No. _____

IN THE

Supreme Court of the United States

SPIRIT AIRLINES, INC.

Petitioner,

v.

STEVEN MAIZES, ET AL.,

Respondents.

On Petition for Writ of Certiorari To The United States Court of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Must a party overcome a higher burden to show that an arbitration agreement delegates to the arbitrator the power to decide the availability of *class* arbitration than to show that it delegates the power to decide the availability of *bilateral* arbitration?

2. May an arbitration agreement be interpreted to delegate to the arbitrator the power to decide the availability of class arbitration if the agreement lacks an express statement making such a delegation, but instead merely requires the arbitration to be conducted under standard arbitration rules?

PARTIES TO PROCEEDINGS BELOW

Petitioner Spirit Airlines, Inc. was plaintiff-appellant below. Respondents Steven Maizes, Vincent Anzalone, Lee Traylor, and Howard Madenberg were defendants-appellees below.

CORPORATE DISCLOSURE STATEMENT

In accordance with Rule 29.6 of this Court's Rules, petitioner states as follows:

Fidelity Management & Research Company owns more than 10% of Spirit Airlines, Inc.'s stock.

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INTRODUCTION

This case presents two deep—and deeply important—circuit splits about whether courts or arbitrators get to decide the availability of class arbitration.

The first circuit split is about the showing that a party must make to establish that an arbitration agreement grants the arbitrator, rather than the court, the power to decide the availability of class arbitration. Three circuits—the Third, Sixth, and Eighth—hold that a party must satisfy a higher burden to establish that an agreement delegates questions of *class* arbitrability to the arbitrator than to establish that it delegates questions of *bilateral* arbitrability. But three others—the Second, Tenth, and (in the decision below) Eleventh—apply the same standard in both contexts. The decision to allow class arbitration is momentous. Who makes the decision is therefore exceptionally important: an arbitrator (subject, in practice, to almost no review) or a court (subject to extensive appellate review). The issue also arises often; in 2018 alone, three federal appellate courts have decided it in four published opinions.

The second circuit split involves whether an arbitration agreement's reference to the standard arbitration rules of the American Arbitration Association is enough to delegate questions of class arbitrability to the arbitrator. Four circuits—the Third, Fourth, Sixth, and Eighth—hold that an arbitration contract delegates such questions to the arbitrator only if the contract says so on its face; a reference to the AAA's rules is not enough. Four other circuits—the Second, Fifth, Tenth, and (in the decision below) Eleventh—hold that such a reference does suffice, because the

AAA's Supplementary Rules for Class Arbitration direct the arbitrator to determine "whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class." App. 7a. This issue, too, is exceptionally important. The AAA's rules are ubiquitous, and in just the past three years, the federal courts have decided at least *thirty* cases about whether a contractual reference to them delegates issues of class arbitrability to the arbitrator. And the Eleventh Circuit's resolution of this issue is incorrect. As this Court has explained in an analogous context, an arbitration agreement's reference to an external text is not a clear statement. It is "unlikely" "as a practical matter" that the parties to an agreement are "actually aware" of limits set out in an independent body of rules referred to, but not contained in, the contract itself. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995).

This Court should grant certiorari to decide both questions presented.

OPINIONS BELOW

The opinion of the court of appeals is reported at 899 F.3d 1230 and reproduced at App. 1a–12a. The opinion of the district court is not reported, but is available electronically at 2017 WL 4155476 and reproduced at App. 13a–34a.

JURISDICTION

The court of appeals affirmed the district court's order on August 15, 2018 and denied a petition for rehearing *en banc* on October 12, 2018. App. 1a, 35a–36a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 2 of the Federal Arbitration Act, 9 U.S.C. § 2, provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

STATEMENT OF THE CASE

A. Legal Background

The Federal Arbitration Act, enacted in 1925, directs courts to enforce arbitration agreements "in accordance with the terms of the agreement." 9 U.S.C. § 4. While the interpretation of arbitration agreements "is generally a matter of state law," the Federal Arbitration Act "imposes certain rules of fundamental importance." *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662, 681 (2010).

One set of federal rules is about who decides certain threshold disputes about the arbitration agreement itself. As a matter of federal law, the court—not the arbitrator—presumptively decides questions of "arbitrability." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). This class of questions includes (for example) whether the parties have entered into a valid contract, whether the arbitration clause within the contract is valid, and whether the arbitration clause applies to a particular type of controversy. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002). An agreement overcomes this presumption only if it provides "clear and unmistakable evidence" "that the parties agreed to arbitrate arbitrability." *First Options*, 514 U.S. at 944.

Another set of federal rules governs the availability of class arbitration. As a matter of federal law, "an arbitrator may employ class procedures only if the parties have authorized them" in their contract. *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 565 (2013). This demand for affirmative authorization reflects the reality that "class-action arbitration" makes "fundamental changes" to "the nature of arbi-

tration." *Stolt-Nielsen*, 559 U.S. at 685–86. In bilateral arbitration, the arbitrator "resolves a single dispute between the parties to a single agreement"; in class arbitration, he "instead resolves many disputes between hundreds or perhaps even thousands of parties." *Id.* at 686. In bilateral arbitration, the arbitrator decides the rights of the parties before him; in class arbitration, the arbitrator "adjudicates the rights of absent parties as well." *Id.* And the stakes in bilateral arbitration tend to be low, but "the commercial stakes of class-action arbitration are comparable to those of class-action litigation." *Id.*

B. Factual Background

This case arises out of the $9 Fare Club, a discount program that petitioner Spirit Airlines offers to its customers. App. 2a. In return for an annual fee, a member of the club receives access to "reduced air fares and other discounted items." App. 14a.

