No. ____-_____

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

PETITION FOR A WRIT OF CERTIORARI

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April 9, 2018

QUESTIONS PRESENTED

As also presented in the nearly identical petition currently pending before this Court in the matter of IQ Products, Co. v. WD-40, Co. (No. 17-986), this matter revolves around the determination of arbitrability of claims. The bias in favor of arbitration increasingly causes courts to overlook the underlying intent of the parties while also rendering the civil jury trial an endangered species. More specifically, federal courts of appeals have held that the mere incorporation in contracts of certain common rules of self-interested private arbitration companies evinces a "clear and unmistakable" intent that arbitrators should decide the "gateway" issue of whether a particular dispute is covered by an agreement to arbitrate. At the same time, often the dispute at issue has nothing to do with the contract containing the arbitration clause and should never involve the arbitral process.

To avoid compelling arbitration of every dispute — no matter how far removed from the subject matter of such a contract — four circuit courts have adopted some version of the "wholly groundless" test, while two other circuits have rejected it.

The questions presented here are:

1. Whether a court must grant a motion to compel arbitration of the gateway question of arbitrability, even where a contract containing an arbitration clause is unrelated to the parties' instant

dispute, or whether the court should deny the motion where the arbitrability argument is "wholly groundless"?

2. Whether the express intent of the parties to resolve arbitrability through the courts consistent with the Federal Arbitration Act is superseded by the general broad reference to commercial arbitration rules?

RULE 14.1(b) PARTIES TO THE PROCEEDING

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

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

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner Simply Wireless, Inc. is a private company. There is no other parent or publicly held corporations owning 10% or more of the stock of Petitioner Simply Wireless, Inc.

TABLE OF CONTENTS

Appendices:[1]

[1] The underlying Agreement containing the arbitration clause is not included in the Appendix as it has a number of confidential terms and attachment of the Agreement is not necessary as all relevant portions are cited and copied within the Opinion of the United States Court of Appeals for the Fourth Circuit, which is included in the Appendix.

TABLE OF AUTHORITIES

Cases:

Statutes and Rules:

INTRODUCTION

Arbitration is a creature of contract. As this Court has long held, agreements to arbitrate — like all contracts — must be interpreted based on the parties' intent. The best expression of the parties' intent is the plain meaning of the words they used in a contract. "[U]nless the parties have clearly and unmistakably" delegated the decision of whether a dispute is arbitrable to an arbitration panel, a court must decide that question. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 947 (1995).

In this case, the Fourth Circuit upheld arbitration of claims relating to trademark claims pursued by Petitioner which had absolutely nothing to do with the contract that contained the parties' agreement to arbitrate. That decision, and this case in particular, highlight a recent, expanding circuit split concerning the proper standard for determining arbitrability of claims that are entirely unrelated to the underlying arbitration agreement. Most courts of appeals (rightly or wrongly) have held that the incorporation into a contract of certain rules promulgated by self-interested major private arbitration organizations constitutes the parties' "clear and unmistakable" intent to delegate questions of arbitrability to arbitrators. That principle, however, does not address the question of what disputes are covered by such implied delegation clauses. That question has divided the circuits. The decision by the Fourth Circuit in the case before this Court highlights this dilemma better than perhaps any other in that the parties incorporated certain rules for arbitration **in the**

event arbitration applied but then expressly declared that resolution of arbitrability was to be resolved by the courts in accordance with the Federal Arbitration Act. The Fourth Circuit applied the inconsistent wholly groundless principle, coupled with the presumption in favor of arbitration, to ignore the parties' intent and direct an arbitrator to resolve arbitrability. Effectively, the Fourth Circuit concluded that once a contract is signed with an arbitration clause incorporating private arbitration rules that claim jurisdiction over arbitrability, all future disputes involving those parties, no matter how entirely irrelevant to the arbitration contract, are subject to arbitration saved only by conduct which would justify an award of sanctions.

In the most extreme view on this issue, the Tenth Circuit has held that all disputes between the parties — no matter how attenuated from the original contract must immediately be sent to arbitration for a determination of arbitrability. The Eleventh Circuit, in an opinion issued this past fall, indicated a willingness to follow suit.

Conversely, four circuits (the Fifth, Sixth and Federal Circuits, with the Fourth Circuit's position now somewhat unclear) have employed some version of the "wholly groundless" test. Under this test, a case cannot be sent to arbitration unless, at a minimum, the court finds a plausible argument in favor of arbitration. Absent such a finding, the requisite "clear and unmistakable" intent to delegate the arbitrability decision to arbitrators does not exist.

In the appeal underlying this Petition, the Fourth Circuit just recently added further complexity to the circuit split. Although the panel nominally adopted the wholly groundless test (as the Federal Circuit had previously done in cases governed by Fourth Circuit law), it interpreted the test as applying only to claims of arbitrability that are so frivolous as to be sanctionable.

The strongest formulation of the wholly groundless test, adopted by the Federal Circuit, places paramount importance on the contractual language and analyzes whether it is susceptible of any reasonable meaning that could bring a dispute within the agreement to arbitrate. Although the Fifth Circuit said in the IQ Products matter that it was applying the wholly groundless test, it ignored the "plain language" standard used by other courts.

