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 AMICUS CURIAE PUBLIC CITIZEN, INC., IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Does the FAA require a court to compel arbitration of an issue of "arbitrability" when the assertion that the dispute before the court is subject to arbitration is wholly groundless?

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INTEREST OF AMICUS CURIAE[1]

Public Citizen, Inc., is a consumer advocacy organization that appears on behalf of its members and supporters nationwide before Congress, administrative agencies, and the courts. Public Citizen works on a wide range of issues, including enactment and enforcement of laws protecting consumers, workers, and the public. Public Citizen has a longstanding interest in issues concerning the enforcement of mandatory predispute arbitration agreements, and it has appeared as amicus curiae in many cases involving such issues in this Court and other federal and state courts.

SUMMARY OF ARGUMENT

Whether courts or arbitrators decide if the parties have agreed to arbitrate a particular dispute "can make a critical difference." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995). In recognition of the potential importance to the parties of this "who decides" question, and to carry out the aims of the Federal Arbitration Act (FAA), this Court has held that it is presumptively up to the courts to decide issues of "arbitrability." Only if the parties have clearly and unmistakably agreed to delegate arbitrability issues to the arbitrators are courts authorized to enforce that agreement and send genuinely disputed issues of arbitrability to the arbitrators for decision in the first instance.

But what if there is no genuine dispute over arbitrability because the assertion that a particular dispute

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[1] This brief was not authored in whole or part by counsel for a party. No one other than amicus curiae or its counsel made a monetary contribution to preparation or submission of the brief. Both parties have filed blanket consents to submission of amicus briefs.

is arbitrable is wholly groundless, yet one party nonetheless insists that the court compel arbitration of its baseless assertion that a dispute initiated by the other party in court is subject to arbitration? That question is the one posed by this case.

Under such circumstances, where who decides arbitrability cannot make a "critical difference" to the ultimate outcome because only one answer is possible, the FAA does not require arbitration of the arbitrability issue. Indeed, read as a whole—as it must be—the FAA requires the opposite. The outcome of any arbitration that rested on the arbitrators' wholly groundless arbitrability determination would be subject to vacatur under section 10(a)(4) of the FAA, 9 U.S.C. § 10(a)(4), because the arbitrators would have "exceeded their powers" in asserting authority over the dispute without any contractual basis. The FAA cannot be read to require that arbitration be compelled where the Act would require vacatur of any outcome other than a decision by the arbitrators not to hear the matter.

This conclusion follows not only from the general principle that the law does not require futile and self-defeating actions—including resort to pointless procedures that can have only one permissible result—but also from the FAA's own foundational principle that parties may be compelled to arbitrate "only those disputes … that the parties have agreed to submit to arbitration." *First Options*, 514 U.S. at 943. Although parties may agree to arbitrate issues of arbitrability, such agreements are not reasonably understood to require arbitration of wholly groundless assertions of arbitrability that could be accepted by the arbitrators only if they exceeded their powers by entirely disregarding the parties' agreement. No party can be said to have

consented to allow arbitrators to consider whether to exceed their powers merely by agreeing to allow them to resolve genuinely disputed matters of arbitrability.

ARGUMENT

I. The FAA does not require courts to compel arbitration when the arbitrators would exceed their powers if they asserted authority over a dispute.

The premise of the question presented is that the assertion that the underlying dispute in this case is subject to arbitration under the arbitration agreement at issue is "wholly groundless." Pet. i. That is, no reasoned decisionmaker legitimately attempting to interpret the agreement could conclude that the claims of respondent Archer and White Sales, Inc., against petitioners Henry Schein, Inc., and others are arbitrable under that agreement. Nonetheless, because Henry Schein contends that the arbitration agreement delegates all questions of arbitrability to the arbitrator (a contention that is itself disputed, Pet. App. 10a, and not before this Court), it asserts that petitioners are entitled to an order compelling arbitration so that their groundless contention that the claims in this case are subject to arbitration can be considered by an arbitrator. The FAA does not require that illogical result.