The $9 Fare Club agreement includes an arbitration clause. That clause provides (App. 10a):

> This Agreement and the terms of membership shall be governed and construed in accordance with the laws of the State of Florida without giving effect to the choice of law provisions thereof. Any dispute arising between Members and Spirit will be resolved by submission to arbitration in Broward County, State of Florida in accordance with the rules of the American Arbitration Association then in effect. Notwithstanding the foregoing, nothing in this Agreement is intended or shall be construed to negate or otherwise af-

> fect the consumer protection laws of the state in which Members reside.

Respondents invoked this arbitration clause to file a class-action arbitration claim against Spirit. App. 2a. They alleged that they signed up for the $9 Fare Club, and that Spirit broke promises in the agreement that they signed. App. 2a–3a.

Spirit then sued respondents in federal district court, seeking a declaratory judgment that the agreement's arbitration clause does not authorize class arbitration. App. 3a. The district court dismissed Spirit's claim, holding that the agreement "delegat[ed] to the arbitrator the question of whether the Agreement allows for class arbitration." App. 21a.

The Eleventh Circuit affirmed. Like the district court, the Eleventh Circuit ruled that the agreement delegated to the arbitrator the power to decide whether the agreement allows for class arbitration. App. 6a–7a.

The Eleventh Circuit explained that, under this Court's decision in *First Options*, a "question of arbitrability" is presumptively a question for the court, unless there is "clear and unmistakable evidence" that the parties agreed to assign the question to the arbitrator. App. 4a–5a. Respondents "did not dispute … that the availability of class arbitration is a question of arbitrability." App. 5a. As a result, the availability of class arbitration was presumptively a question for the court; to overcome this presumption respondents had to produce sufficiently "clear and unmistakable evidence of the parties' intent to have an arbitrator decide whether the agreement permits class arbitration." App. 5a. In explaining what that

standard means, the Eleventh Circuit turned to the first question presented in this petition: whether a party must make a "higher showing" to establish delegation in the context of "class arbitrability" than in the context of bilateral arbitrability. App. 8a. The court answered no, reasoning that there was "no basis for that higher burden in Supreme Court precedent." App. 9a. The court agreed that this Court's decision in *Stolt-Nielsen* had emphasized important "differences between class and bilateral arbitration." App. 8a. Yet the Eleventh Circuit concluded that the *Stolt-Nielsen* line of cases did not affect the separate question before it. The court below "read *Stolt-Nielsen* to address the question of whether an agreement allows class arbitration at all, separate from the issue of who decides the question to begin with." App. 8a–9a.

The Eleventh Circuit acknowledged that its decision conflicted with the decisions of other circuits. App. 8a. The Third, Sixth, and Eighth Circuits had all applied "the reasoning of *Stolt-Nielsen*" not just to the "question of whether an agreement allows class arbitration at all" but also to the "issue of *who decides* the question to begin with." App. 8a–9a (emphasis added). In doing so, these circuits "created a higher burden for showing 'clear and unmistakable' evidence for questions of class arbitrability" than for questions of bilateral arbitrability. App. 9a. The Eleventh Circuit "respect[ed] the work of [its] sister circuits," but disagreed with their conclusion. App. 8a.

The Eleventh Circuit then turned to the second question presented in this petition: whether the agreement delegates the power to determine class

arbitrability to the arbitrator, even though the agreement itself lacks an express statement making a delegation. App. 5a. Once again, the court answered no. App. 5a. The court explained that Spirit's agreement required arbitration "in accordance with the rules of the American Arbitration Association then in effect." App. 3a. The rules of the American Arbitration Association, in turn, "include AAA's Supplementary Rules for Class Arbitrations." App. 6a. And one of the Supplementary Rules, in turn, provides: "Upon appointment, the arbitrator shall determine … whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class." App. 7a. The Eleventh Circuit ruled that this chain of references "amounts to 'clear and unmistakable evidence' of the parties' intent to have an arbitrator decide whether the agreement permits class arbitration." App. 5a.

Once again, the Eleventh Circuit acknowledged that its decision conflicted with the decisions of other circuits. It explained that "four circuits"—the Third, Fourth, Sixth, and Eighth—"have held that adoption of the AAA rules is *not* clear and unmistakable evidence of the parties' intent to have an arbitrator decide whether the agreement allows class arbitration." App. 8a (emphasis added).

Spirit moved for panel rehearing and rehearing *en banc*, but the Eleventh Circuit denied its petition. App. 36a. Spirit then filed this petition for writ of certiorari.

REASONS FOR GRANTING THE PETITION

I. The Court should decide whether a party seeking arbitration of class arbitrability must satisfy a heightened burden

The first question presented asks whether a party must overcome a higher burden to show that an agreement delegates the availability of *class* arbitration to the arbitrator than to show that it delegates the availability of *bilateral* arbitration to the arbitrator. The question warrants this Court's review because it has divided the federal courts of appeals 3–3, it is exceptionally important, and the Eleventh Circuit answered it incorrectly.

A. The courts of appeals have divided 3–3 over the first question presented

Federal courts of appeals have divided 3–3 about whether a party must satisfy a higher burden to show that an agreement delegates to the arbitrator the power to decide the availability of *class* arbitration than *bilateral* arbitration.

