered into arbitration agreements—not just with other businesses, as in this case, but also with customers or employees—containing delegation provisions, which seek to avoid time-consuming litigation in court over the enforceability of arbitration agreements, litigation that can swallow the benefits of arbitration. The "wholly groundless" exception to agreements to arbitrate arbitrability vitiates those contractual commitments. The Court should reject the "wholly groundless" exception and reaffirm that courts must enforce arbitration agreements, including delegation provisions, as written.

ARGUMENT

I. Courts Have No Authority To Read A "Wholly Groundless" Exception Into The FAA.

A. The FAA requires enforcement of arbitration agreements as written.

The "principal purpose" of the FAA, 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). In 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 of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 947 (1995) (citations and internal quotation marks omitted).

To that end, both Section 3 and Section 4 of the FAA 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 must 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 provided for in such agreement*." 9 U.S.C. § 4 (emphasis added).

In short, as this Court recently observed, the FAA 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). Courts "cannot rely on * * * judicial policy concern[s]" to refuse to honor arbitration agreements as written. *14 Penn Plaza LLC* v. *Pyett*, 556 U.S. 247, 270 (2009).[2]

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[2] If an arbitration agreement contains unfair procedural rules or unfair processes for selecting arbitrators, Section 2 of the FAA provides that those unfair terms are subject to invalidation under generally applicable unconscionability principles. See *Marmet Health Care Ctr., Inc.* v. *Brown*, 565 U.S. 530, 533-34 (2012). But as discussed below, 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.

Under the FAA, therefore, courts generally must enforce agreements to arbitrate, including agreements to arbitrate arbitrability. As this Court has explained, the parties are entitled to "specify by contract the rules under which that arbitration will be conducted." *Volt*, 489 U.S. at 479. 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).

And that ability to tailor arbitration agreements includes the ability to choose whether disputes over arbitrability will be decided by a court or the arbitrator. See *First Options*, 514 U.S. at 943; see also *Rent-A-Center*, 561 U.S. at 70 ("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.").

The "wholly groundless" exception created by certain courts is incompatible with the framework just described. At bottom, the exception rests on the notion that, even when the parties have clearly agreed to delegate questions of arbitrability to an arbitrator, courts may decline to enforce that agreement on policy grounds or based on an assumption that the parties did not really mean what they wrote in their agreement.

The FAA does not permit such second-guessing. A court's role under the FAA is limited to determining whether the parties in fact agreed to delegate arbitrability questions to an arbitrator; if they did, the FAA requires that the agreement be enforced.

B. There is no legitimate basis for judicial creation of a "wholly groundless" exception.

The courts that have adopted a version of the "wholly groundless" exception have offered several reasons for doing so, but none is persuasive.

First, some courts have relied on the notion that "what must be arbitrated is a matter of the parties' intent." *Douglas* v. *Regions Bank*, 757 F.3d 460, 464 (5th Cir. 2014). These courts suggest that, when a court believes that the argument for an issue's arbitrability is "wholly groundless," the court can conclude that the party opposing arbitration "never intended that such arguments would see the light of day at an unnecessary and needlessly expensive gateway arbitration." *Ibid.* But this approach—which openly requires courts to evaluate the merits of the parties' arguments regarding the arbitrability of an issue—is barred by this Court's precedents.

The Court has previously 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), 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 arbitrable. Once a court

has determined that the parties agreed to arbitrate issues of arbitrability, the court must enforce that agreement: it may not refuse on the ground that it is convinced that the proponent of arbitration cannot prevail—that would be an intrusion into the merits of the underlying question indistinguishable from the "frivolous[ness]" determination that this Court held improper in *AT&T Technologies*.

Moreover, speculating about whether the parties truly "intended" for certain arguments to be submitted to arbitrators is impermissible when delegation to the arbitrator is required by "the terms of the [parties'] agreement." 9 U.S.C. § 3. This Court has made clear that when the party resisting arbitration "[does] not contest the validity of the delegation provision in particular," the delegation provision must be enforced. *Rent-A-Center*, 561 U.S. at 74.