A. The FAA would require vacatur of an arbitral decision resting on a wholly groundless arbitrability determination.

Henry Schein's argument purports to rest on two propositions, established by this Court's decisions: (1) that provisions delegating questions of arbitrability to an arbitrator are treated as separate arbitration provisions severable from the larger arbitration provisions

of which they are a part; and (2) that section 2 of the FAA, 9 U.S.C. § 2, provides for enforcement of such agreements. *See Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010). According to Henry Schein, it necessarily follows that if an arbitration agreement contains a valid delegation clause, even an entirely baseless assertion by a party to the agreement (or perhaps even a non-party) that a claim asserted against it is subject to arbitration requires a court to compel arbitration under section 4 of the Act, 9 U.S.C. § 4.

Henry Schein's argument founders on one of the most fundamental precepts of statutory interpretation: Statutory construction is a "holistic endeavor," *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 652 (2013) (citation omitted), in which a court must consider the requirements of particular statutory provisions "in their context and with a view to their place in the overall statutory scheme," *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (citation omitted). Thus, courts must read "the particular statutory language at issue" together with "the language and design of the statute as a whole" and "its object and policy." *McCarthy v. Bronson*, 500 U.S. 136, 139 (1991) (citations omitted). Only by examining "the provisions of the whole law" can a court arrive at a result that "produces a substantive effect that is compatible with the rest of the law." *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 985 (2017) (citations omitted). The courts' "duty, after all, is 'to construe statutes, not isolated provisions.'" *King*, 135 S. Ct. at 2489.

Here, consideration of Henry Schein's argument in "the broader context of the statute as a whole," *FCC v. AT&T Inc.*, 562 U.S. 397, 407 (2011) (citation omitted), reveals it to be self-defeating. Reading section 4 of the

statute to require a court to compel arbitration of a wholly groundless claim of arbitrability would be nonsensical because a separate provision of the statute, section 10(a)(4), would require the court to overturn the result of the arbitration if the arbitrators accepted the groundless claim that the parties' underlying dispute was arbitrable and proceeded to decide it.

Specifically, section 10(a)(4) authorizes a court to vacate an arbitration award "where the arbitrators exceeded their powers" in issuing it. 9 U.S.C. § 10(a)(4). Purporting to resolve a matter outside the scope of the parties' arbitration agreement is the classic example of arbitrators exceeding their powers. *See BG Group, PLC v. Repub. of Argentina*, 572 U.S. 25, 32, 44–45 (2014). Although an agreement delegating authority to arbitrators to decide questions of arbitrability establishes that they do not exceed their authority merely by considering an arbitrability question, such a delegation agreement does not "confer[] authority on the arbitrators to exceed the terms of the [arbitration agreement] itself." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 681 n.8 (2010). The arbitrators remain bound by the arbitration clause's limits on their substantive authority. And although their determination whether a particular dispute is subject to arbitration is given "considerable leeway" by a court, *First Options*, 514 U.S. at 943, that determination remains reviewable under section 10(a)(4) to determine whether the arbitrators exceeded their powers in reaching their decision, *see id.*; *see*, *e.g.*, *BG Group*, 572 U.S. at 44–45.

The determination whether arbitrators have exceeded their powers in concluding that a particular dispute falls within the scope of an arbitration agreement depends on whether they have "stra[yed] from

interpretation and application of the agreement or otherwise effectively dispens[ed] their own brand of … justice." *BG Group*, 572 U.S. at 45 (quoting *Stolt-Nielsen*, 559 U.S. at 671, and *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509 (2001); internal quotation marks omitted). A decision by the arbitrators that the parties must arbitrate a particular dispute exceeds the arbitrators' power absent "a contractual basis for concluding that the [parties] *agreed* to do so." *Stolt-Nielsen*, 559 U.S. at 684. The arbitrators' decision must be set aside if they are not "even arguably construing or applying the contract and acting within the scope of [their] authority." *Garvey*, 532 U.S. at 509 (citation omitted); *accord*, *e.g.*, *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 569 (2013); *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987).