1. Three circuits—the Third, Sixth, and Eighth—have held that a party must satisfy a higher burden to show that an agreement delegates questions of class arbitrability to the arbitrator.

Third Circuit. The Third Circuit has ruled that a party must overcome a heightened burden to show that an agreement delegates "the question of class arbitrability"—as opposed to "questions of bilateral arbitrability"—to the arbitrator. *Chesapeake Appalachia, LLC v. Scout Petroleum, LLC*, 809 F.3d 746, 763 (3d Cir. 2016). In reaching this conclusion, the court stressed "the fundamental differences between bilateral arbitration and class arbitration as well as the

serious consequences of permitting a class arbitration proceeding to go forward." *Id.* at 764. Considering these differences, the court explained that, even where parties "intended to delegate questions of bilateral arbitrability to the arbitrators," one cannot infer that they also intended to delegate "the distinctive question of whether they [also] agreed to a fundamentally different type of arbitration not originally envisioned by the FAA itself." *Id.* at 764–65. Applying these principles, the Third Circuit concluded that, even though "incorporation of the [AAA] arbitration rules" may constitute "clear and unmistakable evidence that the parties agreed to arbitrate [bilateral] arbitrability," it does *not* constitute clear and unmistakable evidence that the parties agreed to arbitrate "class arbitrability." *Id.* at 763–64. The court rested this conclusion on the federal legal rules governing arbitration agreements—rules that "qualif[y]" "state law principles" about "incorporat[ion] by reference." *Id.* at 761.

Sixth Circuit. The Sixth Circuit, too, distinguished between the delegation of class arbitrability and the delegation of bilateral arbitrability in *Reed Elsevier, Inc. v. Crockett*, 734 F.3d 594 (6th Cir. 2013). In an opinion by Judge Kethledge, the Sixth Circuit applied a more exacting standard when deciding whether the parties delegated questions of class arbitrability than bilateral arbitrability. *Id.* The court reasoned that "the question whether the parties agreed to classwide arbitration is vastly more consequential than the … question whether they agreed to arbitrate bilaterally." *Id.* at 599. That is so because there are "fundamental" "differences between bilateral and classwide arbitration." *Id.* at 598. "An incor-

rect answer in favor of classwide arbitration would force parties to arbitrate not merely a single matter that they may well not have agreed to arbitrate, but thousands of them." *Id.* at 599 (citation and quotation marks omitted).

Eighth Circuit. The Eighth Circuit joined the Third and Sixth Circuits in *Catamaran Corp. v. Towncrest Pharmacy*, 864 F.3d 966 (8th Cir. 2017). It ruled: "The risks incurred by defendants in class arbitration (bet-the-company stakes without effective judicial review, loss of confidentiality) and the difficulties presented by class arbitration (due process rights of absent class members, loss of speed and efficiency, increase in costs) all demand a more particular delegation of the issue than we may otherwise deem sufficient in bilateral disputes." *Id.* at 973. Even though the Eighth Circuit had held before that "incorporation by reference of AAA rules constitutes a clear and unmistakable indication that the parties intended for an arbitrator to decide substantive questions of [bilateral] arbitrability," it ruled that "incorporation of AAA rules by reference is insufficient evidence that the parties intended for an arbitrator to decide the substantive question of class arbitration." *Id.*

2. In contrast, three circuits—the Second, Tenth, and Eleventh—have rejected a higher burden for establishing delegation of questions of class arbitrability.

Second Circuit. The Second Circuit has "decline[d] to join" "sister circuits that … require parties to explicitly delegate the particular question of class arbitration, in contrast to other questions of arbitrability, to an arbitrator." *Wells Fargo Advisors, LLC v.*

Sappington, 884 F.3d 392, 398 (2d Cir. 2018). Disagreeing with other courts that treat the burden that a party must satisfy to establish delegation as a question of *federal* law, the Second Circuit ruled that "*state* law defines how explicit the clause's language must be" to leave class arbitrability to the arbitrator. *Id.* at 399 (emphasis added). The court also explained that "legitimate concerns" about class arbitration are fully addressed by treating the availability of class arbitration as a "question … of arbitrability presumptively for a court to decide." *Id.* at 398. It believed that the same concerns drop out of the picture once the court turns to "determining, on a case-by-case basis, whether there is clear and unmistakable evidence of the parties' intent to let an arbitrator resolve that question." *Id.*

Tenth Circuit. Like the Second Circuit, the Tenth Circuit has "reject[ed]" "the guidance of multiple circuits that require more specific language delegating the question of classwide arbitrability." *Dish Network LLC v. Ray*, 900 F.3d 1240, 1247 (10th Cir. 2018). The court quoted and agreed with the Second Circuit's reasoning in *Sappington*. *Id.*

Eleventh Circuit. In the decision below, the Eleventh Circuit refused to require "a higher burden" for delegation of "questions of class arbitrability" than for delegation of "ordinary questions of arbitrability." App. 9a.

3. Courts have expressly acknowledged this conflict of authority:

- The Second Circuit has acknowledged the conflict between its decision in *Sappington* and the decisions of the Third, Sixth, and

Eighth Circuits "requiring more explicit language to delegate the question of class arbitrability to an arbitrator." *Sappington*, 884 F.3d at 398.

