

No. 19-963

**In The
Supreme Court of the United States**

————— ◆ —————
HENRY SCHEIN, INC.,

Petitioner,

v.

ARCHER AND WHITE SALES, INC.,

Respondent.

————— ◆ —————
**On a Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit**

————— ◆ —————
**BRIEF OF *AMICUS CURIAE*
DRI—THE VOICE OF THE DEFENSE BAR
IN SUPPORT OF PETITIONER**

DRI—THE VOICE OF THE
DEFENSE BAR
PHILIP L. WILLMAN
222 South Riverside Plaza,
Ste. 1870
Chicago, IL 60606
(312) 795-1101
pwillman@bjpc.com

HORVITZ & LEVY LLP
DAVID M. AXELRAD
(Counsel of Record)
FELIX SHAFIR
JOHN F. QUERIO
3601 W. Olive Ave., 8th Fl.
Burbank, CA 91505
(818) 995-0800
daxelrad@horvitzlevy.com

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF <i>AMICUS CURIAE</i>	1
SUMMARY OF ARGUMENT.....	2
ARGUMENT	5
I. ARBITRABILITY DELEGATION CLAUSES FURTHER THE FEDERAL ARBITRATION ACT'S GOAL OF EFFICIENT DISPUTE RESOLUTION.	5
A. One of the FAA's principal goals is streamlined dispute resolution.	5
B. Delegating disputes over arbitrability to the arbitrator is a common method of streamlining dispute resolution.	6
II. WHERE AN ARBITRATION AGREEMENT CLEARLY AND UNMISTAKABLY DELEGATES ARBITRABILITY DISPUTES TO THE ARBITRATOR, CARVE-OUT LANGUAGE GOVERNING THE ARBITRABILITY OF PARTICULAR TYPES OF CLAIMS ARE FOR THE ARBITRATOR TO INTERPRET.	9

A. A court may not decide arbitrability in interpreting and applying an arbitrability delegation clause.....9

B. Carve-out language in an arbitration clause governs whether particular claims are arbitrable, not who should decide arbitrability, and therefore has no bearing on the who decides arbitrability question.....11

III. THE FIFTH CIRCUIT'S RULE WOULD IMPAIR THE SPEED AND EFFICIENCY OF ARBITRATION AS ENVISIONED BY THE FAA.....13

CONCLUSION.....16

TABLE OF AUTHORITIES

Page(s)

Cases

<i>AT&T Mobility LLC v. Concepcion</i> , 563 U.S. 333 (2011).....	2, 5, 13
<i>AT&T Techs., Inc. v. Commc'ns Workers of Am.</i> , 475 U.S. 643 (1986).....	3
<i>First Options of Chi., Inc. v. Kaplan</i> , 514 U.S. 938 (1995).....	3, 6, 7
<i>Green Tree Fin. Corp. v. Bazzle</i> , 539 U.S. 444 (2003).....	3
<i>Henry Schein, Inc. v. Archer & White Sales, Inc.</i> , 139 S. Ct. 524 (2019).....	<i>passim</i>
<i>Howsam v. Dean Witter Reynolds, Inc.</i> , 537 U.S. 79 (2002).....	3, 6
<i>Lamps Plus, Inc. v. Varela</i> , 139 S. Ct. 1407 (2019).....	5
<i>Rent-A-Center, W., Inc. v. Jackson</i> , 561 U.S. 63 (2010).....	<i>passim</i>
<i>Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.</i> , 559 U.S. 662 (2010).....	3
<i>United Steelworkers of Am. v. Warrior & Gulf Navigation Co.</i> , 363 U.S. 574 (1960).....	3

Statutes

9 U.S.C. § 16 (2018).....14
9 U.S.C. § 16(a)(1)(B) (2018).....14
9 U.S.C. § 16(b)(2) (2018).....14

Miscellaneous

Christopher R. Drahozal & Erin O’Hara
O’Connor, *Unbundling Procedure:
Carve-Outs from Arbitration Clauses*,
66 Fla. L. Rev. 1945 (2014).....9

