No. 2017-1423

IN THE

Supreme Court of the United States

SIMPLY WIRELESS, INC.,

Petitioner,

v.

T-MOBILE US INC. F/K/A T-MOBILE USA, INC.;
T-MOBILE USA INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the incorporation of arbitration rules delegating gateway arbitrability issues to the arbitrator is clear and unmistakable evidence of delegation.

2. Whether, if the wholly groundless exception to the delegation rule exists, a meritorious argument for arbitration is necessarily not wholly groundless.

PARTIES TO THE PROCEEDING BELOW AND RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner Simply Wireless, Inc. was the plaintiff in the district court and the appellant in the court of appeals.

Respondents T-Mobile US, Inc. and T-Mobile USA Inc. were the defendants in the district court and the appellees in the court of appeals.

Pursuant to Supreme Court Rule 29.6, Respondents T-Mobile US, Inc. and T-Mobile USA, Inc. state that they are for profit Delaware corporations, and Deutsche Telekom AG owns 10% or more of their stock.

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INTRODUCTION

Petitioner Simply Wireless, Inc. ("Simply Wireless") and respondents T-Mobile US, Inc. and T-Mobile USA, Inc. (collectively "T-Mobile") entered into an agreement with a broad arbitration clause. There is a trademark dispute between the parties that T-Mobile contends is related to that agreement and therefore arbitrable. Simply Wireless disagrees. The district court and the Fourth Circuit sided with T-Mobile. This is an unremarkable case that is not worthy of Supreme Court review.

While Simply Wireless asserts that this case is the "ideal vehicle," Pet. at 12, to address the wholly groundless exception to the general rule that gateway determinations of arbitrability are made by arbitrators (where the agreement so delegates that determination), nothing in this case turns on the wholly groundless exception. Moreover, the Fourth Circuit majority ruling explained that "Simply Wireless has not argued, either below or on appeal, that T-Mobile's assertion of arbitrability is 'wholly groundless.'" Pet. App. at 15a. And the dissent, on which Simply Wireless relies, does not mention the wholly groundless exception at all. *Id.* at 16a–24a.

Here, the district court accepted T-Mobile's argument that the dispute was subject to arbitration and granted T-Mobile's motion to dismiss. *Id.* at 25a. The Fourth Circuit affirmed the dismissal but on alternative grounds, ruling that the district court should not have reached the issue of arbitrability: "when, as here, two sophisticated parties expressly incorporate into a contract JAMS Rules that delegate questions of arbitrability to an arbitrator, then that

incorporation constitutes the parties' clear and unmistakable intent to let an arbitrator determine the scope of arbitrability." *Id*. at 15a. In so holding, the Fourth Circuit followed decisions from the First, Second, Fifth, Eighth, Ninth, Tenth, Eleventh, D.C., and Federal Circuits. *Id*. at 11a-12a. There is no circuit split on this issue.

Because the Fourth Circuit recognizes the wholly groundless exception, as a second step, the court analyzed that exception. It concluded that T-Mobile's argument for arbitrability was "not frivolous or otherwise illegitimate" because the district court found the argument persuasive, dismissing the case based on T-Mobile's argument. *Id*. at 15a. T-Mobile made a winning argument; by definition it could not be wholly groundless.

The result here does not turn on whether the wholly groundless exception exists because the district court would have dismissed and the Fourth Circuit would have affirmed even if the exception did not exist. This point is made in the reply brief in *Henry Schein, Inc. v. Archer and White Sales*, *Inc.*, which explains that Simply Wireless's petition should be denied because: "[T]he court of appeals accepted the existence of the 'wholly groundless' exception but concluded the moving party's claim for arbitration was *not* 'wholly groundless' (and thus remitted the dispute to arbitration). . . . As a result, the question on which courts of appeal are divided—whether the 'wholly groundless' exception is consistent with the FAA—would not be dispositive . . ., since the petitioner[ ] lost even under the more favorable legal rule." Reply Brief for the Petitioners at 8 n.3, *Henry*

Schein, Inc. v. Archer & White Sales, Inc., No. 17-1272 (U.S. May 29, 2018).