- The Tenth Circuit has acknowledged the conflict between "the Third, Sixth, and Eight Circuits" on the one hand, and "the Second" and Tenth Circuits on the other hand, about whether federal law "require[s] more specific language delegating the question of class-wide arbitrability." *Ray*, 900 F.3d at 1247.
- In the decision below, the Eleventh Circuit acknowledged that its decision conflicted with the decisions of "sister circuits"—specifically, with the decisions of the Third Circuit in *Chesapeake Appalachia*, the Sixth Circuit in *Crockett*, and the Eighth Circuit in *Catamaran*. App. 8a.

In sum, there is a deep and well recognized circuit split about the first question presented. The split will not resolve itself; just the opposite, it keeps getting deeper, with three circuit courts deciding the question in 2018 alone.

B. This first question presented is exceptionally important

1. The question presented is exceptionally important because it makes a big difference whether a court or an arbitrator gets to resolve a threshold dispute over class arbitrability. If a court decides, the parties are guaranteed a process that is formal and deliberate, and, thus, more likely to be accurate. The trial court decides the issue; an appellate court reviews the trial court's decision (typically *de novo*,

since the interpretation of a contract is a question of law); and the appellate court's decision is then subject to even more layers of review—in the federal system, panel rehearing, rehearing *en banc*, and certiorari.

In contrast, if a dispute over class arbitrability is left to the arbitrator, the parties receive a streamlined, informal process. The arbitrator decides whether class arbitration is available, and that decision is all but final. Judicial review of arbitral awards "focuses on misconduct rather than mistake." *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333, 350–51 (2011). A court may thus review an arbitral award for "corruption," "evident partiality," "misbehavior," and the like. 9 U.S.C. § 10. It may not review an arbitral award for correctness; it makes no difference whether the arbitrator's interpretation of the contract was "good, bad, or ugly." *Sutter*, 569 U.S. at 573. "And parties may not contractually expand the grounds or nature of judicial review." *Concepcion*, 563 U.S. at 351. The upshot is that, where the arbitrator decides class arbitrability, it is "more likely that errors will go uncorrected." *Id.* at 350.

Such errors have serious consequences when the availability of class arbitration is on the line. The "shift from bilateral arbitration to class-action arbitration" brings about "fundamental changes." *Stolt-Nielsen*, 559 U.S. at 686. Bilateral arbitration involves "a single dispute between parties to a single agreement," but class arbitration involves "many disputes between hundreds or perhaps even thousands of parties." *Id.* Bilateral arbitration is quick and cheap, but class arbitration is "slower, more costly, and more likely to generate procedural morass

than final judgment." *Concepcion*, 563 U.S. at 348. Bilateral arbitrators often act in their fields of "expertise," but "arbitrators are not generally knowledgeable about the often-dominant procedural aspects of [class] certification, such as the protection of absent parties." *Id.* Many bilateral arbitrations enjoy a "presumption of privacy and confidentiality," but, under standard arbitration rules, that presumption "[does] not apply in class arbitrations." *Stolt-Nielsen*, 559 U.S. at 686. Finally, "the commercial stakes of class-action arbitration"—unlike the stakes of bilateral arbitration—"are comparable to those of class-action litigation." *Id.* These stakes, in turn, create a "risk of in terrorem settlements": "Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." *Concepcion*, 563 U.S. at 350. It therefore matters who decides whether the parties agreed to all of these consequences: an arbitrator subject to almost no review, or a court.

In sum, the first question presented is important because the judicial process promotes accuracy to a greater degree than the arbitral process, and the price of a wrong decision to allow class arbitration is steep.

2. The first question presented also arises often. Arbitration agreements are common, but they rarely include language about "*who* … should decide arbitrability." *First Options*, 514 U.S. at 944. In drafting or negotiating an arbitration agreement, "a party often might not focus upon that question or upon the significance of having arbitrators decide the scope of their own powers." *Id.* at 945. So, the answer to the question about "who should decide class arbitrabil-

ity" usually turns on burdens, presumptions, and default rules.

Unsurprisingly, therefore, disputes about those burdens, presumptions, and default rules come up all the time. In 2018 alone, the federal courts of appeals decided no fewer than four cases about whether a party must make a higher showing before arbitrating class arbitrability than it must before arbitrating bilateral arbitrability. *See* App. 8a; *JPay, Inc. v. Kobel*, 904 F.3d 923 (11th Cir. 2018); *Sappington*, 884 F.3d 392; *Ray*, 900 F.3d 1240.

3. The first question presented also lies at the confluence of two subjects on which this Court has repeatedly granted certiorari: the allocation of responsibility for threshold questions between the court and the arbitrator, and class arbitration. This case is therefore doubly worthy of this Court's review.

To start, this Court has often agreed to hear cases about the allocation of responsibility for threshold questions between the court and the arbitrator. *See BG Group, PLC v. Republic of Argentina*, 572 U.S. 25 (2014) (standard for determining whether arbitration agreement delegates to the arbitrator questions about procedural prerequisites for arbitration); *Sutter*, 569 U.S. 564 (2013) (standard for reviewing arbitrator's resolution of a question of class arbitrability); *Granite Rock Co. v. Teamsters*, 561 U.S. 287 (2010) (standard for determining whether a contract delegates to the arbitrator questions about the formation of the contract); *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010) (validity of clause that delegates to the arbitrator questions about the unconscionability of the arbitration contract); *Howsam*, 537 U.S. 79 (2002) (standard for determining whether a contract

delegates to the arbitrator the question of the timeliness of the arbitration); *First Options*, 514 U.S. 938 (1995) (standard for reviewing arbitrator's resolution of a question of arbitrability); *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643 (1986) (standard for determining whether a contract delegates to the arbitrator questions of arbitrability).