The circuit split regarding the nature of judicial review for arbitration agreements with implied delegation clauses is a matter of national importance. This is particularly true as arbitration clauses become more and more prevalent and as the right to civil jury trials evaporates. Under the standard applied by the appellate courts below, there is uncertainty whether agreeing to arbitrate one type of dispute could make the parties subject to arbitration for every other dispute that might ever arise between them. The outcome of that determination may vary greatly depending on where suit is filed. Review by this Court is needed to resolve these important, unsettled issues of arbitration law.

OPINIONS BELOW

The Fourth Circuit's opinion is reported at 877 F.3d 522 and is reprinted within the attached Appendix ("App.") at 1a–24a.

The January 19, 2016 order of the U.S. District Court for the Eastern District of Virginia dismissing the matter without prejudice to pursue arbitration is unreported and is reprinted at App. 25a–26a.

JURISDICTIONAL STATEMENT

The Fourth Circuit panel filed its opinion on December 13, 2017. Simply Wireless filed a timely petition for rehearing *en banc*, which was denied on January 9, 2018. *See* App. at 27a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1–16, provides in relevant part:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy

> arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

> "**[T]he court shall** hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, **the court shall** make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. . . . If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, **the court shall** proceed summarily to the trial thereof."

9 U.S.C. § 4 (emphasis added).

STATEMENT OF THE CASE

The matter before the Court involves an effort by T-Mobile to impose an arbitration contract upon Simply Wireless which clearly does not apply to the underlying dispute. T-Mobile is motivated by a desire to avoid the requested jury trial while also effectively hijacking the claim to convert it to its own despite not having filed a counterclaim. On December 13, 2017, the Panel of the Fourth Circuit issued a Majority Opinion of Judges Wynn and Harris and a Dissenting Opinion of Judge Floyd. The Majority Opinion addressed a matter of first impression within the Fourth Circuit, related to whether the reference within a contract of certain commercial arbitration rules constitutes "clear and unmistakable" evidence that questions of arbitrability should be resolved by an arbitrator in contravention of the presumption that such questions should be resolved by the courts. The Majority Opinion resolved that matter of first impression in the affirmative, joining various sister circuits that had concluded substantially the same. The flaw, respectfully, in the Majority Opinion, as noted within the Dissenting Opinion, is that the Majority Opinion ignores not only that the contract in question has absolutely nothing to do with the trademark claims filed by Simply Wireless (i.e., the request for arbitration is wholly groundless) but also the Majority Opinion ignored the contractual sentence which expressly and clearly reveals the parties' intent to resolve questions of "arbitrability" through the courts in accordance with the Federal Arbitration Act. The Fourth Circuit's joinder into the wholly groundless circuit split reveals the need for

this Court's review and clarification. This is particularly true in that the privatization of dispute resolution is killing the civil jury trial, an institution that should be protected and preserved when it is invoked (as in this case). The factual scenario presented in this case has never been addressed by any sister circuit, or presumably any circuit, and it presents an ideal scenario in which to clarify the wholly groundless test while also reminding circuit courts that the intent of the parties as revealed by the plain language of their contract must control. If the Majority Opinion is left intact, it creates a wholly groundless standard in the Fourth Circuit which is effectively unattainable while also misapplying established law on contract interpretation, intent, specific clauses superseding general/broad, judicial revision of contracts, and the doctrine of *contra preferentum*. The result of the Majority Opinion if left untouched is that it creates a scenario in which the law of the Fourth Circuit will declare that the intent of the parties as to arbitrability will be ignored if the parties also reference general broad arbitration rules to govern any eventual arbitration.

The Dissenting Opinion (*see* App. at 16a) highlights the underlying flaw in the Majority Opinion in overlooking the clear intent of the parties while also summarizing the facts and law better than the undersigned ever could. As such, the Dissenting Opinion should be adopted by this Court in full as the accurate analysis of the facts and law. More specifically, in the judgment of the undersigned counsel the following situations exist which necessitate granting of this Petition: (1) material factual and legal matters were overlooked

or misapplied in the Majority Opinion contributing to a circuit split; (2) the Majority Opinion conflicts with established decisions of this Court, the Fourth Circuit, other court of appeals, and the conflict can only be resolved by this Court; and (3) this case involves one or more questions of exceptional importance which if not accurately analyzed and accurately stated creates bad law and/or a further circuit split as to determination of arbitrability and leaves contract drafting attorneys with the impossible Hobson's Choice of deciding whether to create ambiguity by omitting reference to arbitration rules to govern any arbitration proceeding or reference arbitration rules knowing that it will be subject to uncertainty and ambiguity depending on where that contract may be enforced. The matter before this Court requires review in order to ensure that this matter is accurately stated consistent with established law.

