

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 HENRY SCHEIN, INC., ET AL.,)

4 Petitioners,)

5 v.) No. 17-1272

6 ARCHER AND WHITE SALES, INC.,)

7 Respondent.)

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10 Washington, D.C.

11 Monday, October 29, 2018

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13 The above-entitled matter came on for
14 oral argument before the Supreme Court of the
15 United States at 10:06 a.m.

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17 APPEARANCES:

18 KANNON K. SHANMUGAM, ESQ., Washington, D.C.; on
19 behalf of the Petitioners.

20 DANIEL L. GEYSER, ESQ., Dallas, Texas; on behalf
21 of the Respondent.

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P R O C E E D I N G S

(10:06 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 17-1272, Schein versus Archer and White Sales.

Mr. Shanmugam.

ORAL ARGUMENT OF KANNON K. SHANMUGAM
ON BEHALF OF THE PETITIONERS

MR. SHANMUGAM: Thank you, Mr. Chief Justice, and may it please the Court:

The Federal Arbitration Act requires courts to enforce arbitration agreements according to their terms. This case involves a straightforward application of that principle in the context of arbitrability, specifically where the parties have agreed to delegate to the arbitrator the authority to decide whether claims are subject to arbitration.

Where the parties have so agreed, the Arbitration Act requires a court to honor that agreement. A court does not have the power to decide the issue of arbitrability for itself and to short-circuit the arbitrator's ability to do so.

JUSTICE GINSBURG: Mr. Shanmugam, can

1 we back up and have you explain why we even get
2 to a question, the question presented, because
3 Schein has no arbitration agreement with
4 Archer, so how -- what is this agreement? It's
5 not between Archer and Schein. How does Schein
6 get to claim the benefit of an agreement Schein
7 did not make?

8 MR. SHANMUGAM: Justice Ginsburg,
9 there is a question in the case concerning
10 non-parties. The agreements in question are
11 agreements with some of the defendants, not all
12 of them.

13 And so, therefore, as to the
14 non-signatory defendants, there is a question
15 reserved by the court of appeals about the
16 doctrine of equitable estoppel, and that would
17 be an issue for the court of appeals to address
18 on remand if this Court agrees with us on the
19 question presented. That is obviously a
20 discrete issue, not reached by the court of
21 appeals in the decision below, and, again, an
22 issue that would be open on remand.

23 But, on the question presented, I
24 think our submission is quite straightforward.
25 The "wholly groundless" exception on which the

1 court of appeals relied has no footing in the
2 text of the Arbitration Act. Where the parties
3 have agreed to delegate the issue of
4 arbitrability to the arbitrator, the merits of
5 that issue are for the arbitrator and wholly
6 for the arbitrator to decide.

7 Sections 2, 3, and 4 of the
8 Arbitration Act all point in the same
9 direction: Where you have a valid delegation,
10 that is treated, as this Court has indicated,
11 like an antecedent agreement to arbitrate, and
12 all there is for a court to do is to determine,
13 first, that that provision is itself valid and,
14 second, to determine whether the opposing party
15 is, in fact, resisting the enforcement of that
16 provision.

17 JUSTICE ALITO: How do we take this --

18 CHIEF JUSTICE ROBERTS: I'm not sure
19 your answer to Justice Ginsburg is totally
20 responsive. The -- the question of whether or
21 not there is a valid arbitration agreement
22 between the parties is antecedent to an order
23 compelling arbitration. The court makes that
24 decision.

25 And I wonder why this isn't a -- a

1 similar question. I mean, your friend on the
2 other side makes the argument that, well,
3 parties would not have agreed to submit wholly
4 groundless questions to the arbitrator. And so
5 you should seek -- treat it as the same type of
6 question.

7 MR. SHANMUGAM: So, Mr. Chief Justice,
8 I think there are two parts to your question.
9 First, to pick up on my response to Justice
10 Ginsburg, we are certainly not disputing that
11 the issue of equitable estoppel, the issue of
12 which parties are bound, is an issue that goes
13 to validity. It's an issue for the court to
14 decide.

15 So, again, on remand, that would be a
16 question for the court of appeals in the first
17 instance. The court of appeals explicitly did
18 not reach that question because of its holding
19 on the "wholly groundless" exception. It said
20 that the -- a -- a requirement that
21 arbitrability goes to the arbitrator was not
22 enforceable as to anyone, even as to the
23 signatories to the agreement.

24 I think, as to the second part of your
25 question, again, we think that the question of

1 whether or not there is a valid agreement more
2 generally is a question for the court. And so,
3 if, for instance, there were some question
4 about the validity of the delegation provision,
5 say a question about whether the delegation
6 provision is itself unconscionable, that would
7 again be a question for the court to decide.

8 But I think that, on the issue of
9 arbitrability, this Court has said time and
10 again, most recently in the First Options case,
11 that arbitrability can be delegated where there
12 is a sufficiently clear delegation, and once
13 the issue is delegated, it is for the
14 arbitrator.

15 JUSTICE ALITO: Well the question --

16 JUSTICE GINSBURG: But clear -- clear
17 and unmistakable delegation, why can't it be
18 both; that is, that the arbitrator has this
19 authority to decide questions of arbitrability,
20 but it is not exclusive of the court?

21 We have one brief saying that that is
22 indeed the position that the Restatement has
23 taken.

24 MR. SHANMUGAM: So all of the courts
25 of appeals to have considered the issue have

1 held that this type of incorporated delegation
2 meets this Court's requirements, and let me
3 explain why that's true, even though, again,
4 that's an issue outside the scope of the
5 question presented. We certainly think it
6 would be appropriate for this Court to provide
7 guidance on that issue, but the Court certainly
8 does not have to reach it if it so chooses.

9 What is going on in this case, if you
10 look at the four corners of the delegation --
11 of -- of the arbitration agreement -- and I
12 would point the Court in particular to page 58
13 of the Joint Appendix or to page 8 of our
14 brief -- is that the arbitration agreement by
15 its terms incorporates the rules of the
16 American Arbitration Association and it does so
17 very clearly. That is a quite common
18 arrangement, particularly in commercial
19 arbitrations like the one at issue here.

20 Then, if you take a look at the rules
21 of the American Arbitration Association, those
22 rules, and, in particular, Rule 7(a), clearly
23 give the arbitrator the authority to decide
24 arbitrability.

25 And under this Court's decision in

1 First Options, the relevant inquiry is whether
2 or not the parties were willing to be bound by
3 the arbitrator's determination on the issue in
4 question.

5 And so, with all due respect to
6 Professor Bermann in his amicus brief, the
7 position that he propounds has been rejected by
8 every court of appeals to have considered this
9 issue. And if the Court has any interest in
10 this issue, I would refer the Court to the very
11 thoughtful opinion of the Tenth Circuit in the
12 Belnap case, which discusses this issue in some
13 detail.

14 Again, the Fifth Circuit, in the
15 decision under review, ultimately did not
16 decide that question. It did discuss that
17 question, and I would respectfully submit that
18 its discussion on that issue was somewhat
19 confused.

20 The Fifth Circuit seemed to think that
21 because there was a substantive carve-out from
22 the scope of arbitration here, that's the very
23 carve-out that's in dispute for actions for
24 injunctive relief, that that -- that somehow
25 had a bearing on the validity of the delegation

1 here.

2 But I think with all due respect --

3 JUSTICE GINSBURG: But the district
4 court -- the district court made -- decided on
5 alternative grounds, and wasn't the district
6 court's first decision that this contract did
7 not have a sufficiently clear and unmistakable
8 delegation?

9 MR. SHANMUGAM: Yes, that is correct.
10 And the Fifth Circuit then discussed the issue
11 but ultimately did not rest on it. And once
12 again, this is a discrete question. It's
13 outside the scope of the question presented.

14 But I would respectfully submit that I
15 think that the law on this issue is quite clear
16 and that, in particular, to the extent that the
17 district court discussed this issue, Justice
18 Ginsburg, its reliance and Respondent's
19 reliance on the substantive carve-out cannot be
20 correct.

21 In other words, the Respondent's
22 submission below, and really, I think,
23 Respondent's only submission on this issue was
24 that because there is a carve-out from the
25 scope of arbitration, that somehow defeats the

1 incorporation of the AAA rules, which provide
2 that arbitrability can be decided by the
3 arbitrator.