In addition, this Court has regularly reviewed cases about class arbitration—granting certiorari in six such cases in just the last eight years. *See Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018) (lawfulness of federal regulation prohibiting class-action waivers in arbitration agreements); *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015) (preemption of state law treating arbitration contracts with class-action waivers differently from other contracts); *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228 (2013) (enforceability of arbitration contract that precludes class arbitration of federal statutory claims); *Sutter*, 569 U.S. 564 (2013) (standard for reviewing arbitrator's resolution of a question of class arbitrability); *Concepcion*, 563 U.S. 333 (2011) (preemption of state law prohibiting arbitration contracts with class-action waivers); *Stolt-Nielsen*, 559 U.S. 662 (2010) (standard for determining whether a contract authorizes class arbitration).

4. Finally, while the first question presented is related to two arbitration cases in which this Court has already granted review, those cases do not present the opportunity to resolve the question here. The Court should grant review here as well, so that it can fully clarify an area of arbitration law that it has already recognized as critical.

In *Henry Schein Inc. v. Archer & White Sales Inc.*, this Court granted certiorari to decide whether to recognize a "wholly groundless" exception to an agreement's delegation of a question of bilateral arbitrability to an arbitrator. The issue here is logically antecedent to the issue in *Henry Schein*: The enforceability of a contractual delegation to the arbitrator comes up only if the contract is properly interpreted to make such a delegation in the first place. *Henry Schein*, however, does not present the Court with the opportunity to address the latter question. The parties have assumed that they "had clearly and unmistakably delegated the authority to decide arbitrability to the arbitrator." *Henry Schein Inc. v. Archer & White Sales Inc.*, No. 17-1272, Brief for Petitioner 10 n.1; *see also* Transcript of Oral Argument 49 (statement of respondent's counsel that "it's assumed in this case that there is [a contractual delegation of issues of arbitrability to the arbitrator]"). As a result, no matter what the Court decides in *Henry Schein* about a "wholly groundless" exception, the circuit split in this case will remain intact.

Similarly, in *Lamps Plus Inc. v. Varela*, this Court granted certiorari to decide whether the arbitration agreement in that case authorizes class arbitration. The issue here is procedurally antecedent to the issue in *Lamps Plus*: That case is about the standard for *whether* an agreement allows class arbitration, and this case is about *who* gets to apply that standard. Once more, however, *Lamps Plus* does not present the latter question, because the parties there agreed that the court rather than the arbitrator would decide class arbitrability. *Lamps Plus Inc. v. Varela*, No. 17-988, Petition for Certiorari 27 n.6.

Moreover, the Eleventh Circuit has already made it clear that the reasoning of *Lamps Plus* will not influence its resolution of this case: In its view, "the question of whether an agreement allows class arbitration at all [is] separate from the issue of who decides the question to begin with," making it inappropriate to "import … reasoning" from the former context to the latter context. App. 8a. As a result, no matter how the Court resolves *Lamps Plus*, the circuit split in this case will persist.

C. The Eleventh Circuit answered the first question presented incorrectly

Contrary to the Eleventh Circuit's decision, federal law requires a party to satisfy a higher burden to establish the arbitrability of class arbitrability than bilateral arbitrability.

First, the requirement for a higher showing reflects the differences between class and bilateral arbitration. "Individualized arbitration" is the "traditional" form of arbitration. *Lewis*, 138 S. Ct. at 1623. Class arbitration is a fundamentally different type of proceeding. This Court has thus explained that "the shift from bilateral to class-action arbitration" brings about "fundamental changes" (*Stolt-Nielsen*, 559 U.S. at 686); that class arbitration interferes with "fundamental attributes of arbitration" (*Italian Colors*, 570 U.S. at 238); that class procedures "reshape traditional individualized arbitration" (*Lewis*, 138 S. Ct. at 1623); and, bluntly, that class arbitration "is not arbitration as envisioned by the FAA" (*Concepcion*, 563 U.S. at 351). The Court has added that class arbitration often frustrates the interests of the parties, because "the switch from bilateral to class arbitration sacrifices the principal advantage"—

"informality"—that makes arbitration desirable in the first place. *Concepcion*, 563 U.S. at 348. What is more, class arbitration "frustrate[s]" one of the "goals of the Arbitration Act"—"efficient and speedy dispute resolution." *Id.* at 345.

Just as there is a fundamental difference between authorizing bilateral and class arbitration, so too there is a difference between allowing an arbitrator to decide questions of bilateral arbitrability and allowing him to decide questions of class arbitrability. When an arbitrator decides a question of bilateral arbitrability, he exercises the modest power of deciding whether a traditional, efficient, congressionally contemplated form of dispute resolution should go forward. When an arbitrator decides a question of class arbitrability, by contrast, he exercises the far more momentous power of deciding whether to go forward with a "crucial[ly] differen[t]" type of proceeding. *Stolt-Nielsen*, 559 U.S. at 687. Indeed, he decides whether to go forward with a type of proceeding that is "not arbitration as envisioned by the FAA" at all, that "lacks its benefits," and that "frustrate[s]" rather than promotes one of the "goals of the Arbitration Act." *Concepcion*, 563 U.S. at 345, 351. Courts should be especially reluctant to conclude that a contract delegates to the arbitrator the transformative power to "change the very nature of the underlying" proceeding. *Catamaran*, 864 F.3d at 972.