David Horton, *Arbitration About Arbitration*,
70 Stan. L. Rev. 363 (2018)7, 8

Philip J. Loree, Jr., *Schein’s Remand
Decision Goes Back to the Supreme
Court. What’s Next?*, 38 Alternatives
to High Cost Litig. 54 (2020)8, 9

INTEREST OF *AMICUS CURIAE*¹

Amicus curiae DRI—the Voice of the Defense Bar (DRI) is an international organization that includes more than 22,000 members involved in the defense of civil litigation. DRI’s mission includes enhancing the skills, effectiveness, and professionalism of defense lawyers, promoting appreciation of the role of defense lawyers in the civil justice system, and anticipating and addressing substantive and procedural issues germane to defense lawyers and the fairness of the civil justice system. DRI has long been a voice in the ongoing effort to make the civil justice system more fair and efficient. To that end, DRI regularly participates as *amicus curiae* in cases that raise issues of vital concern to its members, their clients, and the judicial system.

This case is of significant interest to DRI because its members frequently represent clients seeking to compel arbitration under the Federal Arbitration Act (FAA) pursuant to arbitration clauses that contain provisions delegating the decision about whether a lawsuit’s claims are arbitrable to the arbitrator. As the history of this case shows, such delegation clauses can generate protracted litigation about the proper roles of a court and an arbitrator in relation to the arbitrability of the dispute. This is

¹ This brief was authored by *amicus curiae* and its counsel listed on the front cover, and was not authored in whole or in part by counsel for a party. No one other than *amicus curiae*, its members, or its counsel has made any monetary contribution to the preparation or submission of this brief. All parties provided written consent to the filing of *amicus curiae* briefs, and this written consent is on file with this Court.

particularly the case in the common circumstance where an arbitration clause contains language carving out certain disputes from arbitration and reserving them for adjudication in court. Clear ground rules governing the interpretation of arbitrability delegation clauses and the interaction of such clauses with arbitration carve-out provisions are therefore required to guide parties in drafting arbitration clauses going forward and to avoid unnecessary litigation battles over the meaning of such language in the future.

DRI and its members seek uniform application of the FAA across the nation in order to ensure that arbitration can achieve its basic purpose of resolving disputes efficiently, predictably, and at minimal cost. In service of those goals, DRI submits the accompanying *amicus curiae* brief in support of petitioner Henry Schein, Inc., arguing that the decision of the Fifth Circuit in this case should be vacated.



SUMMARY OF ARGUMENT

“The overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings.” *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011). This case addresses one common method that parties use to achieve efficient and cost-effective dispute resolution in arbitration, namely delegation of preliminary disputes about arbitrability to the arbitrator.

While arbitration agreements typically assign the resolution of particular types of claims to

arbitration, disputes between parties to arbitration agreements often arise regarding “whether the parties are bound by a given arbitration clause” or “whether an arbitration clause in a concededly binding contract applies to a particular type of controversy.” *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002). While such arbitrability disputes are presumptively for a court to decide, this Court has repeatedly held that the parties may delegate such arbitrability questions to the arbitrator as long as they manifest their intent to do so with clear and unmistakable evidence. See *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 527, 530 (2019); *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 68-69 (2010); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 451-53 (2003) (plurality opinion), *holding limited by Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 680 (2010); *Howsam*, 537 U.S. at 83-84; *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995); *AT&T Techs., Inc. v. Commc’ns Workers of Am.*, 475 U.S. 643, 649 (1986); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 583 n.7 (1960).

Parties often include such arbitrability delegation clauses in their arbitration agreements to enhance the efficiency and cost-effectiveness of the arbitration process by allowing arbitrators to make a quick decision regarding arbitrability without the need for protracted litigation in court about such threshold issues. In this way, delegation clauses further the FAA’s aim of ensuring streamlined dispute resolution in accordance with the parties’ agreement.

In its prior opinion in this case, this Court held an agreement to delegate arbitrability issues to the arbitrator “is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other.” *Henry Schein*, 139 S. Ct. at 529 (quoting *Rent-A-Center*, 561 U.S. at 70). Accordingly, “[w]hen the parties’ contract delegates the arbitrability question to an arbitrator, . . . a court possesses no power to decide the arbitrability issue.” *Id.* “Just as a court may not decide a merits question that the parties have delegated to an arbitrator, a court may not decide an arbitrability question that the parties have delegated to an arbitrator.” *Id.* at 530.