4 But that is the very issue that the
5 parties agreed for the arbitrator to decide.
6 And I think it would improperly conflate the
7 question of what is subject to arbitration --

8 JUSTICE SOTOMAYOR: Could I -- could
9 I --

10 MR. SHANMUGAM: -- with the question
11 of who decides to say that that defeats
12 arbitrability here.

13 JUSTICE SOTOMAYOR: You just said the
14 parties agreed to have the arbitrator decide
15 this issue.

16 Assume the Douglas -- facts of the
17 Douglas case. Plaintiff, or Petitioner, signed
18 a arbitration agreement over an account and the
19 account was closed within a year, and years
20 later sues the bank for -- for some malfeasance
21 by a -- a lawyer who took money from a
22 different account or something like it.

23 I think I'm getting the facts of
24 Douglas. And the court -- and the arbitrator
25 there improperly assumes jurisdiction. There's

1 been a delegation.

2 What are the -- what are the potential
3 outs for the party who's now been stuck in an
4 arbitration that legally is wholly groundless?

5 MR. SHANMUGAM: Sure.

6 JUSTICE SOTOMAYOR: The arbitrator
7 made a mistake.

8 MR. SHANMUGAM: So, Justice Sotomayor,
9 let me address, you know, both that and the
10 related question of what remedies are available
11 to the arbitrator and -- and to the opposing
12 party more generally in the event that a truly
13 frivolous claim of arbitrability is raised.

14 JUSTICE SOTOMAYOR: Exactly.

15 MR. SHANMUGAM: I think, to address
16 your question directly first, I think in a case
17 where an arbitrator reaches an improper
18 conclusion on arbitrability, the remedies, if
19 any, would be those provided for review of
20 arbitral decisions more generally.

21 And as this Court is well aware, there
22 is a very live dispute in the lower courts
23 about the extent to which courts can review the
24 merits of arbitrators' decisions and whether
25 they can be reviewed for a -- a -- manifest

1 disregard. That is an issue that this Court
2 has left open.

3 But I think that that would
4 potentially be available. And lower courts
5 have said that that is available where an
6 arbitrator reaches a wildly incorrect decision
7 on arbitrability.

8 I think that, to the extent that the
9 other side points to the Douglas case as sort
10 of the flagship example of a meritless claim of
11 arbitrability being raised and the dangers of
12 getting --

13 JUSTICE SOTOMAYOR: Basically, you're
14 telling me at least on the express terms of
15 enforcing an arbitration award under the
16 statute, there is no remedy for that Douglas
17 party?

18 MR. SHANMUGAM: Well, there is
19 potentially review --

20 JUSTICE SOTOMAYOR: If -- if --

21 MR. SHANMUGAM: -- for manifest
22 disregard.

23 JUSTICE SOTOMAYOR: If we -- if we
24 accept manifest disregard.

25 MR. SHANMUGAM: Yes.

1 JUSTICE SOTOMAYOR: We haven't done
2 that yet.

3 MR. SHANMUGAM: Which is to say --

4 JUSTICE SOTOMAYOR: But there's no
5 statutory provision under the Act?

6 MR. SHANMUGAM: Which is to say that
7 it's no different from review where an
8 arbitrator reaches a wildly incorrect
9 conclusion on the merits of an arbitral award.

10 In other words, arbitrability is in
11 the same bucket as any other issue that is
12 properly remitted to the arbitrator. Review --

13 JUSTICE SOTOMAYOR: Do you think that
14 --

15 MR. SHANMUGAM: -- if any, would be
16 under Section 10 of the Arbitration Act.

17 JUSTICE SOTOMAYOR: Do you think that
18 it could be the arbitrator exceeding their
19 powers?

20 MR. SHANMUGAM: Well, it could be.
21 And I think that if you look at the lower
22 courts that have reviewed arbitrability
23 determinations, some of them have located
24 review in exceeds powers in Section 10(a)(4),
25 though even those courts have engaged in pretty

1 deferential review.

2 I think, as a practical matter, it's
3 basically the same review as manifest disregard
4 review, and it certainly is not the sort of de
5 novo review that Respondent seems to
6 contemplate.

7 JUSTICE SOTOMAYOR: Can -- can you
8 understand the common sense resistance to the
9 idea that, if a party has not agreed to
10 arbitrate a particular issue because it's
11 wholly groundless, there is no way that an
12 arbitrator could in good faith and without
13 error reach a conclusion that arbitration was
14 agreed to? It seems counterintuitive to
15 believe that we're sending a party to
16 arbitration, to potentially go through the
17 expense of arbitration when something's wholly
18 groundless, and then potentially not to have an
19 avenue of relief when it comes to enforcing the
20 arbitration award.

21 MR. SHANMUGAM: Justice Sotomayor --

22 JUSTICE SOTOMAYOR: That's why -- I'm
23 sorry -- that's why I think one of the amici
24 said the courts are not understanding that, at
25 the core, this is always about have you agreed

1 to arbitrate an issue? And, if you haven't,
2 you shouldn't be forced to.

3 MR. SHANMUGAM: Justice Sotomayor, I'm
4 sorry to have interrupted, but two points in
5 response to that.

6 First, I think it's important to the
7 extent that we're talking about the parties'
8 intent to recognize that the parties intended
9 for the arbitrator to -- to decide
10 arbitrability.

11 There was no carve-out, explicit or
12 implicit, for wholly groundless claims, which
13 is to say that where, as here, you have a
14 dispute of this variety, you have one party
15 saying that the claim of arbitrability is
16 wholly groundless. You have the other party
17 saying not only is it not wholly groundless, we
18 believe we have a valid argument about the
19 construction of the carve-out.

20 The parties agreed to have the
21 arbitrator be the decision-maker. And I don't
22 think, with all due respect to Respondent, who
23 faints in this direction, that there's any way
24 to reform the incorporated delegation here to
25 create a carve-out, to create a carve-out for

1 wholly groundless claims to say that the
2 parties somehow implicitly agreed that the
3 arbitrator would decide arbitrability unless
4 the claim was somehow wholly groundless or that
5 there would be some preliminary determination
6 by the district court.

7 JUSTICE KAGAN: But why is that --

8 MR. SHANMUGAM: Now I do --

9 JUSTICE KAGAN: -- Mr. Shanmugam? I
10 mean, if you look at First Options, First
11 Options is a case where we said we're not going
12 to treat these delegation clauses in exactly
13 the same way as we treat other clauses.

14 And there was an idea that people
15 don't really think about the question of who
16 decides, and so we're going to hold parties to
17 this higher standard, the clear and
18 unmistakable intent standard.

19 And wouldn't the same kind of argument
20 be true here, that the parties never really
21 considered who was going to decide these
22 groundless claims of arbitrability, or maybe,
23 if they did consider it, they would have
24 thought that it was a pretty strange system to
25 send it to an arbitrator just so that the

1 arbitrator could send it back to the court?

2 So that we are going to -- to -- you
3 know, to -- to say that there's a special rule
4 in interpreting these kinds of clauses.

5 MR. SHANMUGAM: Justice Kagan, I -- I
6 -- there is obviously an interpretive rule that
7 requires clear and unmistakable evidence that
8 the parties intended to delegate the issue.
9 But I would respectfully submit that, once you
10 have that evidence, that rule falls out of the
11 equation.

12 And again, with --

13 JUSTICE GINSBURG: Why -- why do you
14 have the evidence? When the -- the -- the
15 model case is this Court's Rent-a-Car decision,
16 and there the -- the clause said the
17 arbitrator, not the court, has exclusive
18 authority.

19 And, here, we -- we're missing both
20 the arbitrator, to the exclusion of the court,
21 and the arbitrator has exclusive authority.
22 It's nothing like that.

23 MR. SHANMUGAM: I think, Justice
24 Ginsburg, if you take a look at page 946 of
25 this Court's opinion in First Options, it

1 focuses on the willingness of the party to be
2 bound by the arbitrator's decision.

3 And I think, with all due respect, we
4 have that here. And I think that what you --
5 what you cannot do, I would respectfully
6 submit, is to say that the parties implicitly
7 countenanced a regime where the district court
8 would make a preliminary determination.

9 With respect, Justice Kagan, I think
10 your question assumes that the claim of
11 arbitrability is wholly groundless. That is
12 the very merits dispute between the parties.

13 We believe that we have -- that the
14 claims at issue are arbitrable, and Respondent
15 disagrees with that. And, once that is true,
16 this is a merits issue for the arbitrator to
17 decide where the parties --

18 JUSTICE BREYER: What's wholly
19 groundless? What's wholly groundless? Is --
20 is he saying what's wholly groundless is the
21 claim that arbitrability is to be decided by
22 the arbitrator?