Second, the requirement for a higher showing for delegation of questions of class arbitrability reflects the likely expectations of the parties. Ordinarily, parties are likely to agree to the "absence of multilayered review" inherent in arbitration—and the re-

sulting possibility that "errors in arbitration" "will go uncorrected"—only when the errors' "impact is limited." *Concepcion*, 563 U.S. at 350. Considering this reality about "the parties' likely intent," this Court has held that the amount of evidence needed to show that a contract delegates a given threshold issue to an arbitrator varies with the significance of the issue. *Howsam*, 537 U.S. at 86. The more consequential the threshold issue, the stronger the presumption that the court rather than the arbitrator should decide it. *Id.* at 85.

Under these principles, a court should require a heightened showing before concluding that a contract delegates questions of class arbitrability to an arbitrator. "The question whether parties agreed to classwide arbitration is vastly more consequential than even the gateway question whether they agreed to arbitrate bilaterally." *Crockett*, 734 F.3d at 599. "An incorrect answer in favor of classwide arbitration would force parties to arbitrate not merely a single matter that they may well have not agreed to arbitrate, but thousands of them." *Id.* (citation and quotation marks omitted). In addition, "the switch from bilateral arbitration sacrifices the principal advantage" that makes arbitration desirable in the first place—"its informality"—"and makes the process slower, more costly, and more likely to generate procedural morass." *Concepcion*, 563 U.S. at 348. Furthermore, "class arbitration greatly increases risks to defendants"—especially "the risk of in terrorem settlements." *Id.* It is thus especially unlikely that the parties would have agreed to delegate questions of class arbitrability to the arbitrator. That is why a

party must make a higher showing to establish that an arbitration contract makes such a delegation.

Finally, as Justice Alito explained in *Sutter*, the requirement of a higher showing in the context of questions of class arbitrability accounts for the special problems raised by absent class members. If an arbitrator erroneously concludes that a contract authorizes class arbitration, "it is far from clear that [absent class members] will be bound by the arbitrator's ultimate resolution of [the] dispute." *Sutter*, 569 U.S. at 574 (Alito, J., concurring). "Arbitration is a matter of consent," and "the absent members of the plaintiff class have not submitted themselves to this arbitrator's authority in any way." *Id.* The absent members of the class may have "signed contracts with arbitration clauses materially identical to those signed by the plaintiff who brought [the] suit," but "an arbitrator's erroneous interpretation of contracts that do not authorize class arbitration cannot bind someone who has not authorized the arbitrator to make that determination." *Id.* Similarly, the absent members of the class may receive "opt-out notices," but such notices "d[o] not cure this fundamental flaw," because "arbitration is simply a matter of contract" and "an offeree's silence does not normally modify the terms of a contract." *Id.*

The upshot is that class arbitrations are often "vulnerable to collateral attack" by absent class members. *Id.* at 575. Such arbitrations "allow absent class members to unfairly claim the benefit from a favorable judgment without subjecting themselves to the binding effect of an unfavorable one." *Id.* "This possibility should give courts pause before conclud-

ing that the availability of class arbitration is a question the arbitrator should decide." *Id.*

II. The Court should decide whether a contract requires arbitration of class arbitrability if it lacks an express statement delegating that issue to the arbitrator

The second question presented asks whether an agreement may be interpreted to delegate the availability of class arbitration to the arbitrator if the agreement lacks an express statement making a delegation, but instead merely requires the arbitration to be conducted under standard arbitration rules. This question warrants this Court's review because it has divided the federal courts of appeals 4–4, it is exceptionally important, and the Eleventh Circuit answered it incorrectly.

A. The courts of appeals have divided 4–4 over the second question presented

Federal courts of appeals have divided 4–4 about whether an agreement delegates questions of class arbitrability to the arbitrator if the agreement says nothing about class arbitrability, but instead provides only that the arbitration must be conducted in accordance with standard arbitration rules.

1. Four Circuits—the Third, Fourth, Sixth, and Eighth—have concluded that an arbitration agreement does not delegate class arbitrability to the arbitrator simply because the agreement requires the arbitrator to follow the American Arbitration Association's rules.

Third Circuit. The Third Circuit has held that an agreement delegates the question of class arbitrability to the arbitrator only if it includes "express con-

tractual language unambiguously delegating [that] question." *Chesapeake Appalachia*, 809 F.3d at 761. "It is not enough for [that party] to establish that the AAA rules provide for the arbitrators to decide … the question of class arbitrability, and that, in turn, these rules are incorporated by reference [in the arbitration agreement]." *Id.* That is so because "a daisy-chain of cross-references"—going from the arbitration agreement to the AAA rules, and from the AAA rules to the Supplementary Rules—"fail[s] to satisfy the onerous burden of undoing the presumption in favor of judicial resolution of the question of class arbitrability." *Id.*

Fourth Circuit. The Fourth Circuit has held that an agreement to abide by "the rules of the American Arbitration Association" "d[oes] not unmistakably provide that the arbitrator would decide whether [the] agreement authorizes class arbitration." *Del Webb Communities, Inc. v. Carlson*, 817 F.3d 867, 869, 877 (4th Cir. 2016). Quite the contrary, the Fourth Circuit ruled that such an agreement "says nothing at all about the subject" of class arbitrability. *Id.* at 877.