Where the assertion that a dispute is within the scope of an arbitration agreement is wholly groundless, a court would be required to overturn a decision by the arbitrators to take jurisdiction over that dispute because such a decision would "lack[] *any* contractual basis." *Oxford Health*, 569 U.S. at 571. In asserting jurisdiction over a dispute in the absence of a colorable argument that it fell within the arbitration agreement's scope, the arbitrators would have "abandoned their interpretive role" and "strayed from [their] delegated task of interpreting a contract." *Id*. at 571, 572. Such a decision would exceed the arbitrators' powers within the meaning of section 10(a)(4) "because it was not—indeed, could not have been—'based on a determination regarding the parties' intent.'" *Id*. at 571 (quoting *Stolt-Nielsen*, 559 U.S. at 673, n.4). A decision to accept a wholly groundless claim of arbitrability would thus require vacatur under section 10(a)(4).

Construing the FAA to require arbitration of a wholly groundless issue of arbitrability would thus create two possibilities: The arbitrators would properly reject the claim of arbitrability and return the case to the courts, or they would exceed their authority by determining without any contractual basis that the claim was arbitrable. In the latter case, the result would be an arbitration proceeding whose outcome would ultimately be subject to vacatur by the court under section 10(a)(4).

B. The FAA does not require arbitration of an arbitrability issue that the arbitrators could permissibly resolve only against arbitration.

As a general matter, "[t]he law does not require the doing of a futile act." *Ohio v. Roberts*, 448 U.S. 56, 74 (1980), *overruled on other grounds*, *Crawford v. Washington*, 541 U.S. 36 (2004). "Good judicial administration is not furthered by insistence on futile procedure." *Wade v. Mayo*, 334 U.S. 672, 681 (1948).

Thus, this Court has often read statutory schemes not to require pointless proceedings. In the realm of administrative law, for example, the Court has held that a statutory requirement that an agency make a decision "after a hearing" does not require an actual hearing when "a hearing would be futile and wasteful" because the matter is "concededly beyond [the agency's] competence to decide." *Weinberger v. Salfi*, 422 U.S. 749, 767 (1975). Similarly, the Court has held that statutory requirements of administrative exhaustion may be excused on grounds of futility, *see*, *e.g.*, *Honig v. Doe*, 484 U.S. 305, 327 (1988), except in instances where they are jurisdictional, *see Weinberger*, 422 U.S. at 766.

Of particular relevance here, courts have held that matters ordinarily requiring decision in the first instance by another body—whether an agency or a court—need not be remanded to that body for decision when such a remand "would be an idle and useless formality." *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (1969) (declining to remand to agency where "[t]here is not the slightest uncertainty as to the outcome" and "[i]t would be meaningless to remand"); *see also Already, LLC v. Nike, Inc.*, 568 U.S. 85, 100 (2013) (declining to remand to lower courts where "a remand would serve no purpose" because only one outcome was possible).

Importantly, courts have applied this principle not just in cases, like *Wyman-Gordon*, where the courts had no doubt about how the agency or lower court would rule if the matter were remanded. Courts have applied it as well in cases, like this one, where it was clear that a remand could have only one *permissible* result, and any other outcome would ultimately require vacatur of the lower tribunal's ruling. For example, in *George Hyman Construction Co. v. Brooks*, 963 F.2d 1532 (D.C. Cir. 1992) (Sentelle, J.), the D.C. Circuit found that an agency had failed to provide an explanation for its ruling that was adequate under governing case law. Rather than remanding for further explanation on the point, however, the court held that "a remand would be futile … as only one disposition is possible as a matter of law." *Id*. at 1539. Therefore, the court "retain[ed] and decide[d] the issue" itself. *Id*. As the court explained, sending the case to another decisionmaker for a ruling that would inevitably be overturned if it did not conform to the only legally permissible outcome would "convert judicial review … into a

ping-pong game." *Id*. (quoting *Wyman-Gordon*, 394 U.S. at 766–67 n.6).

Nothing in the FAA requires courts to depart from this common-sense principle and instead to commence a judicial ping-pong volley by sending an issue of arbitrability to arbitration under circumstances where a decision by the arbitrators to hear the matter will inevitably result in vacatur of their award. To be sure, this Court has often stated that the FAA "establishes 'a liberal federal policy favoring arbitration agreements.'" *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 24 (1983)). "But no legislation pursues its purposes at all costs," *Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987)—not even the FAA. Compelling arbitration in a case where the arbitrators, if they reached the merits, would necessarily exceed their authority and subject their decision to vacatur under section 10(a)(4) would pursue a policy favoring arbitration far beyond the limits expressly established by the Act itself.