23 MR. SHANMUGAM: No. It's the claim
24 that these substantive claims are subject to --

25 JUSTICE BREYER: Substantive.

1 MR. SHANMUGAM: -- arbitration. And
2 that is an issue on which the magistrate judge
3 disagreed. The magistrate judge concluded that
4 we had a plausible construction of this
5 agreement --

6 JUSTICE BREYER: Okay. So --

7 MR. SHANMUGAM: -- but notwithstanding
8 --

9 JUSTICE BREYER: -- so you say step 1.
10 Is there clear and unmistakable evidence that
11 an arbitrator is to decide whether a particular
12 matter X is arbitrable? Is that right?

13 MR. SHANMUGAM: Yes. The --

14 JUSTICE BREYER: And step 2, the
15 answer to the first question is yes, they did
16 decide that clearly and unmistakably. And now
17 we see if, why not send it to them, or it's
18 totally groundless, we still won't send it to
19 them. That's this case, right?

20 MR. SHANMUGAM: That is the regime --

21 JUSTICE BREYER: Okay.

22 MR. SHANMUGAM: -- that Respondent --

23 JUSTICE BREYER: Okay.

24 MR. SHANMUGAM: -- is advocating here.

25 JUSTICE BREYER: Yes.

1 MR. SHANMUGAM: And I would like to
2 say a little bit about why we think that --

3 JUSTICE BREYER: Well, I have a
4 question about it.

5 MR. SHANMUGAM: Sure.

6 JUSTICE BREYER: You say when you get
7 to step 2, once we're there, now there is no
8 wholly groundless exception, go send it to the
9 arbitrator. Is that right?

10 MR. SHANMUGAM: That is correct.

11 JUSTICE BREYER: Okay. Now suppose
12 it's really weird. I mean, you want to say no
13 exception at all? He says, my claim here is a
14 Martian told me to do it. Okay?

15 (Laughter.)

16 JUSTICE BREYER: Are you saying no
17 matter what, even if he has to read the word
18 yes in the contract to mean no, never, under no
19 circumstances, is there no exception no matter
20 what?

21 MR. SHANMUGAM: Yes, and picking up on
22 Justice --

23 JUSTICE BREYER: Yes? Yes, no
24 exception no matter what?

25 MR. SHANMUGAM: There is no exception

1 no matter what, but there are remedies
2 available where a party makes a truly frivolous
3 claim.

4 JUSTICE BREYER: What?

5 MR. SHANMUGAM: First, it is agreed
6 that the arbitrator has the ability to impose a
7 wide range of sanctions on a party that is
8 making a frivolous argument. Those sanctions
9 are comparable to the sanctions that a court
10 can impose in litigation.

11 And it may also be true that a court
12 --

13 JUSTICE BREYER: The arbitrator, by
14 the way, loves Martians.

15 MR. SHANMUGAM: Well, what we contend
16 --

17 JUSTICE BREYER: So -- so what they're
18 worried about is they're going to get a bad
19 decision on this ridiculous claim.

20 MR. SHANMUGAM: But going back to the
21 very early days or the relatively early days of
22 this Court's --

23 JUSTICE BREYER: Yeah.

24 MR. SHANMUGAM: -- FAA jurisprudence,
25 this Court made clear in Shearson Lehman that

1 we presume that arbitrators are fair, impartial
2 decision-makers.

3 JUSTICE ALITO: Well, they may not --

4 JUSTICE KAGAN: Mr. Shanmugam --

5 JUSTICE ALITO: They may or may not
6 love Martians, but do you think it's fair to
7 say that they love arbitration, so they're not
8 probably very much inclined to sanction parties
9 who bring suit -- bring arbitrable disputes to
10 them?

11 MR. SHANMUGAM: They actually do have
12 specific and explicit remedies under their
13 rules for providing -- for imposing sanctions,
14 including cost and fee shifting and the like.
15 And it may very well be that after an
16 arbitrator makes his or her determination that
17 a district court would have the ability to
18 impose sanctions under Rule 11 where the
19 requirements of that rule have been met.

20 JUSTICE KAGAN: Well, how can it do
21 that? If the court can't even take a peek at
22 the arbitrability question itself, how does the
23 court all of a sudden have the power to
24 sanction a motion to compel?

25 MR. SHANMUGAM: At least before

1 remitting the issue to arbitration, I think
2 there would be a conflict between Rule 11 and
3 the Arbitration Act if a court were to make a
4 merits determination first. But I think, after
5 an arbitrator makes a determination, when the
6 parties are back before the district court, I
7 think the district court would have the ability
8 to make the determination that the petition to
9 compel arbitration was frivolous or brought in
10 bad faith.

11 JUSTICE BREYER: Now what is the
12 advantage -- what is the advantage of this?
13 Because remember step 1. Step 1 is we have to
14 decide -- court, we're a court -- we have to
15 decide whether there is a clear and
16 unmistakable commitment to have this kind of
17 matter decided in arbitration. Now, kind of
18 matter.

19 Now you would have thought if you
20 really have a Martian case, the judge would
21 have found some way not to send it, and he
22 would have said kind of matter. Well, not the
23 Martian kind of matter.

24 There's no clear and unmistakable
25 commitment to send that kind of matter. In

1 other words, if it's weird enough, you don't
2 have to get beyond step 1 because you can say
3 there's no commitment to send this kind of
4 matter. And now what's the difference between
5 that and what they did say, there's no
6 commitment to send a groundless matter?

7 MR. SHANMUGAM: But the whole point of
8 the principle that the parties can delegate
9 arbitrability to the arbitrator --

10 JUSTICE BREYER: Yes.

11 MR. SHANMUGAM: -- is that the parties
12 can make a decision about who decides and
13 where --

14 JUSTICE BREYER: No, I understand
15 that.

16 MR. SHANMUGAM: -- the parties' intent
17 is sufficiently clear that the arbitrator --

18 JUSTICE BREYER: Yes.

19 MR. SHANMUGAM: -- decides, it's --

20 JUSTICE BREYER: Well, it's never
21 sufficiently clear if the matter that they're
22 deciding to arbitrate is a Martian matter,
23 unless they really said Martians, which I don't
24 think would ever happen.

25 In other words, if it is a totally

1 ridiculous claim, shouldn't you have to find a
2 clear and definite commitment to send a wholly
3 ridiculous matter to the arbitrator?

4 MR. SHANMUGAM: That goes to the
5 merits, and wherever you set the bar, the fact
6 remains that it is still a merits
7 determination.

8 And to the extent that this Court is
9 concerned about this as a policy matter -- and
10 I would respectfully submit that there is not a
11 lot of evidence to indicate that this is a
12 problem, perhaps not surprisingly, because
13 often the defendants bear the cost of arbitral
14 proceedings -- the regime that we are
15 advocating is not only more faithful to the
16 language of the Arbitration Act --

17 JUSTICE KAVANAUGH: Well, what
18 about --

19 MR. SHANMUGAM: -- it is a much more
20 efficient regime.

21 JUSTICE KAVANAUGH: -- what about
22 Section 4 of the Act, which Respondent points
23 to as the front-end equivalent of what you
24 alluded to in response to Justice Sotomayor as
25 the back-end Section 10 review?

1 MR. SHANMUGAM: As -- as this Court
2 made clear --

3 JUSTICE KAVANAUGH: The "failure to
4 comply therewith" language in particular which
5 they focus on, what does that mean and what
6 does that do?

7 MR. SHANMUGAM: Sure. As this Court
8 made clear in Prima Paint, that language limits
9 a court's role in ruling on a petition to
10 compel arbitration to reviewing the making and
11 the performance of the agreement. And, here,
12 the relevant agreement is the agreement to
13 remit arbitrability to the arbitrator.

14 And there is a failure to comply when
15 the opposing party, the party that does not
16 want arbitration, is resisting arbitration.
17 That is all that is required.

18 JUSTICE KAVANAUGH: So what work --
19 what work does that language do?

20 MR. SHANMUGAM: All that it --

21 JUSTICE KAVANAUGH: On performance.

22 MR. SHANMUGAM: -- requires --

23 JUSTICE KAVANAUGH: I -- what -- give
24 me an example of when that would have some
25 effect, if there is one.

1 MR. SHANMUGAM: Well, I -- I think
2 that all it requires a court to do -- and this
3 is a pretty minimal function -- is to determine
4 that you have one party that wants arbitration
5 and another party that does not.

6 JUSTICE KAVANAUGH: So that -- that's
7 what I thought you'd say. And that means, in
8 essence, I think, that that language in the
9 statute does no work.