FACTUAL BACKGROUND

The core issue addressed in this Petition is succinctly summarized in the Dissenting Opinion included within the Appendix at page 17a as follows:

> On July 12, 2012, Simply Wireless and T-Mobile entered into an "Amended & Restated Limited Purpose Co-Marketing and Distribution Agreement for Equipment Sold th[r]ough HSN & QVC" (the "HSN/QVC Agreement"). S.J.A. 502. The Agreement provided that "[a]ny claims or controversies . . . arising out of or relating to this Agreement ("Dispute") shall be resolved by submission to binding arbitration," and that the "arbitration shall be administered pursuant to the JAMS Comprehensive Rules and Procedures then in effect." S.J.A. 514. Importantly, it also included a provision stating that "[n]otwithstanding any choice of law provision in this Agreement, the parties agree that the Federal Arbitration Act [("FAA")], 9 U.S.C. §§ 1–15, not state law, shall govern the arbitrability of all disputes under this Agreement" (the "FAA clause"). *Id.*

It is this discrete set of facts summarized by the above paragraph from the Dissenting Opinion that is now before this Court on this Petition. No part of the HSN/QVC Agreement referenced in

Judge Floyd's Dissenting Opinion has any relation to the claims filed by Simply Wireless alleging trademark violations by T-Mobile. Quite simply, the questions before this Court, if accepted for further review, are: (1) Whether a court must grant a motion to compel arbitration of the gateway question of arbitrability, even where a contract containing an arbitration clause is unrelated to the parties' instant dispute, or whether the court should deny the motion where the arbitrability argument is "wholly groundless"?; and (2) Whether the express intent of the parties to resolve arbitrability through the courts consistent with the Federal Arbitration Act is superseded by the general broad reference to commercial arbitration rules? Established rules of contract interpretation require that the above questions be resolved by refusing to compel arbitrability of claims that clearly do not belong in arbitration while protecting the express intent of the parties.

REASONS FOR GRANTING THE WRIT

1. Federal courts of appeals are divided 4-2 regarding whether an assertion of arbitrability that is "wholly groundless" must nonetheless be sent to arbitration pursuant to an implicit delegation clause. Within the past year, the Tenth Circuit has required arbitration of arbitrability in all circumstances, and the Eleventh Circuit has indicated it is likely to take a similar approach. Conversely, the Fourth, Fifth, Sixth, and Federal Circuits have rejected the idea that an implicit delegation clause requires all disputes, no matter how attenuated from the parties' contract, be immediately sent to arbitration by adopting the "wholly groundless" test. As this case shows, however, even when courts invoke this test there have been significant circuit conflicts about the type of claims it covers and how the test should be applied.

2. The Fourth Circuit erred in finding that T-Mobile's assertion of arbitrability was not "wholly groundless." On its face, the arbitration clause in question was tied to a contract expressly limited to resale of products through various TV networks, products that are not in any way at issue in this case. The wholly groundless standard should be applied based on the plain meaning of the contract and the claims raised in this action should not have been sent to arbitration.

3. The questions presented in this Petition are of exceptional importance because if left unresolved they leave thousands (and perhaps vastly more)

contracts subject to uncertainty and undermines the FAA's goal of ensuring arbitration provisions are applied consistently and in accordance with the parties' intent. The nationwide circuit split regarding judicial review of arbitration agreements with implied delegation clauses will cause arbitrary outcomes and encourage forum-shopping.

4. This case is an ideal vehicle for deciding the nature of the test to apply in deciding whether questions of arbitrability must be sent to arbitration. The arbitration clause at issue here uses typical contractual language, inserts an intent to resolve arbitrability through the courts, and highlights the dangers of the presumption in favor of arbitration (and the resulting disappearing jury trial) if left unchecked.

I. COURTS OF APPEALS ARE SHARPLY DIVIDED ON THE APPLICATION OF THE WHOLLY GROUNDLESS TEST

Arbitration is an area of law frequently addressed by this Court in recent years. As this case exemplifies, various legal doctrines regarding judicial treatment of arbitration agreements have recently collided, creating a rapidly widening split among circuits that merits resolution by this Court.

In *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 947 (1995), this Court held that arbitrability is "an issue for judicial determination unless the parties clearly and unmistakably provide otherwise." In *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 68–69 (2010), this Court ruled that

courts must enforce parties' agreement "to arbitrate 'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." *Rent-A-Center* stands for the proposition that even where there are doubts about the applicability of an agreement to arbitrate, the existence of a delegation provision requires sending gateway questions to arbitration unless a party specifically challenges the delegation provision itself as void due to fraud or other invalidating causes. *Id.* at 72.

In the contract at issue in *Rent-A-Center*, the delegation provision was contained in the body of the arbitration clause. The Court did not have occasion to consider the situation where the arbitration clause merely incorporates by reference the rules of a private dispute resolution organization, such as the American Arbitration Association Rules (the "AAA Rules").

The AAA Rules, like many other dispute resolution guidelines, grant an arbitrator "the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim." AAA Rule 7.[2] Courts in most circuits have held that incorporating this broad authority implicitly constitutes "clear and unmistakable" agreement to arbitrate all gateway questions of

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[2] *See* https://www.adr.org/sites/default/files/commercial_rules.pdf.

arbitrability. *See, e.g.*, *Brennan v. Opus Bank*, 796 F.3d 1125, 1130 (9th Cir. 2015) ("Virtually every circuit to have considered the issue has determined that incorporation of the [AAA] arbitration rules constitutes clear and unmistakable evidence that the parties agreed to arbitrate arbitrability."); *Petrofac, Inc. v. DynMcDermott Petroleum Operations Co.*, 687 F.3d 671, 675 (5th Cir. 2012); *Fallo v. High–Tech Inst.*, 559 F.3d 874, 878 (8th Cir. 2009); *Awuah v. Coverall N. Am., Inc.*, 554 F.3d 7, 11 (1st Cir. 2009); *Contec Corp. v. Remote Sol., Co.*, 398 F.3d 205, 208 (2d Cir. 2005).