In the opinion below, the Fifth Circuit ran afoul of this principle. That court refused to honor the parties’ arbitrability delegation clause in this case, holding that language carving out certain categories of disputes from the scope of arbitrable issues negated the parties’ delegation of arbitrability to the arbitrator altogether. Pet. App. 11a-12a. The Fifth Circuit thus proceeded to decide arbitrability for itself, in violation of the parties’ agreement. That holding “confuse[d] the question of who decides arbitrability with the separate question of who prevails on arbitrability.” *Henry Schein*, 139 S. Ct. at 531.

Accordingly, this Court should vacate the judgment of the Fifth Circuit and send a clear message that the FAA requires that arbitrability delegation clauses be enforced without regard to whether a court thinks the particular dispute at issue is arbitrable.



ARGUMENT

- I. **Arbitrability delegation clauses further the Federal Arbitration Act’s goal of efficient dispute resolution.**
 - A. **One of the FAA’s principal goals is streamlined dispute resolution.**

“The overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings.” *Concepcion*, 563 U.S. at 344. “In individual arbitration, ‘parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes.’” *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1416 (2019) (citation omitted).

The FAA accomplishes its goal of streamlined dispute resolution by affording the parties discretion to craft arbitration procedures as they see fit. “The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute.” *Concepcion*, 563 U.S. at 344. “It can be specified, for example, that the decisionmaker be a specialist in the relevant field, or that proceedings be kept confidential to protect trade secrets. And the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution.” *Id.* at 344-45.

B. Delegating disputes over arbitrability to the arbitrator is a common method of streamlining dispute resolution.

One oft-encountered option for making arbitration more efficient and less expensive is to delegate to the arbitrator the resolution of disputes about the arbitrability of a lawsuit. To understand why, it helps to conceptualize the different types and levels of disputes that can arise in the arbitration context.

At the first level is the parties' disagreement about the merits of their claims. At the next level, the parties sometimes disagree about whether they agreed to arbitrate the merits (that is, whether the dispute is arbitrable), which encompasses the questions of whether there is a binding arbitration agreement at all, and if so, whether that agreement applies to the particular dispute at issue. At the highest level, the parties may also disagree about who has the power to decide the arbitrability of the dispute. See *Henry Schein*, 139 S. Ct. at 527 (explaining these distinctions); *First Options*, 514 U.S. at 942 (same); see also *Howsam*, 537 U.S. at 84 (explaining the two inquiries that fall under the rubric of a "question of arbitrability" (citation omitted)). When parties include a delegation clause in their arbitration agreement, they address the third type of dispute by agreeing that the arbitrator has the power to decide the arbitrability of any dispute arising between them.

Under the FAA, "the question of who decides arbitrability is itself a question of contract. The [FAA] allows parties to agree by contract that an arbitrator,

rather than a court, will resolve threshold arbitrability questions as well as underlying merits disputes.” *Henry Schein*, 139 S. Ct. at 527; see *Rent-A-Center*, 561 U.S. at 68-70; *First Options*, 514 U.S. at 943-44. While “courts ‘should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so,’” *Henry Schein*, 139 S. Ct. at 531 (quoting *First Options*, 514 U.S. at 944), “[w]hen the parties’ contract delegates the arbitrability question to an arbitrator, the courts must respect the parties’ decision as embodied in the contract,” *id.*

It has been recognized for some time that arbitrability delegation clauses in arbitration agreements are powerful tools to enhance the efficiency and cost-effectiveness of the arbitration process. In many European countries, the default rule has been that arbitrators have the power to determine the scope of their own jurisdiction in the first instance. David Horton, *Arbitration About Arbitration*, 70 *Stan. L. Rev.* 363, 382 (2018). “This straight-to-arbitration pipeline prevented parties from exploiting their right to a judicial forum to thwart the streamlined private dispute resolution process.” *Id.* Delegating arbitrability to the arbitrator also “gained a foothold in the field of labor arbitration in the mid-twentieth century” because “it sometimes made sense to allow the parties to ‘economize time and effort’ by asking the arbitrators to say whether an arbitration clause covered a particular grievance.” *Id.* at 382-83 (citations omitted).