10 MR. SHANMUGAM: Well, there has to
11 still be a -- a -- a dispute, which is to say
12 you've got to have one party --

13 JUSTICE KAVANAUGH: That's covered by
14 the beginning of the Section 4, though. That
15 there's a dispute.

16 MR. SHANMUGAM: Well, I -- I don't
17 think so. I mean, I think that that is the
18 relevant -- the relevant failure to comply.

19 JUSTICE KAVANAUGH: A -- a party
20 aggrieved by the alleged failure or refusal to
21 arbitrate. I'm -- I'm just trying to figure
22 out what "failure to comply therewith" means --

23 MR. SHANMUGAM: I think both sides
24 agree that those two things are essentially
25 reenforcing, which is to say that when you have

1 a party that resists arbitration, the moving
2 party is aggrieved. And I think that
3 Respondent recognizes in a footnote in its
4 brief that "aggrieved" does no independent work
5 beyond that.

6 But I do think that the regime that
7 we're advocating is a more efficient regime
8 precisely because, under Respondent's regime, a
9 district court is supposedly making this
10 threshold determination on whether or not the
11 claim of arbitrability is wholly groundless.

12 If a district court concludes that the
13 claim is not wholly groundless, presumably, the
14 issue would then go to the arbitrator to make a
15 plenary determination on that issue, and if the
16 district court determines that the claim is
17 wholly groundless, there will be appeals as of
18 right immediately under Section 16 of the
19 Arbitration Act.

20 And that will lead to the very
21 inefficiency that we see in this case. This
22 case is certainly an outlier because it has
23 taken so long, but we are now six years down
24 the road, still litigating the issue of
25 arbitrability.

1 JUSTICE GINSBURG: But that was --
2 that was the court's -- for the court to decide
3 whether the motion was for the magistrate judge
4 to reconsider or for the district court to
5 review.

6 MR. SHANMUGAM: That explains three of
7 the six years of the delay, Justice Ginsburg.
8 But I really don't think it can be reasonably
9 disputed that if the issue of arbitrability had
10 gone to the arbitrator in the first instance,
11 as it should have, that we probably would be
12 entirely done with this case.

13 JUSTICE GORSUCH: They --

14 MR. SHANMUGAM: And, of course, our
15 fundamental submission is that there is simply
16 no footing in the text of the Arbitration Act
17 for this exception. To the extent that the
18 Court has questions about the delegation in
19 this case, that is a discrete question that the
20 Court need not reach here.

21 And so we submit that on the question
22 presented, the answer is quite simple: The FAA
23 does not permit this exception and, therefore,
24 the judgment should be vacated.

25 I'll reserve the balance of my time

1 for rebuttal.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Mr. Geysler.

5 ORAL ARGUMENT OF DANIEL L. GEYSER

6 ON BEHALF OF THE RESPONDENT

7 MR. GEYSER: Thank you, Mr. Chief
8 Justice, and may it please the Court:

9 Petitioners' position is -- is at odds
10 with the FAA's plain language and the parties'
11 obvious intent. Under Section 4 of the Federal
12 --

13 JUSTICE SOTOMAYOR: But your position
14 is contrary to Rent-A- -- Rent --
15 Rent-A-Center?

16 MR. GEYSER: I don't believe so, Your
17 Honor.

18 JUSTICE SOTOMAYOR: So explain it to
19 me, because I think Rent-A-Center said that
20 that language is limited to was there an
21 agreement between the parties and was there a
22 -- a delegation, and if there is, don't look to
23 the merits.

24 MR. GEYSER: I -- I --

25 JUSTICE SOTOMAYOR: I don't see how

1 determining whether something is wholly
2 groundless is anything but a merits
3 determination.

4 MR. GEYSER: Well, Your Honor, it's --
5 it's what type of merits determination.
6 Section 4's plain text authorizes the courts
7 and, in fact, instructs them to have a
8 gatekeeping function in looking at the merits
9 of whether there's a failure to comply with the
10 arbitration agreement.

11 It says nothing at all about the
12 failure to file a legitimate claim on the
13 merits. So it draws a -- a textual --

14 JUSTICE SOTOMAYOR: I'm sorry. Was
15 there an agreement? There was an agreement.

16 MR. GEYSER: But Rent-A-Center, again,
17 the -- what they were talking about in that
18 case is they're saying that if the underlying
19 merits is -- is frivolous, the underlying
20 merits of the case, the actual lawsuit --

21 JUSTICE SOTOMAYOR: No, Rent-A- --
22 Rent-A-Center didn't say that at all.
23 Rent-A-Center said don't look at the merits at
24 all. It didn't carve out --

25 MR. GEYSER: Well, I -- I --

1 JUSTICE SOTOMAYOR: -- a particular
2 form of the merits.

3 MR. GEYSER: Well, I don't think
4 Rent-A-Center, though, is saying that if
5 there's only one possible outcome, then you
6 should send it to the arbitrator anyway. And,
7 in fact, that would be inconsistent with what
8 this Court did in Stolt-Nielsen. In
9 Stolt-Nielsen, the parties expressly agreed
10 that the arbitrator would decide if there's
11 class arbitration.

12 And the court said the arbitrator
13 applied the wrong analysis. And it did not
14 send the case back to the arbitrator to do
15 again. It said there is only one possible
16 outcome and so proceeded to decide the issue on
17 its own.

18 And that's consistent with general
19 legal principles. If there is an absolutely
20 futile claim that makes absolutely no sense,
21 there is no conceivable possibility that the
22 arbitrator will say that this case belongs in
23 arbitration, there's not a bona fide dispute,
24 there's no point to sending it to the
25 arbitrator.

1 JUSTICE SOTOMAYOR: But doesn't --

2 JUSTICE BREYER: Well, that's the
3 problem, isn't it? That's the problem with my
4 prior suggestion. It's really what Justice
5 Sotomayor says. Once you look beyond the first
6 question, did the parties agree to send this
7 kind of dispute to arbitration, and then you
8 start getting to the second question, did they
9 mean this kind, that kind, you're really
10 deciding arbitrability and courts will decide
11 different things. Everybody will start making
12 their arbitration argument. And even though
13 it'll save time in a handful of cases, time
14 will be lost overall.

15 So read it for what it says.

16 MR. GEYSER: The --

17 JUSTICE BREYER: It hands the decision
18 to the arbitrator to make the arbitrability
19 decision. What's wrong with that?

20 MR. GEYSER: The -- there are a number
21 of problems with that, Justice Breyer. The
22 first is a textual problem. If there's no
23 chance that the arbitrator will conclude --
24 it's the Martian example -- that this case is
25 subject to arbitration, there's no possible

1 failure to comply with the arbitration
2 agreement. And that's what Section 4 says.

3 The court, before it can compel
4 arbitration, it has to conclude there's a
5 failure to comply. And if they look and there
6 is no conceivable universe where this case
7 belongs in arbitration, there's not a failure
8 to arbitrate by filing in court.

9 He -- no one agreed to that. It's
10 also inconsistent with the parties' obvious
11 intent.

12 JUSTICE ALITO: But doesn't that
13 depend on the -- the -- the nature of the --
14 the agreement as to arbitrability? What did
15 the parties agree to have the arbitrator
16 decide?

17 Suppose you have an agreement that
18 says the arbitrator has exclusive authority to
19 decide all questions of arbitrability,
20 regardless of whether the claim of
21 arbitrability has any merit whatsoever. What
22 would you say then?

23 MR. GEYSER: I -- I think that would
24 be a highly unusual agreement.

25 JUSTICE ALITO: Yeah, but what would

1 you say?

2 MR. GEYSER: If -- if the parties said
3 that, then I think you would have a failure to
4 comply with that agreement. But the reason we
5 don't see that is because no one agrees to be
6 subjected to a needless and needlessly
7 expensive gateway arbitration.

8 JUSTICE ALITO: But that's a question
9 of -- that's not the question that's before us.
10 That's the question of the interpretation of
11 the -- of this contract and the scope of what
12 was delegated to the arbitrator.

13 MR. GEYSER: Well, but the -- the
14 scope of what was delegated, the question here
15 is did the parties actually agree at the
16 outset, is there a clear and unmistakable
17 showing that they intended to have an
18 arbitrator decide a wholly groundless claim
19 that has only one possible outcome?

20 JUSTICE ALITO: Well, I thought the
21 question we agreed to take was whether there's
22 a wholly groundless exception when the parties
23 have agreed that arbitrability will be decided
24 by the arbitrator.

25 MR. GEYSER: Well, but I -- I think

1 there are two different things here, Justice
2 Alito. One is, is there a general delegation
3 clause, which, again, wasn't even found in this
4 case. It comes to the court assuming that
5 there is one.