Similarly, the Fourth Circuit by way of this appeal recently held that incorporating the JAMS Comprehensive Arbitration Rules & Procedures, which contain a similar provision regarding the broad authority of arbitrators,[3] is an implicit delegation of the right to determine arbitrability. *See Simply Wireless, Inc. v. T-Mobile US, Inc.*, 877 F.3d 522, 528 (4th Cir. 2017) ("We agree with our sister circuits and therefore 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."); *Belnap v. Iasis Healthcare*, 844 F.3d 1272, 1283 (10th Cir. 2017); *Cooper v. WestEnd Capital Mgmt., L.L.C.*, 832 F.3d 534, 546 (5th Cir. 2016); *Emilio v. Sprint Spectrum L.P.*, 508 Fed. App'x 3, 5 (2d Cir. 2013).

While the terms of the AAA and JAMS rules

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[3] *See* https://www.jamsadr.com/rules-comprehensive-arbitration.

in themselves may be "clear and unmistakable" in delegating arbitrability decisions to arbitrators, incorporation by reference of a lengthy set of rules the intricacies of which may well be unknown even to relatively sophisticated parties — is not the sort of "clear and unmistakable" agreement to arbitrate that should send every dispute between the parties to arbitration without at least some level of judicial review. *See Ashworth v. Five Guys Operations, LLC*, No. 16-cv-06646, 2016 WL 7422679, at *3 (S.D.W. Va. Dec. 22, 2016) ("Incorporation by reference of an obscure body of rules to show a clear and unmistakable intent to adhere to one rule specifically is preposterous . . . . How this could be considered clear and unmistakable can only be explained if the true meanings of 'clear' and 'unmistakable' are ignored."). Indeed, a stringent application of *Rent-A-Center* to implicit delegation clauses would virtually wipe out all judicial review of arbitrability, because it is exceedingly difficult for a party to raise a challenge, such as fraud, that is specific to the incorporation clause itself. Thus, the effect of treating implicit delegation clauses in this manner would be to nullify this Court's decision in *First Options* that requires "clear and unmistakable" evidence of an agreement to arbitrate.

More broadly, if an implicit delegation clause automatically sent every dispute between the parties to arbitration, it would dramatically expand the scope of arbitration agreements beyond what the parties could have possibly intended. The Federal Circuit addressed this problem in adopting the "wholly groundless" test to "prevent[] a party

from asserting any claim at all, no matter how divorced from the parties' agreement, to force an arbitration." *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366, 1371 (Fed. Cir. 2006). Under this test, if the parties have generally agreed to delegate questions of arbitrability to an arbitrator, a court must determine whether there is a "plausible" argument that arbitration is required for the claim at hand. *Id.*

The Sixth Circuit was the next court of appeals to expressly adopt the "wholly groundless" test. In *Turi v. Main Street Adoption Services, LLP*, 633 F.3d 496, 511 (6th Cir. 2011), the Sixth Circuit found that there was "no need for an arbitrator to decide the arbitrability of any of the plaintiffs' claims" where they were "not even arguably subject to arbitration" because the arbitration clause excluded the type of claims at issue.

The Fifth Circuit adopted the wholly groundless test in *Douglas v. Regions Bank*, 757 F.3d 460 (5th Cir. 2014). There, the court denied arbitration of the plaintiff's claim that a bank negligently allowed her attorney to embezzle funds from a trust account, where the only arbitration clause that the plaintiff had signed was in connection with the opening of a checking account unrelated to the errant lawyer's trust account. *Id.* at 461. The *Douglas* court explained that the wholly groundless test was derived from the principle that delegating the arbitrability of a claim under one contract "cannot possibly bind [a party] to arbitrate gateway questions of arbitrability in all future

disputes with the other party, no matter their origin." *Id*. at 462.

While the Fifth Circuit continues to profess recognition of the test today, it has sharply limited its scope. In *Kubala v. Supreme Production Services, Inc.*, 830 F.3d 199, 201–03 & n.1 (5th Cir. 2016), the court characterized the wholly groundless test as "exceptional" and said that the mere presence of a delegation clause (inferred through incorporation of the AAA Rules) means that a "'motion to compel arbitration should be granted in almost all cases.'" *Id*. at 202. Similarly, last month the Fourth Circuit, in this appeal, acknowledged the wholly groundless test, but adopted an exceedingly narrow interpretation of its scope. Rather than looking at the plausibility of the pro-arbitration argument, the Fourth Circuit considered only whether an assertion of arbitrability was "frivolous or otherwise illegitimate," to the point that it could be sanctioned under Rule 11. *Simply Wireless*, 877 F.3d at 528–29 (quoting Fed. R. Civ. P. 11(b)).

In contrast, the Federal Circuit continues to apply a robust version of the test. In *Evans v. Building Materials Corp. of Am.*, 858 F.3d 1377, 1381 (Fed. Cir. 2017), the court found that defendant's assertion of arbitrability was "wholly groundless" where a contract requiring defendant to promote a specific product supplied by plaintiff included a provision to arbitrate all disputes arising under the agreement. Several years later, the plaintiff brought suit based on defendant's marketing of a different product, and the defendant

sought to compel arbitration under the original contract. Applying Fourth Circuit law prior to *Simply Wireless*, the Federal Circuit held that because the lawsuit "challenge[s] actions whose wrongfulness is independent of the [contract's] existence," they were "plainly outside the arbitration provision" and therefore wholly groundless. *Id.* at 1381.