More recently, delegation clauses have proliferated in this country outside the labor relations

context. *See id.* at 393; *see also* Philip J. Loree, Jr., Schein’s *Remand Decision Goes Back to the Supreme Court. What’s Next?*, 38 *Alternatives to High Cost Litig.* 54, 68 (2020). Parties increasingly recognize the efficiency gains reaped when arbitrability disputes are delegated to an arbitrator. Such an arrangement allows the arbitrator to quickly and informally decide whether the parties agreed to arbitration and whether a given dispute falls within the scope of an arbitration agreement, without the need to resort to lengthy proceedings in court in order to decide a dispute’s arbitrability.

One efficient way that parties (like those involved in this case) include such delegation clauses in their arbitration agreements is by incorporating the rules of an arbitration provider organization that accords the arbitrator the power to decide arbitrability disputes. *See* Loree, *supra*, at 68; *see also* *Henry Schein*, 139 S. Ct. at 528 (“The rules of the American Arbitration Association provide that arbitrators have the power to resolve arbitrability questions.”); Pet. App. 7a (“Under AAA Rule 7(a), [t]he arbitrator shall have 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.”). That is what the parties did here.

While parties frequently seek to streamline arbitration proceedings to increase efficiency and cost-effectiveness, they also commonly carve out certain types of claims from the scope of arbitrable disputes in order to customize and better tailor the dispute resolution process to their particular business

needs. Christopher R. Drahozal & Erin O’Hara O’Connor, *Unbundling Procedure: Carve-Outs from Arbitration Clauses*, 66 Fla. L. Rev. 1945, 1949-50 (2014); Loree, *supra*, at 68 (“Carve-out provisions are commonplace, and so is incorporation of provider rules requiring arbitration of arbitrability disputes.”). It is the interaction of arbitrability delegation clauses and carve-out provisions that gives rise to the question presented in this case.

- II. Where an arbitration agreement clearly and unmistakably delegates arbitrability disputes to the arbitrator, carve-out language governing the arbitrability of particular types of claims are for the arbitrator to interpret.**
- A. A court may not decide arbitrability in interpreting and applying an arbitrability delegation clause.**

Under the FAA, “parties may agree to have an arbitrator decide not only the merits of a particular dispute but also “gateway” questions of “arbitrability,” such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy.” *Henry Schein*, 139 S. Ct. at 529 (quoting *Rent-A-Center*, 561 U.S. at 68-69). Such “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.” *Id.* (quoting *Rent-A-Center*, 561 U.S. at 70).

Thus, an arbitrability delegation clause is separable from the rest of the arbitration agreement of which it forms a part, just as an arbitration clause is separable from the larger agreement of which it forms a part. *See id.*; *Rent-A-Center*, 561 U.S. at 68-72. The validity and enforceability of an arbitrability delegation clause must therefore be examined apart from the rest of the arbitration clause, and the question of who decides a dispute's arbitrability is accordingly unaffected by the arbitrability issue itself. In other words, an argument that an arbitration clause is inapplicable to a particular merits dispute must still be decided by the arbitrator pursuant to the delegation clause. "When the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract. In those circumstances, a court possesses no power to decide the arbitrability issue." *Henry Schein*, 139 S. Ct. at 529.

This rule is rooted in the established arbitration principle that "a court may not 'rule on the potential merits of the underlying' claim that is assigned by contract to an arbitrator" "because the "agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious."” *Id.* (citations omitted). "That . . . principle applies with equal force to the threshold issue of arbitrability. Just as a court may not decide a merits question that the parties have delegated to an arbitrator, a court may not decide an arbitrability question that the parties have delegated to an arbitrator." *Id.* at 530. To do so "confuses the question of who decides arbitrability with the

separate question of who prevails on arbitrability.” *Id.* at 531.