6 And then the second is, if there is a
7 general delegation clause, such as here it is
8 incorporating the AAA rules, which, as
9 Professor Berman pointed out, is -- is a pretty
10 tenuous hook to, again, satisfy a clear and
11 unmistakable standard, did the parties when
12 they said nothing else about it really intend
13 to be subjected to frivolous arbitration
14 claims?

15 JUSTICE SOTOMAYOR: Mr. Geysler, the
16 problem is that you're taking the position here
17 that this was wholly groundless to consider a
18 mixed injunctive relief and damages claim as
19 being covered by this arbitration award.

20 The other side makes a very compelling
21 argument that, no, there's actually a ground to
22 -- to say that injunctive relief goes to the
23 court, but damages go to arbitrators.

24 And when we have mixed claims, most
25 courts will either send the matter to

1 arbitration and stay the injunctive relief
2 until the arbitration's over. If they
3 determine that both can go simultaneously, they
4 do it.

5 But there are plenty of cases with
6 mixed questions that courts handle all the
7 time. My difficulty is that I don't know where
8 to draw that line. I don't know where what's
9 wholly frivolous to you may not be to someone
10 else.

11 MR. GEYSER: Well, I --

12 JUSTICE SOTOMAYOR: And if there's
13 been a true delegation, why shouldn't that go
14 to the arbitrator?

15 Don't go to the facts of this case.
16 Let's assume a clear delegation. Because I
17 know you're making arguments about the ABA, but
18 we didn't grant cert on that.

19 MR. GEYSER: I -- I agree. Let's
20 assume a clear delegation. But let's also
21 assume a completely frivolous, baseless, maybe
22 even abusive claim because --

23 JUSTICE SOTOMAYOR: No. Are you
24 claiming -- because you're arguing that this
25 case is wholly groundless, because that's the

1 ground that arbitration was not ordered by the
2 court below.

3 This is the quintessential case where
4 most of these cases are on the margin. And
5 I've actually gone and had the library do
6 research. The number of wholly groundless
7 cases is very small.

8 MR. GEYSER: It -- it -- it is.

9 JUSTICE SOTOMAYOR: So, you know,
10 mistakes are made even by judges. So the fact
11 that the four or five arbitrators who make a
12 mistake, I don't know if that's statistically
13 different than judges making mistakes.

14 MR. GEYSER: Your -- Your Honor, the
15 wholly groundless doctrine is a very modest
16 inquiry. All -- all you need to do to satisfy
17 it, in respect to my friend, it is not asking
18 the court to decide the arbitrability
19 determination. It's asking them to decide is
20 there a dispute over arbitrability, a bona fide
21 dispute? Is it -- is --

22 JUSTICE GINSBURG: But the court has
23 to decide wholly groundless. So where do you
24 draw the line between merely incorrect,
25 groundless, wholly groundless?

1 JUSTICE GORSUCH: Good question.

2 MR. GEYSER: I -- I think the -- where
3 the line is drawn is where the courts of
4 appeals have drawn it. Is there a bona fide
5 dispute? If a court cannot identify any
6 plausible or legitimate argument, it can be
7 exceedingly weak, then it goes to the
8 arbitrator because that's what the parties
9 agreed.

10 CHIEF JUSTICE ROBERTS: But you're
11 just --

12 JUSTICE SOTOMAYOR: That's my problem
13 with this case.

14 JUSTICE GORSUCH: Yeah.

15 MR. GEYSER: Well, but, again, my
16 friend, though -- my --

17 JUSTICE SOTOMAYOR: It may be
18 extremely weak, and I'm not sure that's true,
19 but --

20 MR. GEYSER: Your Honor, respectfully,
21 though, Petitioners sought review on one
22 question, not two. They took -- it was their
23 strategy. They did an all-or-nothing
24 categorical attack saying there is no wholly
25 groundless doctrine under any circumstances.

1 They could have added a second
2 question saying, if there is a wholly
3 groundless doctrine, we don't think it was met
4 here. But they didn't -- they didn't raise
5 that question.

6 JUSTICE GORSUCH: Well, Mister --

7 CHIEF JUSTICE ROBERTS: You seem to be
8 just, you know, slicing the baloney a little
9 thin. It's not just groundless, it's wholly
10 groundless. And when you say, well, what's
11 wholly groundless, you say, well, there's no
12 bona fide dispute.

13 You know, the -- the answers about
14 what the content of it is just sort of
15 substitute one adjective for another, which I
16 think highlights the problem, which is that, I
17 mean, do you think there's a difference between
18 groundless and wholly groundless?

19 MR. GEYSER: I -- I think that the
20 difference is, is there a legitimate or
21 plausible argument? Is there any argument on
22 --

23 CHIEF JUSTICE ROBERTS: Well --

24 MR. GEYSER: -- the other side of the
25 bound -- of the ledger? And, if there is, then

1 the courts compel arbitration.

2 CHIEF JUSTICE ROBERTS: So what
3 standard should we say: Wholly groundless or
4 no bona fide dispute?

5 MR. GEYSER: I -- I would say if
6 there's not a bona fide dispute, then it goes
7 to the arbitrator. I think that effectively,
8 even though courts have used different
9 articulations, that's where each standard
10 points to.

11 JUSTICE GORSUCH: But -- but what does
12 even that mean? Clearly, there's a bona fide
13 dispute when two parties are litigating all the
14 way to the United States Supreme Court.

15 (Laughter.)

16 MR. GEYSER: Well, but -- but in the
17 --

18 JUSTICE GORSUCH: Right? And so I
19 know it's a small exception today, but the
20 experience of this Court has been when it
21 creates small exceptions, they tend to become
22 larger ones with time.

23 And -- and the whole point of
24 arbitration, of course, is to try and
25 streamline things. And -- and having

1 litigation all the way up and down the federal
2 system over wholly groundless, only to wind up
3 in arbitration, ultimately seems highly
4 inefficient.

5 Isn't your real complaint here the
6 first one, Justice Breyer's, in that there's
7 just maybe a really good argument that clear
8 and unmistakable proof doesn't exist in this
9 case of a -- of a desire to go to arbitration
10 and have the arbitrator decide arbitrability?

11 And why doesn't that take care of
12 90 percent of these kinds of cases?

13 MR. GEYSER: It -- it -- it may take
14 care of a lot of them. And it will take care
15 of it in this case. The Fifth Circuit all but
16 concluded that there's -- they're not --

17 JUSTICE GORSUCH: So why -- so why do
18 we need to go down the baloney slicing road, to
19 mix my metaphors?

20 MR. GEYSER: Well, we -- we -- we
21 suggested that the Court not grant review
22 precisely because this is not a good vehicle
23 for it because there's not a clear and
24 unmistakable showing in any possible way, but
25 --

1 JUSTICE GORSUCH: So are you -- are
2 you -- are you now saying we -- we don't need
3 to answer the question presented --

4 MR. GEYSER: Oh, no.

5 JUSTICE GORSUCH: -- and you give up
6 and go back to the court of appeals on the
7 first one?

8 MR. GEYSER: Absolutely not, Your
9 Honor.

10 JUSTICE GORSUCH: I didn't think so.

11 (Laughter.)

12 MR. GEYSER: Absolutely not. Now --
13 and just to show how little of a problem this
14 causes in practice, this doctrine has existed
15 for decades in multiple circuits, and it's
16 rarely invoked because courts can understand
17 the difference between something that is like a
18 Rule 11 sanctionable argument and something
19 that's a legitimate argument.

20 And they've applied it faithfully.
21 The -- the Federal Circuit in Qualcomm, the
22 Fifth Circuit in Kubala, they've made it
23 absolutely clear you do not invade the province
24 of the arbitrator. You make sure that there is
25 literally no argument that supports it.

1 Now maybe you disagree, looking at the
2 facts of this case, whether the standard was
3 met. But the fact is that we didn't brief this
4 because it's outside the question presented.

5 The Texas district judge looked at it.
6 Three Fifth Circuit judges looked at it. And
7 they all said there is no possible scenario
8 where this will end up in arbitration.

9 JUSTICE SOTOMAYOR: Well, we have a
10 magistrate judge who disagreed and we have
11 other courts in other circuits, I'll bet, but
12 we have other courts who have read it exactly
13 the way they read it. And so it can't be
14 wholly frivolous when you have so many people
15 split on an issue.

16 MR. GEYSER: Well, no, Your Honor.
17 And just to be very clear on two things. The
18 magistrate judge recognized that Petitioners'
19 construction of the actual language of the
20 agreement was problematic. That's at page 41a
21 of the -- of the petition appendix. It said
22 problematic.