In another decision from the past year, the Tenth Circuit created a full-fledged circuit split by flatly rejecting the "wholly groundless" test. *See Belnap*, 844 F.3d at 1286. The court noted that "[n]either the Supreme Court nor our court has spelled out the next steps for a court when it finds clear and unmistakable intent to arbitrate arbitrability," but reasoned that because incorporation of the JAMS rules shows the "clear and unmistakable" intent to delegate arbitrability, a court "must compel the arbitration of arbitrability issues in all instances." *Id.* (emphasis in original). In so holding, the court stated that the "wholly groundless" approach of other circuits "appears to be in tension with language of the Supreme Court's arbitration decisions — in particular, with the Court's express instruction that when parties have agreed to submit an issue to arbitration, courts must compel that issue to arbitration without regard to its merits." *Id.*

In rejecting the "wholly groundless" test, the Tenth Circuit court predicted that other courts would follow suit. In August, the Eleventh Circuit did just that in *Jones v. Waffle House, Inc.*, 866 F.3d 1257 (11th Cir. 2017), finding that "the wholly

groundless exception is in tension with the Supreme Court's arbitration decisions" and thus should have "no place in" a court's analysis. While *Jones* did not involve an implicit delegation clause, it expressly stated that "[w]e join the Tenth Circuit in declining to adopt what has come to be known as the wholly groundless exception." *Id.* at 1269.

Thus, within just the past year, a circuit split has developed in which different circuits are determining arbitrability differently under different standards. Intervention by this Court is warranted to resolve the conflicting positions of the lower courts.

II. THE FOURTH CIRCUIT MISAPPLIED THE WHOLLY GROUNDLESS TEST

Arbitration is a matter of contract, and a party cannot be required to submit to arbitration of any matter it has not agreed to arbitrate. *AT&T Techs., Inc. v. Commcn's Workers*, 475 U.S. 643, 648 (1986).

Review in this case is necessary in order to ensure that lower courts follow this Court's long-standing direction that arbitration clauses should be "as enforceable as other contracts, but not more so." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967) (emphasis added); *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989) (courts must "enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms").

This bedrock principle is precisely what the "wholly groundless" test was developed to protect, but it failed to do so here. The undisputed facts show that Simply Wireless never agreed to arbitrate its own claims that T-Mobile was violating a trademark. In fact, the underlying contract has nothing to do with: (1) the allegations in question, (2) products authorized for resale in the contract, (3) the sales channels involved, or (4) trademarks owned by Simply Wireless. Any assertion to the contrary is wholly groundless because it is belied by the plain language of the parties' contract. The Agreement involves a limited distribution agreement for the sale of T-Mobile products through various television networks. The allegations in question involve T-Mobile's use of Simply Wireless trademarks. There is undeniably no question or link between the contract and the trademark claims filed by Simply Wireless.

As the Federal Circuit held in *Evans*, it is "wholly groundless" to claim the dispute here is arbitrable because the claims in this case "challenge actions whose wrongfulness is independent of the [contract's] existence." 858 F.3d at 1381. As such, the "wholly groundless" test should have compelled the conclusion that this case does not belong in arbitration.

While the Majority Opinion declares that arbitrability may not be appropriately resolved by an arbitrator if the pursuit of arbitration is "wholly groundless," the Majority Opinion only briefly discusses the wholly groundless standard and

largely side-steps the circuit split by arguing that Simply Wireless failed to raise this argument. To be clear, Simply Wireless repeatedly alleged at every stage of this case and throughout the Appeal that the pursuit of arbitration was meritless and not in any way related to the actual claims presented. The filings with the Fourth Circuit are literally riddled with the argument that T-Mobile's attempt to force Simply Wireless into arbitration is meritless. *See, e.g.*, Fourth Circuit Docket No. 18, Opening Brief, at 13, 16, 18, 21, 22, 26, 27, 30, 36, 40, 41, 46 (all alleging in one form or another that T-Mobile's attempt to compel arbitration is meritless); Fourth Circuit Docket No. 29, Reply Brief, at 8, 9, 10, 11, 18, 19, 20, 21, 22, 24, 25, 26, 27, 28 (same). The identical argument was presented to the District Court.

It is also important to note that Judge Floyd, who found that Simply Wireless had preserved the argument that arbitrability lacked merit, is the only appellate judge to analyze whether the arbitration claim has any merit. He adopted the argument of Simply Wireless, effectively found the request for arbitration by T-Mobile was wholly groundless, and concluded "clearly" with "positive assurance" that "this dispute is not subject to mandatory arbitration and should proceed on the merits in the district court." *See* Appendix A, at 19a–22a. The attempt to compel arbitration on an HSN/QVC Agreement that likely will never be referenced in this case again after this arbitrability dispute is resolved, is clearly "wholly groundless" such that this matter should be remanded to the District Court for proceedings on

the merits and for the jury trial that Simply Wireless has requested.

III. THE QUESTIONS PRESENTED ARE OF GREAT NATIONAL IMPORTANCE

Parties to a contract rely on existing law to understand how the terms of their contract will be enforced. It is thus critical that such terms are applied consistently and uniformly.