B. Carve-out language in an arbitration clause governs whether particular claims are arbitrable, not who should decide arbitrability, and therefore has no bearing on the who decides arbitrability question.

In the decision under review, the Fifth Circuit fell into the trap of “confus[ing] the question of who decides arbitrability with the separate question of who prevails on arbitrability.” *Henry Schein*, 139 S. Ct. at 531. The carve-out language on which the Fifth Circuit relied pertains to arbitrability and does not affect the delegation of arbitrability issues to the arbitrator. See Pet. App. 3a.

Carve-out language in an arbitration agreement generally excludes certain types of claims, actions, or particular remedies from the scope of arbitration. The carve-out in this case is fairly typical, excluding intellectual property, trademark, and trade secret disputes, as well as suits seeking injunctive relief, from the scope of arbitration. *Id.* Such carve-outs pertain entirely to arbitrability because they address “whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy.” *Henry Schein*, 139 S. Ct. at 529 (quoting *Rent-A-Center*, 561 U.S. at 68-69).

In the experience of DRI and its many members who regularly litigate questions under the FAA, carve-outs generally do not address the separate and distinct question of who decides arbitrability, an issue addressed by the American Arbitration Association

rules that are incorporated into the arbitration agreement here. Pet. App. 3a (arbitration clause incorporating AAA rules), 7a (quoting AAA Rule 7(a) which delegates arbitrability disputes to the arbitrator to decide).

Thus, the arbitration agreement at issue here contained a delegation of arbitrability issues to the arbitrator and a substantive carve-out from the scope of arbitrable issues. The Fifth Circuit ignored the delegation and read the carve-out language as excluding suits for injunctive relief from both the scope of arbitrable issues and the delegation of arbitrability to the arbitrator. Pet. App. 5a-12a. In doing so, the Fifth Circuit erroneously conflated “the question of who decides arbitrability with the separate question of who prevails on arbitrability,” *Henry Schein*, 139 S. Ct. at 531, as demonstrated by the fact that it proceeded to engage in practically the same analysis in deciding the arbitrability issue itself, Pet. App. 12a-16a. The Fifth Circuit’s holding contravenes this Court’s clear holdings in *Henry Schein* and *Rent-A-Center*.

Furthermore, the Fifth Circuit’s rule would render this Court’s prior opinion in *Henry Schein* largely a dead letter by allowing lower courts to do an end-run around the rule that parties can delegate arbitrability issues to the arbitrator. In its prior opinion, this Court rejected the so-called “wholly groundless” exception to that rule, holding that a court faced with an arbitration agreement delegating arbitrability disputes to the arbitrator may not decide arbitrability itself even in circumstances where it finds the argument for arbitrability wholly groundless (i.e., virtually frivolous). *Henry Schein*,

139 S. Ct. at 527-28. If the Fifth Circuit’s holding on remand is correct, there was no need for lower courts to have created a “wholly groundless” exception to the rule that parties may delegate arbitrability to the arbitrator. A court could just as easily refuse to enforce a delegation clause by relying on a carve-out, whether that reading was “wholly groundless” or not. Replacing a “wholly groundless” exception to the enforceability of arbitrability delegation clauses with a much broader and easy-to-satisfy exception is surely not what this Court intended to accomplish in its prior opinion in *Henry Schein*.

III. The Fifth Circuit’s rule would impair the speed and efficiency of arbitration as envisioned by the FAA.

The Fifth Circuit’s rule would not only allow courts to easily evade the enforceability of arbitrability delegation clauses; it would also significantly slow the determination of a dispute’s arbitrability—the opposite of the streamlined process intended by the Congress that enacted the FAA. See *Concepcion*, 563 U.S. at 344-46. To understand why this is so, it helps to conceptualize why Henry Schein, Inc.’s position maximizes efficiency while remaining faithful to the parties’ intent in including a delegation clause in their arbitration agreement.