23 It rewrote the agreement to -- to --
24 to match what the magistrate judge thought
25 would be a better arbitration clause.

1 That's exactly what this Court has
2 said that arbitrators can't do, and I don't see
3 any license for a magistrate judge to be able
4 to do it either. You have to apply the
5 agreement as written.

6 And for the other circuits that have
7 looked at other clauses and said we can divide
8 it up between injunctive relief and cases on
9 the merits, those involved very different
10 arbitration clauses. The language of those
11 clauses were written in very different terms.

12 They typically divided up one general
13 delegation where everything goes to the
14 arbitrator and then in a separate section or
15 separate sentence at least, it carved out
16 specific claims that sought injunctive relief.

17 Here, you have in parenthetical that
18 says that if -- if it's an action, not a claim,
19 but an action seeking injunctive relief, it's
20 -- it's excluded.

21 JUSTICE GINSBURG: Well, what -- what
22 injunctive relief does Archer seek? We're told
23 that -- that what Archer wants most of all is
24 money damages.

25 MR. GEYSER: Well, and -- and the

1 courts could have, or the parties could have
2 written -- and at least the ones that had the
3 arbitration clause -- could have written this
4 to say that the predominant relief is damages.
5 It goes to the arbitrator. That's not what
6 they wrote.

7 JUSTICE GINSBURG: But what kind of
8 injunctive relief? Just let's take this down
9 to the ground level.

10 MR. GEYSER: Sure. They're -- they're
11 seeking an injunction of anticompetitive
12 conduct that has been investigated now by
13 multiple state and federal agencies and that we
14 allege is ongoing today.

15 So what they'd like to have happen is
16 the -- the -- the anticompetitive conduct to
17 stop. Now, that goes to the arbitrator, that
18 will multiply proceedings because an arbitrator
19 can't enforce their own award. They don't have
20 an army. You need to get an award from the
21 arbitrator saying we'll grant an injunction and
22 get that enforced in court, where surely there
23 will be more litigation in court.

24 So it makes perfectly good sense that
25 parties thinking in advance that they might

1 need injunctive relief that would not want to
2 include to -- to arbitration an action seeking
3 injunctive relief.

4 But to -- to bring this back to the
5 actual text of the statute, I --

6 JUSTICE KAVANAUGH: On -- on the text
7 of the statute, you hang almost everything on
8 the "failure to comply therewith" language.
9 And you heard Mr. Shanmugam's response to that,
10 that that's very much a minimal bar that is
11 merely designed to ensure that someone's
12 opposing the referral or opposing arbitration.
13 What's your response to him?

14 MR. GEYSER: I -- respectfully, I -- I
15 think he's mistaken. I -- when -- when the
16 plain language of the statute, which is
17 imposing a direct gatekeeping function on the
18 court, say they have to be satisfied, there's
19 been a failure to comply with the arbitration
20 agreement. So, from a common sense
21 perspective, does anyone think that you fail to
22 comply with an arbitration agreement when the
23 only conceivable outcome is a case belongs in
24 court?

25 It's effectively like saying a party

1 has to go to the arbitrator and seek
2 preclearance before they can file their claim,
3 even if it's the Martian example, where there's
4 no conceivable chance that the arbitrator, if
5 they're genuinely construing the agreement,
6 will say this belongs in arbitration.

7 And that respectfully just makes no
8 sense. It especially makes no sense looking at
9 the statutory design. Congress under
10 Section 10 -- and we do think Section 10
11 provides a back-end safeguard here, that if an
12 arbitrator takes the Martian case and they
13 absolutely exceed their powers, they've
14 adjudicated a dispute that the parties did not
15 grant authority for the arbitrator to resolve,
16 that would be an excess of authority.

17 It makes no sense when Congress has
18 that specific substantive check on the back
19 end, they've authorized the same judges to read
20 the same agreement and make the same "wholly
21 groundless" type determination, that they say
22 let's just do it on the back end and not on the
23 front end before we can save this huge and
24 colossal waste of time and resources.

25 JUSTICE BREYER: Is -- is -- just

1 follow me here -- is -- Professor Bermann, I
2 thought, was writing a -- an amicus brief on
3 your side which says there isn't a clear and
4 unmistakable commitment to arbitration. But is
5 that issue in front of us?

6 MR. GEYSER: The -- it's -- I think
7 it's assumed in this case that there is even
8 though he didn't quite --

9 JUSTICE BREYER: There is? So we'd --
10 so his -- so we'd say that that point he makes
11 might be a good point, but that's not in the
12 case. So it's not in the case that there is --
13 whether there is a clear and unmistakable
14 arbitration. It's not in the case whether this
15 was wholly groundless. And we're taking this
16 case -- assuming that there is such a thing as
17 the unmistakable and assuming also that it is
18 not wholly -- it is wholly groundless, then is
19 there an exception for the wholly groundless?

20 So I'm not making an argument. I just
21 want to be sure I'm right.

22 MR. GEYSER: We -- you -- that -- that
23 is, in fact, what the Court I believe is doing.
24 And we would warmly --

25 JUSTICE BREYER: It's pretty

1 theoretical. And that's an argument.

2 MR. GEYSER: We -- we would warmly
3 invite a DIG if the Court would like to -- to
4 DIG the case.

5 (Laughter.)

6 JUSTICE BREYER: Yeah.

7 MR. GEYSER: But, at the same time,
8 though, we -- we do think there is, in fact, a
9 "wholly groundless" doctrine just as there has
10 been one for decades in the lower courts
11 without any meaningful frustration of
12 legitimate rights to arbitrate.

13 JUSTICE KAGAN: Mr. Geyser, can I go
14 back to Justice Kavanaugh's textual question,
15 because, when I stare at this language, "the
16 failure to comply therewith" language, it seems
17 to me I can read it two ways, neither of which
18 is yours.

19 So the first way is Mr. Shanmugam's
20 minimalist way. It doesn't mean very much of
21 anything at all.

22 The second way suggests that we've
23 gone wrong in -- in prior cases. It's the
24 maximalist approach, which is what this
25 language was meant to do was assign

1 arbitrability issues to the courts, but we --
2 we've -- we've pretty much -- we've -- we've
3 gone by that -- that understanding of the
4 language.

5 What I can't understand is how you can
6 read the language to create this halfway house
7 position.

8 MR. GEYSER: Sure. And -- and,
9 Justice Kagan, first of all, I do think that,
10 actually, the most faithful interpretation of
11 this text is that it does assign to the courts
12 the responsibility to decide the gateway issue.
13 But that -- that ship has somewhat sailed.

14 JUSTICE KAVANAUGH: You can't do that?

15 MR. GEYSER: But -- but -- I'm sorry?

16 JUSTICE KAVANAUGH: Keep going.

17 JUSTICE KAGAN: The ship has sailed.
18 We're agreeing that the ship has sailed.

19 MR. GEYSER: The ship has sailed. But
20 I do think, though, just if you read the
21 language sensibly, both -- both looking at --
22 at the actual text and looking at Section 10,
23 understanding that there will be this review on
24 the back end, it only makes sense to say that
25 there's not a failure to comply with an

1 arbitration agreement if what the parties
2 agreed is that if there's a legitimate dispute,
3 there's a bona fide dispute, it goes to the
4 arbitrator. If there's not a bona fide
5 dispute, then there's no failure to comply by
6 filing it in court.

7 And I do think that you can't read
8 that into the language of -- of an ordinary
9 agreement. We -- looking at all the contracts
10 and all the cases that came up in this, I
11 didn't see a single example where people said:
12 We'll have a delegation provision but no
13 frivolous claims or no sham allegations. No
14 one writes that into an agreement because it's
15 presumed.

16 JUSTICE KAVANAUGH: But you -- you
17 seem to agree with Justice Kagan, I think, that
18 the statute doesn't, most naturally read,
19 create a "wholly groundless" exception with
20 that language. It may have suggested the court
21 should decide questions of arbitrability. So
22 we've -- the Court's rejected that. So why
23 create -- I guess I'm repeating Justice Kagan's
24 question, but why create this new thing out of
25 language that was not designed to do that?

1 MR. GEYSER: Well, Justice Kavanaugh,
2 I don't think it's new at all. I -- I think
3 that the -- it's -- it's very hard to say --

4 JUSTICE KAVANAUGH: It's new in the
5 statute, is what I'm saying, in the sense that
6 you had an all-or-nothing question, I think,
7 with the statutory language, as Justice Kagan
8 said, and the court decided that.