This is especially true with agreements to arbitrate. As this Court has made clear, a key purpose of the FAA is to enforce arbitration agreements according to their terms. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). Today, however, the treatment of arbitration agreements with implicit delegation clauses depends on the circuit in which they are interpreted. This inconsistent approach undermines the FAA's goal to create a uniform body of federal law governing arbitration.

If merely incorporating certain common arbitral rules into a contract were enough to require that every dispute between the parties must forever be sent to arbitration, it would upset parties' settled expectations. It also could lead to extreme consequences for those contractual counterparties who have less bargaining power, and less financial ability to hire experienced counsel to point out this hidden effect of choosing certain arbitration rules which naturally seem to be necessary for any arbitration clause **if** a claim ends up in arbitration as the arbitral proceedings are otherwise left

disorganized and arbitrary. Given the sharp conflict between circuits on the nature of the test to be applied, leaving this split unresolved will lead to arbitrary outcomes and encourage forum-shopping.

The Court should address this critical issue to ensure that arbitration clauses are not so broadly construed and that the rush to transfer cases to arbitration does not result in compelling parties into a dispute resolution forum they did not agree to enter.

IV. THIS CASE IS A PROPER VEHICLE TO DECIDE THE SCOPE OF THE WHOLLY GROUNDLESS TEST

This case presents an excellent platform for the Court to consider uniform national standards for judicial review of implied contractual delegation clauses. The arbitration clause at issue is typical, as is the contract's incorporation of the JAMS Rules. Moreover, 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. Further, the factual record is straightforward and clearly presents the issue of contract interpretation as a matter of law for the following reasons:

a. The Fourth Circuit's Majority Opinion ignores the express intent of the parties to resolve "arbitrability" through the courts under the Federal Arbitration Act.

This Court is presented with the question of whether an arbitration clause of an expired contract wholly unrelated to pending trademark claims subjects Simply Wireless to arbitration that it did not consent to, at least for the claims pleaded in this case. Resolution of this issue invokes the threshold question of who is empowered to decide that jurisdictional issue. T-Mobile argued, in Catch-22 fashion, that the HSN/QVC Agreement it relies upon answers this question by simply providing that: "[t]he arbitration shall be administered pursuant to the JAMS Comprehensive Rules and Procedures then in effect." Fourth Circuit Resp. Br., at 45–46; J.A., at 514, § 19.1.1. T-Mobile interprets this clause to mean that an arbitrator, appointed pursuant to JAMS arbitration rules, must determine whether arbitration is appropriate. The Majority Opinion agreed with T-Mobile and has adopted this viewpoint as a matter of first impression in the Fourth Circuit.

This argument is flawed for the simple reason that the parties expressly addressed arbitrability and agreed it would be resolved by the courts under the Federal Arbitration Act in the very next sentence of the contract after the JAMS Rules are

referenced.[4] A plain reading of the arbitration clause even seems to confirm, particularly when coupled with the parties' clear intent to resolve arbitrability through the courts, that the JAMS rules would not even become involved until there was an arbitration to be "administered." To decide otherwise negates the clear terms of the contract between these parties. T-Mobile's argument on this point was obviously rejected, albeit *sub silentio*, by the District Court. To the extent T-Mobile even preserved this issue for appeal without a cross-appeal, it should be rejected by this Court as well. Section 19.1.1 of the HSN/QVC Agreement expressly provides for resolution of arbitrability under the FAA. Section 4 of the FAA provides that:

> "**[T]he court shall** hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, **the court shall** make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. . . . If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, **the court shall** proceed summarily to the trial thereof."

9 U.S.C. § 4 (emphasis added). The parties

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[4] The exact wording of the contract provides: "[n]otwithstanding any choice of law provision in this Agreement, the parties agree that the Federal Arbitration Act [("FAA")], 9 U.S.C. §§ 1–15, not state law, shall govern the **arbitrability** of all disputes under this Agreement." S.J.A. at 514 (emphasis added).

contractually agreed that any disagreement as to arbitrability would be resolved by the courts. There was a reason the parties drafted their contract in this manner and that intent should be enforced.

Simply Wireless' position is further confirmed by a wealth of case law requiring, like the FAA, judicial determination of arbitrability, including a "trial" of that issue. *See, e.g.*, *AT&T Techs., Inc. v. Commc'ns Workers of Am.,* 475 U.S. 643, 649 (1986); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 626 (1985); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002); *Virginia Carolina Tools, Inc. v. Int'l Tool Supply, Inc.*, 984 F.2d 113, 117 (4th Cir. 1993). Virginia state law is to the same effect.[5] Other circuits agree. *See Chastain v. Robinson-Humphrey Co., Inc.*, 957 F.2d 851, 852–55 (l1th Cir. 1992); *Par-Knit Mills, Inc. v. Stockbridge Fabrics Co., Ltd*, 636 F.2d 51, 54 (3d Cir. 1980).[6] Here, the parties expressly detailed their

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[5] *See, e.g., Waterfront Marine Const., Inc. v. N. End 49ers Sandbridge Bulkhead Groups A, B &C,* 251 Va. 417, 425–27, 468 S.E.2d 894, 899–900 (1996) ("[I]n the absence of a clear agreement showing that the parties intended that the arbitrator decide questions of arbitrability, that question is to be resolved by the court.") (citations omitted); *United Paperworkers v. Chase Bag C.,* 222 Va. 324, 327 n. 1, 281 S.E.2d 807, 809 n. 1 (1981).