Simply Wireless asserts that this case is "nearly identical" to *IQ Products Co. v. WD-40 Co.*, No. 17-986 (U.S. Jan. 10, 2018). Pet. at i. That petition was denied June 11, 2018. Order Denying Petition for a Writ of Certiorari, *IQ Products Co. v. WD-40 Co.,* No. 17-986 (U.S. June 11, 2018). If the petition in *Schein* is also denied, there is no reason to grant the Simply Wireless petition. But even if the *Schein* petition is granted (an unknown at the time of the filing of this opposition), the petition here should still be denied because the existence and scope of the wholly groundless exception is irrelevant to the outcome of this matter. It is arbitrable under any conceivable ruling in *Schein*.

Simply Wireless can make its argument against arbitrability to an arbitrator. The Fourth Circuit has not prejudged the outcome. It has simply ruled, correctly, that the two parties here agreed that the gateway question of arbitrability is for the arbitrator to decide.

STATEMENT

The parties entered into an agreement concerning cellular telephone goods and services in 2012 with an arbitration clause providing:

> 19.1.1. Submission to Arbitration. Any claims of controversies, regardless of the theory under which they arise, including without limitation contract, tort, common law, statutory, or regulatory duties or any other liability arising

> out of or relating to this Agreement ("Dispute") shall be resolved by submission to binding arbitration.

The agreement contained provisions relating to trademarks. In 2015, Simply Wireless filed a trademark lawsuit against T-Mobile. T-Mobile moved to dismiss, arguing the dispute was subject to the arbitration clause in the agreement. The district court compared the claims in the complaint to the agreement and granted T-Mobile's motion.

The Fourth Circuit opinion quotes from Sections 18.1 and 18.5 of the agreement concerning trademarks, Pet. App. at 4a, and notes that Simply Wireless's lawsuit also concerned trademarks. It was T-Mobile's position below—disputed unsuccessfully by Simply Wireless—that the lawsuit "related to" the agreement. While Simply Wireless's petition argues that "[t]here is undeniably no . . . link between the contract and the trademark claims filed by Simply Wireless," Pet. at 20, T-Mobile disagrees and so did the district court.

On January 14, 2016, the district court ruled that "[a]ll causes of action arising out of the business relationship between the parties are subject to mandatory arbitration." Pet. App. at 25a. The district court order concluded: "It appearing to the Court that Plaintiff's claims are arbitrable because they fall within the scope of the parties' written agreement, it is hereby ordered that Defendants' motion to dismiss is granted and this case is dismissed without prejudice to pursue arbitration pursuant to the parties' written agreement." *Id.* at 26a.

The Fourth Circuit affirmed. The majority opinion analyzed the "who decides" question and concluded that the parties had delegated the question to the arbitrator by incorporating the JAMS rules. "We agree with our sister circuits and . . . hold that, in the context of a commercial contract between sophisticated parties, the explicit incorporation of JAMS Rules serves as 'clear and unmistakable' evidence of the parties intent to arbitrate arbitrability." *Id.* at 13a.

The Fourth Circuit did not end its analysis there, explaining "a district court need not, and should not, enforce a delegation provision when a party's assertion that a claim falls within an arbitration clause is frivolous or otherwise illegitimate." *Id.* at 14a. Deferring to the district court, which had compared the agreement to the claims in the lawsuit and found the dispute arbitrable, the Fourth Circuit held that "T-Mobile's assertion of arbitrability was not frivolous or otherwise illegitimate." *Id.* at 15a.

The dissent found the language of the arbitration clause susceptible to "more than one reasonable interpretation" and thus concluded that "it cannot be said that the parties clearly and unmistakably intended to submit the question of arbitrability to the arbitrator." *Id.* at 20a. The dissent concluded that the dispute was not arbitrable. *Id.* at 21a-24a. It did not mention the wholly groundless exception. While Simply Wireless argues that that the dissent "effectively found the request for arbitration by T-Mobile was wholly groundless," Pet. at 21, that is not a fair reading of the dissent. It does

not address or analyze the wholly groundless exception at all.