9 MR. GEYSER: Well, I think -- I think
10 there are two ways to look at it, and one is a
11 statutory hook, which I still do think is the
12 best way to read this language. It's very hard
13 to understand how something is a failure to
14 comply with an arbitration agreement if the
15 arbitration agreement is saying if there's a
16 bona fide dispute over arbitrability, then it
17 goes to the arbitrator. If there's not a bona
18 fide dispute over arbitrability, then you don't
19 fail to comply by filing it in court.

20 So it is, in fact, I think the "wholly
21 groundless" doctrine that it's -- it's tapping
22 on an intuition that's already there. It's
23 just giving this language some sort of reading
24 that makes sense and that's consistent with the
25 parties' intent. And that --

1 JUSTICE ALITO: But that goes, again,
2 to the interpretation of the delegation of
3 arbitrability. As I understand your argument,
4 you're saying that implicit in any provision of
5 the contract that says arbitrability is for the
6 arbitrator, there's the exception for -- for
7 this type of dispute.

8 MR. GEYSER: There -- there is --

9 JUSTICE ALITO: That's the argument,
10 right?

11 MR. GEYSER: That -- that is -- that
12 is part of the argument, Your Honor, and the
13 reason I think it's correct is that no one
14 anticipates being dragged into a --a -- an
15 absolutely frivolous dispute. Good faith is
16 inherent in every contract. That's a matter of
17 North Carolina contract law, which is what this
18 agreement is subjected to, and general contract
19 principles.

20 JUSTICE ALITO: But is that -- is that
21 generally true when parties agree by contract
22 on a particular decision-maker? What if it's a
23 forum selection clause? Is there an exception
24 to that for wholly groundless disputes?

25 MR. GEYSER: No, I think a forum

1 selection clause would be slightly different
2 because someone has to adjudicate the -- the
3 underlying merits, whether it's this judge or a
4 judge in a different district.

5 That's not true, though, with a wholly
6 groundless arbitration demand. This is
7 generating a pointless process. This is what
8 happens when you file "an wholly groundless"
9 arbitration demand. Either it goes to the
10 arbitrator, who wastes time and money, and it's
11 -- it's far more than my friend suggests. It
12 can take weeks or months, and it can take tens
13 of thousands of dollars to get this predicate
14 threshold issue resolved.

15 And then they send it right back to
16 the court, or even worse, they make a
17 catastrophic error -- and sometimes people make
18 mistakes -- they keep the case, and then the
19 court vacates it at the end of the day under
20 Section 10.

21 And, respectfully, that -- that is not
22 a sensible system. And to the extent my friend
23 suggests that ways to police that are the
24 arbitrator could send --

25 JUSTICE SOTOMAYOR: Sorry, but is this

1 a sensible system where, even though we only
2 have five cases over a long period of time in
3 which courts have denied arbitration on wholly
4 frivolous grounds, we're now inviting this
5 fight in every motion to compel arbitration --

6 MR. GEYSER: I -- I --

7 JUSTICE SOTOMAYOR: -- and that itself
8 will multiply expenses? Maybe not in your
9 individual case but as a burden on courts.

10 MR. GEYSER: No --

11 JUSTICE SOTOMAYOR: So it's not clear
12 to me that your solution is more efficient in a
13 meaningful way.

14 MR. GEYSER: I think our -- our
15 solution is far more efficient, Your Honor, and
16 if -- if I could explain why.

17 JUSTICE SOTOMAYOR: Only if you win.

18 MR. GEYSER: Well -- well, if we win,
19 then I -- I think --

20 JUSTICE SOTOMAYOR: If you win in
21 court.

22 MR. GEYSER: Well, no, I think
23 plaintiffs have -- have an incentive to have
24 their cases adjudicated. They're not the ones
25 that are trying to invite protracted side

1 litigation over issues. It's only the
2 plaintiffs who actually think the arbitration
3 demand is wholly groundless that will spend the
4 resources to resist on that level.

5 And I also think it's far more
6 efficient for the court to decide this than the
7 arbitrator. The court already has to look at
8 the arbitration clause. It has to do that.
9 Whatever Section 4 means, we can all agree that
10 it does impose a gatekeeping function; the
11 court -- the courts do have to look at
12 something. So they're looking at the dispute
13 already.

14 All they need to do to resolve the
15 "wholly groundless" inquiry is say, is there a
16 dispute? They don't need to decide it.
17 They're not resolving arbitrability. They say,
18 is there any legitimate argument here that any
19 reasoned decision-maker could credit? If they
20 identify that argument, they send it to the
21 arbitrator.

22 That is far more efficient than asking
23 the parties to initiate a needless and
24 needlessly expensive gateway arbitration when
25 everyone knows the only two possible outcomes

1 is they send it right back so you can start
2 over in court months later, you know, possibly
3 tens of thousands of dollars in the hole, or
4 months or years later if the arbitrator makes a
5 mistake and keeps it.

6 So I -- I don't think that is an
7 efficient system. And I think, again, this
8 doctrine has existed in courts, multiple
9 courts, for decades without any noticeable
10 effect on parties' legitimate arbitration
11 rights.

12 JUSTICE KAGAN: But could I go back?
13 Beyond your saying it's not an efficient
14 system, are -- are you saying essentially that
15 the -- the -- that the basis for this rule is
16 that we don't believe that a delegation clause
17 includes this, that we don't believe that the
18 parties intended for a general delegation
19 clause to include these kinds of groundless
20 questions? Is that basically the idea?

21 MR. GEYSER: That -- that is certainly
22 --

23 JUSTICE KAGAN: The contractual idea.

24 MR. GEYSER: Exactly. That -- that is
25 the core of the idea.

1 JUSTICE KAGAN: Yeah. So -- but --
2 but -- so, I mean, that might be a rule of --
3 of the -- of contract interpretation here, but
4 you're trying to say that the FAA, specifically
5 Section 4, sets up as a -- a kind of
6 substantive interpretive rule that we're going
7 to interpret these contracts in a certain way.

8 And that seems like a strange thing
9 for us to think about the FAA.

10 MR. GEYSER: Oh, I -- I don't think
11 that's strange at all, Your Honor. In -- in
12 First Options and -- and in -- in Oxford, or in
13 Stolt-Nielsen, the Court specifically says that
14 it crafts interpretive rules in the setting to
15 match the parties' likely intent.

16 So, if the court thinks that when
17 parties are silent about what do you do with a
18 wholly groundless, frivolous dispute, and,
19 again, if -- the -- the doctrine, this is an
20 all-or-nothing challenge to it, so the Court
21 has to think what about the truly frivolous
22 arbitration demand.

23 And I -- I think it's perfectly
24 sensible to say that parties did not agree to
25 have non-bona fide disputes sent to an

1 arbitrator. I -- I don't think that's an
2 unreasonable proposition.

3 Again, I have not seen a single
4 contract that says we reserve wholly frivolous,
5 abusive arbitration demands.

6 CHIEF JUSTICE ROBERTS: Well, but you
7 phrase it that way. But you could phrase it
8 differently. What if there's a party that has
9 historically not done well in court and
10 whatever -- whatever comes up, they say I don't
11 want a court to do it, I want an arbitrator to
12 do it.

13 What's wrong with that?

14 MR. GEYSER: I -- I think if the party
15 is clear and unmistakable in saying that, even
16 if the dispute has absolutely no conceivable
17 merit, and everyone knows it's going to be back
18 in court whether the parties like it or not,
19 then, if they make that sufficiently clear,
20 then debatably --

21 JUSTICE BREYER: A work --

22 MR. GEYSER: -- there's a failure
23 under Section 4.

24 JUSTICE BREYER: But there's a work
25 contract lawyer, labor, one of them says I'll

1 tell you what I want arbitrated. Who owns
2 Crimea? Okay? What's the judge supposed to
3 do? The contract has nothing to do with this.
4 So what's the judge supposed to do?

5 MR. GEYSER: The -- well, I -- I think
6 if it -- so if it's a wholly groundless --

7 JUSTICE BREYER: It has nothing to do
8 with this contract. He wants something
9 arbitrated, nothing to do with it.

10 MR. GEYSER: Again, I think the answer
11 if the Court looks at it and says there's
12 nothing for the arbitrator to do, then there's
13 not a failure to comply by not filing an
14 arbitration demand.

15 JUSTICE BREYER: No failure to comply.
16 Okay. So that's the basis of this groundless
17 business. Okay. So he has the -- I have the
18 same question. Okay.

19 MR. GEYSER: So I think -- and that's
20 also consistent just with general litigation
21 norms. My friend suggests effectively that the
22 FAA carves an exception to Rule 11 principles.
23 And I don't see that anywhere in the text of
24 the FAA.