Sixth Circuit. The Sixth Circuit, too, has held that an arbitration clause that "does not mention classwide arbitration at all" "does not clearly and unmistakably assign to an arbitrator the question whether the agreement permits classwide arbitration." *Crockett*, 734 F.3d at 599. A contractual reference to the rules "of the American Arbitration Association" does not suffice. *Id.*

Eighth Circuit. Like the Third, Fourth, and Sixth Circuits, the Eighth Circuit requires clear contractual "language" to assign the question of class arbitra-

bility to the arbitrator. *Catamaran*, 864 F.3d at 971. "Incorporation of AAA Rules by reference is insufficient evidence that the parties intended for an arbitrator to decide the substantive question of class arbitration." *Id.*

2. Four Circuits—the Second, Fifth, Tenth, and Eleventh—have held that an arbitration agreement does delegate class arbitrability to the arbitrator by requiring the arbitrator to follow the American Arbitration Association's rules.

Second Circuit. The Second Circuit has held that an arbitration contract's "incorporation" of AAA rules "demonstrates an intent to delegate to an arbitrator any questions of arbitrability, including whether class arbitration is available." *Sappington*, 884 F.3d at 397–98. The Second Circuit was unmoved by the "string of inferences" it takes to go from the contract to the rule that "authorize[s] arbitrators to resolve questions of [class] arbitrability." *Id.* at 397.

Fifth Circuit. The Fifth Circuit, too, has held that an agreement to follow "AAA rules" "also constitutes consent to the Supplementary Rules," and that "consent to the Supplementary Rules … constitutes a clear agreement to allow the arbitrator to decide whether the party's agreement provides for class arbitration." *Reed v. Florida Metropolitan University, Inc.*, 681 F.3d 630, 635–36 (5th Cir. 2012), *abrogated in part on other grounds*, *Sutter*, 569 U.S. 564.

Tenth Circuit. The Tenth Circuit has held that "incorporation of the [AAA] Rules clearly and unmistakably shows the parties intended for the arbitrator to decide all issues of arbitrability," including "the

question of classwide arbitrability." *Ray*, 900 F.3d at 1245, 1247.

Eleventh Circuit. In the decision below, the Eleventh Circuit held that "incorporation of AAA rules, standing alone, is … enough" to establish that "the parties' intent to have an arbitrator decide whether the agreement permits class arbitration." App. 5a.

3. Courts have expressly acknowledged this conflict of authority:

- The Second Circuit has acknowledged that the Third, Sixth, and Eighth Circuits disagree with the Second and Fifth Circuits about whether "the incorporation of AAA rules, standing alone, suffices to refer the class arbitration availability question to an arbitrator." *Sappington*, 884 F.3d at 398.
- The Tenth Circuit explicitly "reject[ed] the analyses of the Third, Sixth, and Eight Circuits," and "instead adopt[ed] the approach of the Second Circuit," in ruling that "incorporation of the AAA rules provides clear and unmistakable evidence that the parties intended to delegate matters of [class] arbitrability to the arbitrator." *Ray*, 900 F.3d at 1247–48.
- In the decision below, the Eleventh Circuit acknowledged that "four circuits have held that adoption of the AAA rules is not clear and unmistakable evidence of the parties' intent to have an arbitrator decide whether the agreement allows class arbitration." App. 8a.

B. The second question presented is exceptionally important

1. The second question presented is exceptionally important because arbitration contracts routinely require arbitration to be conducted under standard arbitration rules. Parties to arbitration contracts often find it easier to refer to a standardized set of rules already established by an outside organization, rather than devise their own arbitration rules from scratch. The interpretation of such routine references is, therefore, vitally important.

The standard rules here—those of the American Arbitration Association—are particularly popular. The AAA was founded in 1926, soon after the enactment of the Federal Arbitration Act. American Arbitration Association, *AAA Mission & Principles*, https://www.adr.org/MissionPrinciples. Today, over 400 companies—including AT&T, Citibank, Comcast, Discover, Verizon, and Wells Fargo—have registered their consumer arbitration contracts with the AAA. American Arbitration Association, *Consumer Clause Registry*, https://www.adr.org/simplefileandpay/faces/oracle/webcenter/portalapp/pages/clauseRegistry.jspx (follow "View Registered Consumer Arbitration Clauses" hyperlink). And in the past five years, over 18,000 consumer and employment arbitration claims have been filed before the AAA. American Arbitration Association, *Consumer Report Q3 2018*, https://www.adr.org/sites/default/files/document_repository/ConsumerReportQ3_2018.xlsx. Members of this Court have repeatedly cited the AAA's rules. *See, e.g.*, *Lewis*, 138 S. Ct. at 1640; *Green Tree Financial Corp.–Alabama v. Randolph*, 531 U.S. 79, 95 (2000) (Ginsburg, J., concurring in part and dissenting in

part); *Commonwealth Coatings Corp. v. Continental Casing Co.*, 393 U.S. 145, 149 (1968). And this Court alone has decided at least *16* cases in which the contract required the arbitration to be conducted under the rules of the AAA—a testament to the rules' ubiquity.[1]

The second question presented most often comes up in the context of the AAA's rules, but other common arbitration rules raise it too. For example, another leading arbitration organization, JAMS (formerly Judicial Arbitration and Mediation Services), also has rules that state that the arbitrator may decide class arbitrability. JAMS Class Action Procedures, Rule 2 (May 1, 2009) ("once appointed, the Arbitrator . . . shall determine as a threshold matter whether the arbitration can proceed on behalf of or against a class"). So too, the