ARGUMENT

I. All circuits agree that incorporation of arbitration rules delegating gateway issues to arbitrators is clear and unmistakable evidence of delegation; there is no circuit split

1. The Fourth Circuit framed the central question in this case as "whether the parties express incorporation of JAMS Rules constitutes clear and unmistakable evidence of the parties' intent to delegate to the arbitrator the question of arbitrability." Pet. App. at 11a. Every circuit that has addressed this question as it relates to the JAMS Rules, or similar arbitration rules, has answered it affirmatively.[1]

At least four circuits have addressed the incorporation of JAMS Rules and found that they provide the requisite clear and unmistakable

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[1] JAMS Rule 11(b) provides: "Jurisdictional and arbitrability disputes, including disputes over the formation, existence, validity, interpretation or scope of the agreement under which arbitration is sought, … shall be submitted to and ruled on by the Arbitrator. The Arbitrator has the authority to determine jurisdiction and arbitrability issues as a preliminary matter." Judicial Arbitration & Mediation Servs., Inc., JAMS Comprehensive Arbitration Rules and Procedures 14 (2014).

evidence of delegation to the arbitrator of questions of arbitrability. *Belnap v. Iasis Healthcare*, 844 F.3d 1272, 1284 (10th Cir. 2017) ("[B]y incorporating the JAMS Rules into the Agreement, [the parties] clearly and unmistakably agreed to submit arbitrability issues to an arbitrator."); *Cooper v. WestEnd Capital Mgnt., L.L.C.*, 832 F.3d 534, 546 (5th Cir. 2016); *Emilio v. Sprint Spectrum L.P.*, 508 F. App'x 3, 5 (2d Cir. 2013); *Wynn Resorts, Ltd. v. Alt.-Pac. Capital, Inc.*, 497 F. App'x 740, 742 (9th Cir. 2012).

At least six circuits have reached the same conclusion when the AAA Rules were incorporated in the agreement. *Brennan v. Opus Bank*, 796 F.3d 1125, 1130 (9th Cir. 2015); *Fallo v. High-Tech Inst.*, 559 F.3d 874, 878 (8th Cir. 2005); *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366, 1373 (Fed. Cir. 2006); *Terminix Int'l Co. v. Palmer Ranch Ltd. P'ship*, 432 F.3d 1327, 1332-33 (11th Cir. 2005); *Contec Corp. v. Remote Sol., Co.*, 398 F.3d 205, 208 (2d Cir. 2005); *Awuah v. Coverall N. Am, Inc.*, 554 F.3d 7 (1st Cir. 2009). Two circuits have reach the same conclusion when international arbitration rules were incorporated in the agreement. *Chevron Corp. v. Republic of Ecuador*, 795 F.3d 200, 207-08 (D.C. Cir 2015) (UNCITRAL Arbitration Rules); *Apollo Comput., Inc. v. Berg*, 886 F.2d 469, 473-74 (1st Cir. 1989) (International Chamber of Commerce Rules of Arbitration).

Here, the Fourth Circuit agreed with its sister circuits and concluded that the arbitrator, and not the court, should decide the arbitrability question. "Because the JAMS Rules expressly delegate arbitrability question to the arbitrator, the district court erred in deciding whether Simply Wireless's

claims fall within the proper scope of the parties' arbitration agreement." Pet. App. at 13a.

2. Simply Wireless relies on the dissenting opinion in the Fourth Circuit, but the dissent "did not disagree" with the rule that incorporation of the JAMS rules can evidence clear and unmistakable evidence of delegation. Pet. App. at 20a. Rather, the dissent concluded that the language of the agreement "in this case" is ambiguous and that it "muddies the waters." *Id.* The dissent finds there are two "equally plausible" interpretations of the clause related to arbitration in the agreement and thus there was not a "clear and unmistakable" delegation of arbitrability to the arbitrators. *Id.* Following the reasoning of the dissent, Simply Wireless spends much of its petition arguing about contract interpretation rules. Pet. at 27 ("[T]he question to be addressed by this Court is ascertaining the intent of the parties."); *id.* at 29 ("Established law of the Fourth Circuit provides that every word of a contract is to be provided meaning and that specific wording takes priority over the general."); *id.* at 30 ("Established case law of the Fourth Circuit provides that courts are not to rewrite contracts").[2]