25 On the contrary, this Court construes

1 the FAA as creating sort of an equal treatment
2 rule. All arbitration agreements are treated
3 just the same as any other agreement. And
4 normally, when a party files a frivolous and
5 abusive claim in court, they're sanctioned.
6 They don't -- they don't win.

7 And I don't think it makes any sense
8 to say that someone can file a frivolous claim,
9 then you can -- you -- you reward the claim,
10 you send it to the arbitrator, and then, after
11 the arbitrator gets done saying, yeah, that was
12 frivolous, then you sanction them under Rule
13 11. That's -- that's --

14 JUSTICE GINSBURG: If you -- if we --
15 if we don't accept your argument, can you tell
16 us, there are many, many open questions in this
17 case, right?

18 MR. GEYSER: There are many open
19 questions in this case.

20 JUSTICE GINSBURG: So -- so -- that
21 the Fifth Circuit didn't decide?

22 MR. GEYSER: That's correct. The --
23 the -- it comes to the Court where the Fifth
24 Circuit -- it -- it -- almost decided. It
25 explained why Petitioners' argument that there

1 is a delegation clause was wrong but then
2 didn't actually enter a holding on that, which,
3 again, is why we think that, in a way, this is
4 an academic decision in this particular case.

5 Again, it's outside the question
6 presented, so we didn't -- we didn't brief the
7 substance of that.

8 JUSTICE SOTOMAYOR: It's not academic
9 because our answer has a consequence. If we
10 agree with him that there is no statutory
11 provision for wholly groundless exceptions,
12 then all the other questions have to go back
13 and be actually answered.

14 MR. GEYSER: Yes -- yes. No, I'm --
15 I'm not suggesting that there -- there's not
16 jurisdiction to resolve the question. I'm just
17 saying that in this case it -- it is highly
18 unlikely to have any effect on the ultimate
19 outcome.

20 JUSTICE SOTOMAYOR: Well, that's only
21 because you intend to win all the other
22 questions.

23 (Laughter.)

24 MR. GEYSER: Well, we -- that's
25 certainly our intent, Your Honor.

1 JUSTICE SOTOMAYOR: I can't tell you
2 that.

3 MR. GEYSER: Yeah. But -- but, again,
4 though, the -- the way it comes to the Court is
5 it's saying, even for the most frivolous and
6 abusive arbitration demand imaginable, if there
7 is a delegation clause, are the courts actually
8 powerless where they have -- their only option
9 is to send it to the arbitrator, where they
10 already know the answer.

11 And that's inconsistent with what this
12 Court did in Stolt-Nielsen. Stolt-Nielsen
13 specifically looked -- and this is at page 676
14 and 677 of the court's opinion -- and said if
15 there is only one possible outcome, even where
16 the parties, as they did in that case,
17 expressly agreed that this is a determination
18 for the arbitrator, then you do not send it
19 back to the arbitrator because it's pointless.
20 You decide it yourself.

21 And that's exactly what the wholly
22 groundless doctrine is doing, and it's doing it
23 sensibly on the front end when you look at an
24 arbitration demand and you can either say the
25 parties didn't clearly and unmistakably intend,

1 when you have a frivolous dispute that has
2 nothing at all to do with the contract, to send
3 it to the arbitrator, it's enforcing the
4 parties' intent, and I think it's consistent
5 with Section 4.

6 If the Court has no further questions.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 Four minutes, Mr. Shanmugam.

10 REBUTTAL ARGUMENT OF KANNON K.

11 SHANMUGAM ON BEHALF OF THE PETITIONERS

12 MR. SHANMUGAM: Thank you, Mr. Chief
13 Justice.

14 Respondents' argument today really
15 assumes the answer to the inquiry when
16 Respondent argues that the parties never would
17 have wanted to arbitrate wholly groundless
18 claims of arbitrability.

19 The exact same argument could be made
20 where the underlying substantive claims are
21 frivolous. The argument could be made that the
22 parties would never have wanted for that to go
23 to the arbitrator and would have instead wanted
24 a court to short-circuit that inquiry.

25 But this Court in AT&T Technologies

1 made clear that, even if a court thinks that a
2 claim is not arguable, it is still obligated to
3 send that claim to arbitration, where the
4 parties have so intended.

5 JUSTICE KAGAN: It is a little bit
6 different, though, Mr. Shanmugam, because in --
7 in the case that you said, if it's really
8 groundless, you expect that the arbitrator will
9 get rid of it just as fast as the court will
10 get rid of it.

11 What makes this case a little bit
12 different from that is that, here, all the
13 arbitrator is going to do is to send it back to
14 the court. And you might think: Well, what
15 sense does that make?

16 MR. SHANMUGAM: But the arbitrator
17 will make that determination presumably
18 efficiently, will do so at the outset of the
19 proceedings, and, of course, we're assuming
20 here that the parties contracted to have the
21 arbitrator make that determination presumably
22 for the same reason that parties arbitrate --
23 parties agree to have arbitrators make merits
24 determinations, because they conclude that that
25 will be a more efficient and cheaper way of

1 resolving the relevant issue.

2 And Respondent has no answer for
3 Justice Sotomayor's question about this Court's
4 decision in Rent-A-Center, which provides that,
5 where the parties have remitted the issue of
6 arbitrability to the arbitrator, it should be
7 treated just like any other issue.

8 And what Respondent is asking this
9 Court to do is to allow courts to make merits
10 determinations on the issue of arbitrability
11 even in the face of a delegation.

12 And that brings me --

13 JUSTICE SOTOMAYOR: Assuming for sake
14 of argument only, hypothetically, that we
15 disagree with you, there -- there, in fact, can
16 be a wholly groundless ground -- pardon the pun
17 -- do you lose --

18 MR. SHANMUGAM: Well --

19 JUSTICE SOTOMAYOR: -- under your
20 question presented? Assuming that I thought,
21 again, presuming only, that you had an arguable
22 claim.

23 MR. SHANMUGAM: We -- we continue to
24 believe that we have a valid claim of
25 arbitrability and certainly not a wholly

1 groundless one. And if this Court vacates and
2 this case gets to the arbitrator on that issue,
3 we will make that argument.

4 And I would note parenthetically --

5 JUSTICE SOTOMAYOR: But you don't
6 under the question presented if I -- if we
7 disagree with you?

8 MR. SHANMUGAM: We didn't present a
9 question concerning the application of the
10 wholly groundless exception. To be sure,
11 that's obviously a case-specific determination.
12 But I do think that this case illustrates the
13 danger of the wholly groundless exception.

14 There would be a dangerous pliability
15 to that standard regardless of what words this
16 Court puts on a page. And this case
17 illustrates that.

18 And so, in addition to the
19 inefficiency of this standard, I would point to
20 that pliability as reasons why this Court as a
21 policy matter should not adopt this exception,
22 an exception that, as you point out, Justice
23 Sotomayor, has been applied in only a very
24 small number of cases since the Federal Circuit
25 of all people first recognized this exception

1 about a decade ago.

2 And so it simply would not be worth
3 the candle to filter out the truly frivolous
4 claims, particularly where there are remedies
5 available, sanctions remedies available for
6 Justice Breyer's Crimea hypothetical and any
7 other hypothetical one might imagine.

8 And I think it's very hard to look at
9 the --

10 JUSTICE BREYER: Yes, but in the law,
11 I mean, normally, in the law, when a judge has
12 something frivolous, he says so. So -- so you
13 have your thing on the one side. So it's like
14 a forum selection clause. But on the other
15 side is a natural reluctance, when you have
16 something absolutely frivolous, not to say.

17 MR. SHANMUGAM: There are certainly
18 cases in the law more generally --

19 JUSTICE BREYER: It's not just
20 arbitration. It's all over the place.

21 MR. SHANMUGAM: I -- I recognize that,
22 for instance, in the context of administrative
23 law there are cases that stand for the
24 proposition that, where an administrative
25 agency concludes that it would be futile to

1 have a hearing, the agency has the power not to
2 hold the hearing.

3 But this case is different from any of
4 those cases because what Respondent is arguing
5 is that, where the parties have agreed to have
6 one decision-maker make a determination,
7 another decision-maker has the power to
8 short-circuit that determination.

9 And, after all, the fundamental policy
10 of the FAA is to enforce arbitration agreements
11 according to their terms. The wholly
12 groundless exception would create a way around
13 that policy.

14 And we would respectfully submit that
15 the judgment should, therefore, be vacated.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel. The case is submitted.

18 (Whereupon, at 11:05 a.m., the case
19 was submitted.)

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