Second, some courts have relied on Section 3 of the FAA, which provides that a court must stay litigation in favor of arbitration "upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement." 9 U.S.C. § 3. These courts have held that, if a court believes that the argument in favor of a dispute's arbitrability is "wholly groundless," "then it may conclude that it is not 'satisfied' under Section 3, and deny the moving party's request for a stay." *Qualcomm Inc.* v. *Nokia Corp.*, 466 F.3d 1366, 1371 (Fed. Cir. 2006).

But Section 3's plain language refutes that conclusion. It requires only that the court be "satisfied" that the dispute at hand is "referable to arbitration under [the parties'] agreement." 9 U.S.C. § 3. And in the context of disputes about arbitrability, that question depends upon whether (1) the parties agreed to

arbitrate arbitrability, and (2) the delegation provision itself is enforceable. If those conditions are met, then nothing in the text of the FAA or this Court's precedents authorizes a court to declare itself "unsatisfied" with sending a dispute to arbitration based on the court's view of the merits of the arbitrability issue.

Finally, the Fourth Circuit has suggested that the exception finds support in Federal Rule of Civil Procedure 11's prohibition of frivolous arguments. *Simply Wireless, Inc* v. *T-Mobile US, Inc.*, 877 F.3d 522, 528-29 (4th Cir. 2017). That suggestion is impossible to square with this Court's declaration in *AT&T Technologies* that "a court is not to rule on the potential merits of the underlying claims," "even if [a party's arguments] appear[] to the court to be frivolous." 475 U.S. at 649-50.

Moreover, providing parties resisting arbitration with "an entitlement" under Rule 11 to "invalidat[e] private arbitration agreements" that unquestionably delegate determinations of arbitrability to arbitrators "likely * * * would be an 'abridg[ment]' or 'modif[ication]' of a 'substantive right' forbidden to the Rules" under the Rules Enabling Act. *Am. Express Co.* v. *Italian Colors Rest.*, 570 U.S. 228, 234 (2013) (quoting 28 U.S.C. § 2072(b)). The Federal Rules similarly cannot override the FAA's mandate to enforce arbitration agreements according to their terms; only a "clear and manifest congressional command" in a federal statute can do that. *Epic Sys. Corp.*, 138 S. Ct. at 1624.[3]

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[3] To be sure, a court retains authority to impose Rule 11 sanctions if a motion to compel arbitration of an arbitrability dispute violates the stringent standards of that rule because a par-

The judicial creation of the "wholly groundless" exception, in short, conflicts directly with the text of the FAA and this Court's precedents interpreting it. The Court should reject this exception and adhere to its longstanding rule that the FAA requires enforcement of arbitration agreements as written.

II. The "Wholly Groundless" Exception Is Contrary To The FAA's Policy Favoring Predictability Of And Certainty About The Enforceability Of Arbitration Agreements.

The "wholly groundless" exception is not only unsupportable as a matter of law; it is contrary to the congressional policies embodied in the FAA. Recognizing such an exception would serve only to inject uncertainty into the enforcement of arbitration agreements and to facilitate the sort of "judicial hostility to arbitration agreements" that the FAA was meant to prevent.

A. The "wholly groundless" exception allows courts hostile to arbitration to nullify valid arbitration agreements.

The "wholly groundless" exception is harmful, first and foremost, because it empowers courts to disregard delegation provisions that were intended to minimize judicial involvement in assessing the enforceability of arbitration agreements.

The rules set forth in the FAA reflect Congress's objective to "'overcome judicial hostility to arbitration agreements.'" *Circuit City Stores, Inc.* v. *Adams*,

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ty's assertion that the agreement delegates arbitrability determinations to the arbitrator is frivolous. But courts cannot rely on Rule 11 to create a broader "wholly groundless" exception to the FAA's statutory mandate.