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[2] Oddly, while embracing the dissent's argument that the contract language is ambiguous, Simply Wireless also asserts that "the language of the contractual limitation is unambiguous, which creates a clean case in which to test the application of the proper standard to apply to contracts containing implicit delegation clauses." Pet. at 23. There are additional inconsistencies in the Simply Wireless's arguments. It argues that "the factual record is

There is no circuit split on the relevant law on the incorporation of arbitration rules into contracts. Simply Wireless's and the dissent's contract interpretation arguments do not justify granting the petition.[3]

II. This case is a poor vehicle for addressing the wholly groundless exception because it was not argued below and T-Mobile's argument that the dispute is arbitrable is meritorious, not wholly groundless

The Fourth Circuit's finding that Simply Wireless "has not argued, either below or on appeal, that T-Mobile's assertion of arbitrability is 'wholly groundless,'" Pet. App. at 15a, makes this case a poor vehicle for addressing the question. While Simply

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straightforward and clearly presents the issue of contract interpretation as a matter of law. . ." Pet. at 23. But then it complains that the district court "resolved the arbitrability issue without a trial, or any sort of evidentiary hearing, let alone the jury trial demanded by Simply Wireless, despite the presence of highly disputed facts . . ." *Id*. at 32.

[3] Simply Wireless's contract interpretation argument is wrong. The language of 9 U.S.C. § 4 relied on by Simply Wireless, Pet. at 25, provides that federal courts have the authority to direct the parties to arbitration. *Oppenheimer & Co. v. Neidhardt*, 56 F.3d 353, 358 (2d Cir. 1995) (rejecting argument that 9 U.S.C. § 4 requires trial); *Chorley Enters., Inc. v. Dickey's Barbeque Rests., Inc.*, 807 F.3d 553, 564 (4th Cir. 2015) (same).

Wireless attacks the Fourth Circuit's statement contending that its briefs are "literally riddled with the argument that T-Mobile's [argument] is meritless," Pet. at 21, that attack ignores the difference between arguing that something lacks merit and demonstrating that an argument is wholly groundless (*i.e.* frivolous). Those are two different things.

The petition in *Schein* argues that there is a circuit split between circuits that recognize a wholly groundless exception that empowers courts, in narrow circumstances, to override agreements delegating questions of arbitrability to arbitrators and circuits that do not recognize that exception. Petition for a Writ of Certiorari at 10, *Henry Schien, Inc. v. Archer & White Sales, Inc.*, No. 17-1272 (U.S. Mar. 9, 2018).

If the *Schein* petition is denied, then there is no need to consider how the purported circuit split affect this case. But even if the *Schein* petition is granted, the split does not matter in this case because regardless of whether there is a wholly groundless exception, T-Mobile's argument for dismissal still prevails. Here, because the district court accepted T-Mobile's argument, there is no fair argument that T-Mobile's position is groundless, let alone wholly groundless. Indeed, even Simply Wireless did not make that argument in this case until its petition, when it was looking for a way to embellish this routine business dispute to make it look like a case worthy of review, which it is not.

III. The questions presented by this case are not of national importance

Simply Wireless contends this case is of national importance because "[i]f merely incorporating certain arbitral rules into a contract were enough to require every dispute between the parties must forever be sent to arbitration, it would upset parties' settled expectations." Pet. at 22. To the contrary, the rule universally followed by the courts puts contracting parties on notice of the consequences of incorporating arbitral rules into their agreements. Any change to that rule would unsettle the expectations of contracting parties.

Simply Wireless also contends this case is of national importance because of the "sharp conflict between the circuits on the nature of the test to be applied" in determining whether an argument is wholly groundless. Pet. at 23. Simply Wireless did not demonstrate a "sharp conflict." Moreover, T-Mobile's winning argument in the district court that the dispute is arbitrable was certainly reasonable, non-frivolous, and not wholly groundless.

CONCLUSION

Simply Wireless's petition for a writ of certiorari should be denied.

Respectfully submitted,

June 13, 2018

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