Henry Schein, Inc.’s position is that, once clear and unmistakable evidence of the parties’ intent to delegate arbitrability to the arbitrator is found, the FAA’s general presumption in favor of arbitrability applies to the delegation clause, such that any disputes about arbitrability (including the effect of

any carve-out language in the arbitration agreement) are for the arbitrator to decide. Pet'r's Br. 16-18. Under this view, the FAA will encourage parties acting in good faith to proceed directly to arbitration of any arbitrability dispute in the event of any ambiguity in the application of a carve-out. At that point, if the arbitrator finds the parties' dispute not arbitrable, the plaintiff can simply go to court.

This is far more efficient than allowing the plaintiff to go first to court only to be ordered to arbitrate arbitrability. But even in that scenario where a plaintiff ignores its obligations under an arbitrability delegation clause, the FAA helps enhance streamlined dispute resolution because of the way Congress structured appellate jurisdiction of district court orders respecting arbitration. See 9 U.S.C. § 16 (2018). Orders denying motions to compel arbitration (including arbitration of arbitrability pursuant to a delegation clause) are immediately appealable, *id.* § 16(a)(1)(B), whereas orders compelling arbitration (including arbitration of arbitrability pursuant to a delegation clause) are not appealable, *id.* § 16(b)(2). Thus, the party opposing arbitration may not appeal a district court order enforcing a delegation clause and compelling arbitration of arbitrability; instead, that party must proceed before the arbitrator, who can then quickly and efficiently decide the arbitrability issue and either proceed to the merits of the dispute (upon deciding the dispute is arbitrable) or send the case back to court (upon deciding the dispute is not arbitrable). In this way, the FAA's goals of efficient and cost-effective dispute resolution are still well-served.

Now consider what would happen were the Fifth Circuit's rule to become the law of the land. A district court presented with a motion to compel arbitration of arbitrability pursuant to a delegation clause would effectively decide arbitrability for itself in order to decide whether to send the same arbitrability issue to the arbitrator for decision, at least where (as is almost always the case) the arbitration opponent could muster a plausible argument that the arbitration agreement's language carves out certain issues from the scope of arbitrability. This alone is hardly the streamlined dispute resolution process the FAA contemplates, but it gets worse. If the district court refuses to compel arbitration of arbitrability, the arbitration proponent can immediately appeal that ruling, leading to years of litigation over who should decide arbitrability. This would utterly defeat the purpose of the FAA to ensure streamlined proceedings.

Such concerns are far from theoretical, as shown by this very case. Plaintiff Archer and White Sales, Inc. filed this lawsuit back in August 2012, meaning that this case is now entering its ninth year and the issue of who should decide arbitrability has yet to be settled. Pet. App. 1a, 3a, 19a. After a magistrate judge granted defendant Henry Schein, Inc.'s motion to compel arbitration of arbitrability in May 2013, Pet. App. 37a-41a, the district court reversed and denied the motion to compel arbitration three years later in December 2016, Pet. App. 17a-36a. Henry Schein, Inc. appealed, the Fifth Circuit affirmed the district court's ruling in 2017, Pet. App. 2a & n.1, and this Court reversed the Fifth Circuit in January 2019, *Henry Schein*,

139 S. Ct. 524. On remand, the Fifth Circuit again affirmed the district court's refusal to compel arbitration in August 2019, Pet. App. 1a-16a, and the case has now returned to this Court. This case thus demonstrates in microcosm the threat posed to streamlined proceedings where courts are free to disregard arbitrability delegation clauses, as the Fifth Circuit's rule allows.



CONCLUSION

For the foregoing reasons and for the reasons stated in petitioner Henry Schein, Inc.'s brief on the merits, this Court should vacate the Fifth Circuit's decision and remand for further proceedings consistent with this Court's opinion.

Respectfully submitted,

DRI-THE VOICE OF	HORVITZ & LEVY LLP
THE DEFENSE BAR	DAVID M. AXELRAD
PHILIP L. WILLMAN	<i>(Counsel of Record)</i>
222 S. Riverside Plaza,	FELIX SHAFIR
Suite 1870	JOHN F. QUERIO
Chicago, IL 60606	3601 W. Olive Avenue,
(312) 795-1101	8th Floor
pwillman@bjpc.com	Burbank, CA 91505
	(818) 995-0800
	daxelrad@horvitzlevy.com

Counsel for Amicus Curiae
DRI-The Voice of the Defense Bar

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