532 U.S. 105, 118 (2001) (quoting *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 272 (1995)). Under the FAA, 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. But the "wholly groundless" exception undermines this protection against anti-arbitration animus by allowing courts to take the question of arbitrability out of the hands of the arbitrator despite the parties' "'clear and unmistakable'" delegation of arbitrability to the arbitrator. *Rent-A-Center*, 561 U.S. at 69 n.1 (quoting *First Options*, 514 U.S. at 944) (brackets omitted).

The Fifth Circuit has suggested that the "wholly groundless" exception is harmless because it applies only when the argument for arbitrability is so "groundless" that there is no point in subjecting the parties to an "unnecessary and needlessly expensive gateway arbitration." *Douglas*, 757 F.3d at 464. But the "groundless" standard provides no meaningful check on courts' discretion, because what constitutes a "groundless" argument is very much in the eye of the beholder.

This case illustrates the point: petitioners' argument as to why the dispute here is arbitrable rests on a plausible reading of the contract—as demonstrated by the fact that the magistrate judge who originally considered the question held that the question of arbitrability should be submitted to the arbitrator. Pet. App. 41a-42a. But the district court reached the opposite conclusion, holding that the

contract unambiguously ruled out petitioners' interpretation. *Id.* at 28a.

The problem is evident: it may be trivially easy for a court that is opposed to moving a dispute to arbitration to assert that the parties' contract "clearly" precludes arbitration of a particular kind of dispute, even where there is room for debate on the issue. As long as this easy end run around the FAA is available to courts, at least some courts will make use of it to frustrate the statute's purposes and avoid enforcing valid arbitration agreements.

The availability of the "wholly groundless" exception is troubling for an additional reason: the doctrine assumes that arbitrators will either fail to correctly decide questions of arbitrability or that arbitrators cannot be trusted to resolve such disputes quickly and efficiently. That "suspicion of arbitration" has "fallen far out of step with" this Court's "strong endorsement of the federal statutes favoring this method of dispute resolution." *Rodriguez de Quijas* v. *Shearson/Am. Express, Inc.*, 490 U.S. 477, 481 (1989).

B. Businesses and consumers have good reasons for agreeing to arbitrate questions of arbitrability.

The decision below should also be reversed for an additional reason: affirmance would have significant and deleterious practical consequences, effectively rewriting millions of contracts and severely undermining the interests that arbitration was designed to serve.

Relying on this Court's precedents interpreting the FAA, many businesses have entered into contracts with customers, employees, or

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 the full range of contract disputes, including questions of arbitrability, and because resolving these disputes in arbitration can help avoid a slow and costly detour through the courts.

By making every dispute over arbitrability reviewable by courts, the "wholly groundless" exception denies contracting parties this flexibility and "breed[s] litigation from a statute that seeks to avoid it." *Allied-Bruce*, 513 U.S. at 275. Before a dispute could proceed to arbitration, a party resisting arbitration would be able to instigate a judicial proceeding to determine whether the argument in favor of arbitrability was "wholly groundless," which—depending on the nature of the arguments made—could involve burdensome discovery, formal hearings, and time-consuming interlocutory appeals.

Businesses that have entered into millions of contracts premised on "the relative informality of arbitration" and procedures "more streamlined than federal litigation" (*14 Penn Plaza*, 556 U.S. at 269) would nonetheless be unable to avoid civil litigation. This lawsuit is a case in point: despite having agreed to arbitrate any questions of arbitrability with respondent, petitioners have been tied up in litigation for years.

That result thwarts contracting parties' reasonable expectations under this Court's precedents. And by injecting "uncertainty as to procedure and outcome" into the decision whether to agree to arbitrate, the "wholly groundless" exception creates a perceived

"risk [of] using arbitration clauses due to the uncertainty present." Gregory C. Cook & A. Kelly Brennan, *The Enforceability of Class Action Waivers in Consumer Agreements*, 40 UCC L.J. 331, 333, 348 (2008). The consequent deterrence of the use of arbitration frustrates the FAA's basic purpose.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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