As this Court has stated, the FAA "cannot be held to destroy itself." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 343 (2011). Requiring arbitration under section 4 of the FAA in a case where section 10(a)(4) would require vacatur if the arbitrators decided to hear the case would read the FAA to require a quixotic and counterproductive act that runs directly contrary to the FAA's objective of providing "efficient, streamlined procedures tailored to the type of dispute." *Id*. at 344.

II. Compelling arbitration of a groundless claim of arbitrability would be contrary to the principle that FAA arbitration is a matter of consent.

Not only would reading the FAA to require arbitration of wholly groundless claims of arbitrability make nonsense of the Act, but it would do nothing to advance—would, indeed, contradict—the FAA's actual "proarbitration" policy. As this Court has explained:

> [T]his "policy" is merely an acknowledgment of the FAA's commitment to "overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts." *Volt* [*Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ.*], 489 U.S. [468,] 478 [(1989)] (internal quotation marks and citations omitted). Accordingly, we have never held that this policy overrides the principle that a court may submit to arbitration "only those disputes ... that the parties have agreed to submit." *First Options*, 514 U.S., at 943; see also *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995) ("[T]he FAA's proarbitration policy does not operate without regard to the wishes of the contracting parties") ….

Granite Rock Co. v. Int'l B'hood of Teamsters, 561 U.S. 287, 302 (2010).

Declining to compel arbitration of matters that the parties have excluded from arbitration so unequivocally that any argument for arbitrating them is wholly groundless is fully consistent with the FAA's core principle that "[a]rbitration is strictly 'a matter of consent.'" *Id.* at 299 (quoting *Volt*, 489 U.S. at 479). Indeed, under ordinary circumstances, the FAA's

requirements prohibit courts from ordering arbitration of issues that they independently determine to fall outside the scope of arbitration. *See id*. at 299–300; *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002); *First Options*, 514 U.S. at 943.

The Court has recognized an exception to this rule for cases where the parties have clearly and unmistakably agreed to delegate questions of arbitrability to the arbitrators. *See Rent-A-Center*, 561 U.S. at 69 n.1; *Howsam*, 537 U.S. at 83; *First Options*, 514 U.S. at 944–45. The Court, however, has carefully limited the circumstances in which arbitration of arbitrability is required to those where the parties' agreement is clear and unmistakable—a standard that this Court has said "reverses" the ordinary "presumption" that disputes arguably within the scope of an arbitration agreement are arbitrable. *First Options*, 514 U.S. at 945. This limitation reflects the Court's recognition that agreements in which "arbitrators decide the scope of their own powers" are outside the normal expectations of the parties and that enforcing them too readily risks "too often forc[ing] unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide." *Id*. at 945; *see also Howsam*, 537 U.S. at 83–84 (describing the issues subject to *First Options*' clear-and-unmistakable standard as ones "where reference of the gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate").

These same considerations remain present even when parties have, or assertedly have, agreed to allow the arbitrators to determine the scope of their

authority under an arbitration agreement.[2] The reasonable expectation of parties to such an agreement is that they have agreed to allow the arbitrators to decide *arguable* questions as to the arbitrability of particular matters, not that they have consented to allow the arbitrators to consider *wholly groundless* assertions that they may decide a dispute under the parties' agreement. In particular, where the parties have expressly agreed to deny the arbitrators authority over a specific type of dispute (as they did here with respect to actions seeking injunctive relief), "one naturally would think that they did *not* want the arbitrators" to consider grabbing the power to decide such matters without any basis in the contract. *First Options*, 514 U.S. at 946. Declining to compel arbitration of wholly groundless claims of arbitrability respects rather than frustrates the reasonable expectations of the parties.

The assertion that courts should compel parties to take any wholly groundless action is an unusual one requiring an unusually powerful justification. The FAA provides no such justification. Read as a whole, its provisions foreclose rather than require orders compelling parties to arbitrate wholly groundless assertions that a dispute is arbitrable.

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[2] Again, whether the parties here agreed to arbitrate the question of arbitrability at issue remains disputed, was not resolved below, and is not included in the question presented here.

CONCLUSION

The Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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