[6] *See also Caribbean S.S. Co. v. Sonmez Denizciliki Ve Ticaret A.S.*, 598 F.2d 1264, 1266 (2d Cir. 1979) (unless clearly demonstrated by the arbitration agreement, it is the responsibility of the court to determine arbitrability and which disputes, if any, are governed by the arbitration agreement); *International Union of Operating Engineers, Local Union No. 139 v. Carl A. Morse, Inc.,* 529 F.2d 574, 579 (7th Cir. 1976) (same); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 360 F.2d 315, 316 (2d Cir. 1966) (same).

intent within their contract to resolve all matters of arbitrability through the courts consistent with the FAA.

Substantively, the question to be addressed by this Court is ascertaining the intent of parties and how that intent factors into the wholly groundless analysis. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 947 (1995) (declaring the basic objective of the Federal Arbitration Act is to insure the intention of the parties is upheld); *Am. Recovery Corp. v. Computerized Thermal Imaging,* 96 F.3d 88, 91–92 (4th Cir.1996) ("[A] party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 626 (1985) (same).

The mechanism for ascertaining the parties' intent if not clear from the plain wording of the contract is a trial. *See* FAA, 9 U.S.C. § 4 ("[I]f the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the **trial** thereof.") (emphasis added); *see also World Brilliance Corp. v. Bethlehem Steel Co.*, 342 F.2d 362, 364 (2d Cir. 1965) (same); *Atlanta Shipping Corp. v. Cheswick-Flanders & Co.*, 463 F. Supp. 614, 617–18 (S.D.N.Y. 1978) (same).

To the extent this Court determines that express reference to arbitrability is ambiguous and the express mechanism the parties chose to resolve arbitrability (i.e., the courts via the FAA) is unclear, at a minimum this matter should be remanded for

proceedings to clarify the intent of the parties.

Even the JAMS Rules that the Majority Opinion relied upon indicate that statutory law should control over the general JAMS Rules. More specifically, JAMS Rule 1 defines the "Scope of Rules." The first sentence of that Rule provides that the Rules only apply to "binding Arbitrations of disputes or claims that are administered by JAMS . . . ." [7] Thus, even under JAMS Rules, there is still a threshold question this Court must resolve before referring any aspect of this matter, including arbitrability, to arbitration. Additionally, JAMS Rule 4 provides that "[i]f any of these Rules . . . is determined to be in conflict with a provision of applicable law, the provision of law will govern over the Rule in conflict . . . ."[8] Here, application of JAMS Rule 11, at least T-Mobile's reading of it, directly conflicts with the FAA, 9 U.S.C. § 4, both of which are squarely in conflict given the language of the HSN/QVC Agreement. Thus, the JAMS Rules have no application.

An arbitration clause cannot be applied so broadly that it imposes requirements upon parties which they never agreed to arbitrate, thereby depriving a party of the crucial adjudicative right of presenting a legal dispute to a judge and a factual dispute to a jury and asking that jury to determine what is right and what is fair. Inherent in the responsibility of the courts is the responsibility to interpret contracts as the parties agreed. The province of the courts is to bind parties to the

[7] *See* https://www.jamsadr.com/rules-comprehensive-arbitration/
[8] *See* https://www.jamsadr.com/rules-comprehensive-arbitration/

agreement they signed. A ruling that Simply Wireless is required to arbitrate these claims in a forum to which it never agreed is *prima facie* inequitable, wholly groundless, and contradicts the express intent embodied within the plain words of the HSN/QVC Agreement.

b. The Fourth Circuit's Majority Opinion violates established contract interpretation law by elevating general/broad contract provisions over those of specific, effectively negating the specific statements of the parties as to arbitrability

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. *See, e.g.*, *Red Roof Inns, Inc. v. Scottsdale Ins. Co.*, 419 F. App'x 325, 329 (4th Cir. 2011) (stating that every word of a contract should be given meaning as a whole); *United States v. Holbrook*, 368 F.3d 415, 428 (4th Cir. 2004) ("when there is a conflict between general and specific provisions of a contract, the specific clause controls its meaning.") (vacated on other grounds); *Sentinel Associates v. American Mfrs. Mut. Ins. Co.,* 804 F.Supp. 815, 818 (E.D.Va. 1992), *aff'd,* 30 F.3d 130 (4th Cir. 1992) (same). These are long-standing contract interpretation principles which the Majority Opinion is in conflict with if left to stand.

c. The Fourth Circuit's Majority Opinion effectively rewrites the contract between the parties by ignoring certain language in an effort to resolve a question of first impression in the Fourth Circuit

Established case law of the Fourth Circuit provides that courts are not to rewrite contracts but they are to take the wording and intent of the parties as evidenced by the contract. *See, e.g.*, *Red Roof Inns, Inc. v. Scottsdale Ins. Co.*, 419 F. App'x 325, 329 (4th Cir. 2011). This is also well established under Virginia law.[9] The Majority Opinion violates this case law by ignoring the express intent of the parties to resolve arbitrability under the Federal Arbitration Act.

d. The Fourth Circuit's Majority Opinion ignores a clause which, as noted by the Dissenting Opinion, clearly "muddies" the water as to what these parties intended and then fails to apply contract interpretation standards of *contra preferentum* which necessitates ruling against T-Mobile's interpretation or at a minimum remanding for evidentiary

[9] *See, e.g.*, *Bentley Funding Group, LLC v. SK&R Group, LLC*, 269 Va. 315, 330, 609 S.E.2d 49, 56 (2005) (declaring that it is a court's function to construe the contract and intent of the parties, not to alter the contract); *Rash v. Hilb, Rogal & Hamilton*, 251 Va. 281, 286, 467 S.E.2d 791, 794 (1996) (same).

hearings to determine the intent of these parties

A running footer on each and every page of the HSN/QVC Agreement indicates that it is T-Mobile's "Proprietary and Confidential Information," making clear that this Agreement was drafted by T-Mobile and belongs to T-Mobile. The doctrine of *contra preferentum* dictates that ambiguities, including those relating to arbitrability are construed against the drafter/owner of a contract. *See*; e.g., *Hendrick v. Brown & Root, Inc.,* 50 F. Supp. 2d 527, 532–33 (E.D. Va. 1999) ("[A]mbiguities in unilaterally prepared contracts are to be resolved against the drafter."). "[T]he presumption [favoring arbitration] applies only as to doubts respecting the scope of the agreement reached by the parties. It does not apply in resolving doubts respecting whether the parties have reached an agreement respecting what they will arbitrate." *See id.* at 533–38; *Allen v. Green,* 229 Va. 588, 592, 331 S.E.2d 472, 475 (1985) ("An ambiguity exists when language is of doubtful import, admits of being understood in more than one way, admits of two or more meanings, or refers to two or more things at the same time.").[10]

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[10] *See also Renner Plumbing, Heating & Air Conditioning, Inc. v. Renner,* 225 Va. 508, 515, 303 S.E.2d 894, 898 (1983); *Berry v. Klinger,* 225 Va. 201, 207, 300 S.E.2d 792, 796 (1983) (stating that ambiguity is created by the "[d]oubtfulness [or] doubleness of meaning ... of an expression used in a written instrument."); *Galloway Corp. v. S.B. Ballard Const. Co.*, 250 Va. 493, 502, 464 S.E.2d 349, 354–55 (1995). The fact that at least one appellate judge has already found that arbitrability should have been resolved by the court (and that the arbitration clause clearly did not apply) seems to weigh heavily in favor or

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, and without any findings of fact or conclusions of law. The District Court simply assumed (wrongly) certain key facts and ignored all other factual disputes. This summary adjudication is completely improper under FAA, § 4, which requires a "trial" in this situation, and Rules 52 and 56, Fed. Rules Civ. Proc., which require findings of fact and preclude summary adjudication of disputed facts, respectively. It is also improper under 9 U.S.C. § 4 which specifically provides for resolution of arbitrability issues by a jury when demanded by the party opposing arbitration.

Section 19.1.1 of the HSN/QVC Agreement on which T-Mobile relies provides for resolution of arbitrability under the Federal Arbitration Act ("FAA") ("The Federal Arbitration Act, 9 U.S.C. §§1-15, not state law, shall govern the arbitrability of all disputes under this Agreement"). FAA § 4 provides that when the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be at issue, the court shall proceed summarily to **the trial** thereof. 9 U.S.C. § 4 (emphasis added).

No "trial" was had in this case, let alone the jury trial that Simply Wireless properly

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"doubleness of meaning" or at a minimum ambiguity if the express reference to "arbitrability" is not clear.

demanded[11], instead the District Court, and now the Majority Opinion, resolved multiple fact-intensive issues of intent, waiver, and substantial compliance without a single evidentiary hearing, let alone fact finding by a jury.

This is contrary to law. *See, e.g.*, *Par-Knit Mills, Inc. v. Stockbridge Fabrics Co.*, 636 F.2d 51, 54 (3d Cir. 1980) (a party contesting the applicability of an arbitration clause is entitled to have the issue presented to a jury); *El Hoss Eng'g & Transp. Co. v. Am. Indep. Oil Co.*, 289 F.2d 346, 351 (2d Cir. 1961) (same); *PMC, Inc. v. Atomergic Chemetals Corp.*, 844 F. Supp. 177, 183 (S.D.N.Y. 1994) (same); *Century Steel Erectors, Inc. v. Aetna Cas. & Sur. Co.*, 757 F. Supp. 659, 661 (W.D. Pa. 1990) (same); *Ferreri v. First Options of Chicago, Inc.*, 623 F. Supp. 427, 437 (E.D. Pa. 1985) (same). At the very least, Simply Wireless is entitled to an expedited trial of these issues.[12]

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[11] Simply Wireless repeatedly requested "a trial by jury on all issues so triable." *See* District Court Docket No. 27, at 11, 13, 13 n. 11, 23, 24.

[12] *See* 9 U.S.C. § 4; *see also Atlanta Shipping Corp. v. Cheswick-Flanders & Co.*, 463 F. Supp. 614, 617–18 (S.D.N.Y. l978).

CONCLUSION

For the foregoing reasons, Petitioner Simply Wireless, Inc. respectfully requests that this Court grant this Petition for a Writ of Certiorari.

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