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[1] *See Sutter*, 569 U.S. at 566; *Nitro-Lift Technologies, LLC v. Howard*, 568 U.S. 17, 18 (2012) (*per curiam*); *Marmet Health Care Center, Inc. v. Brown*, 565 U.S. 530, 531 (2012); *Stolt-Nielsen*, 559 U.S. at 668; *Arthur Anderson LLP v. Carlisle*, 556 U.S. 624, 626 (2009); *Preston v. Ferrer*, 552 U.S. 346, 350 (2008); *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 282 n.1 (2002); *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 412 (2001); *Cortez Byrd Chips, Inc. v. Bill Harbert Construction Co.*, 529 U.S. 193, 195 (2000); *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 470 n.1 (1989); *Southland Corp. v. Keating*, 465 U.S. 1, 4 (1984); *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 5 (1983); *Longshoremen v. Philadelphia Marine Trade Association*, 389 U.S. 64, 66 n.2 (1967); *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395, 398 (1967); *Wilko v. Swan*, 346 U.S. 427, 432 n.15 (1953); *Paramount Famous Lasky Corp. v. United States*, 282 U.S. 30, 37 n.1 (1930).

National Arbitration Forum's rules state that issues involving "the addition of Parties" "will be decided by the Arbitrator." National Arbitration Forum, Code of Procedure for Resolving Business-to-Business Disputes, Rule 2.14(A) (Nov. 1, 2015). Contracts that refer to these rules may raise the same issue as contracts that refer to the AAA's rules.

2. The second question presented also comes up a great deal. In 2018 alone, 4 court of appeals cases have considered whether a contract incorporating the AAA's rules delegates issues of class arbitrability to the arbitrator. *See* App. 5a; *JPay, Inc. v. Kobel*, 904 F.3d 923 (11th Cir. 2018); *Sappington*, 884 F.3d 392; *Ray*, 900 F.3d 1240. The same question has arisen in at least 26 more federal cases since 2015.[2]

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[2] *Catamaran*, 864 F.3d 966; *Del Webb*, 817 F.3d 867; *Chesapeake Appalachia*, 809 F.3d 746; *Sakyi v. Estée Lauder Companies, Inc.*, 308 F. Supp. 3d 366 (D.D.C. 2018); *Wells Fargo Advisors, LLC v. Sappington*, 2018 WL 3632525 (S.D.N.Y. July 31, 2018); *Anytime Labor–Kansas LLC v. Anderson*, 2018 WL 3313027 (W.D. Miss. July 5, 2018); *Torgerson v. LCC International, Inc.*, 227 F. Supp. 3d 1224 (D. Kan. 2017); *Abrams v. Chesapeake Energy Corporation*, 2017 WL 6541511 (M.D. Penn. Dec. 21, 2017); *Spirit Airlines, Inc. v. Maizes*, 2017 WL 4155476 (S.D. Fla. Sep. 19, 2017); *Dish Network, LLC v. Ray*, 226 F. Supp. 3d 1168 (D. Colo. 2016); *Langston v. Premier Directional Drilling, L.P.*, 203 F. Supp. 3d 777 (S.D. Tex. 2016); *Wells Fargo Advisors, LLC v. Tucker*, 195 F. Supp. 3d 543 (S.D.N.Y. 2016); *Henderson v. U.S Patent Commission, Ltd.*, 188 F. Supp. 3d 798 (N.D. Ill. 2016); *Hedrick v. BNC National Bank*, 186 F. Supp. 3d 1189 (D. Kan. 2016); *Tiffany v. KO Huts, Inc.*, 178 F. Supp. 3d 1140 (W.D. Okla. 2016); *Martinez v. Utilimap Corp.*, 2016 WL 6872649 (S.D. Ill. Nov. 22, 2016); *Catamaran Corporation v. Towncrest Pharmacy*, 2016 WL 7494281 (S.D. Iowa July 5, 2016); *JPay, Inc. v. Salim*, 2016 WL 9735069 (S.D. Fla May 24, 2016); *JPay, Inc. v. Kobel*, 2016 WL 2853537 (S.D. Fla. May 16,
(continued)

3. The Court has granted certiorari to decide similar questions before. The Court has granted certiorari to resolve conflicts about the meaning of other provisions commonly found in arbitration contracts. *See, e.g.*, *Lamps Plus, Inc. v. Varela*, No. 17-988 (O.T. 2018) (interpretation of general language commonly found in arbitration agreements); *BG Group*, 572 U.S. 25 (2014) (interpretation of multi-step dispute-resolution clause commonly found in international arbitration agreements); *Mastrobuono*, 514 U.S. 52 (1995) (interpretation of choice-of-law clause commonly found in arbitration agreements). More broadly, the Court has granted certiorari to decide questions of contract interpretation in areas where contract interpretation involves issues of federal law. *See, e.g.*, *M&G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926 (2015) (interpretation of durational clauses in collective-bargaining agreements). These cases confirm that the question of arbitration-agreement interpretation presented here is worthy of this Court's review.

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2016); *Chesapeake Appalachia, LLC v. Brown*, 2016 WL 815571 (M.D. Penn. Mar. 2, 2016); *Rossi v. SCI Funeral Services of New York, Inc.*, 2016 WL 524253 (E.D.N.Y. Jan. 28, 2016); *Castaldi v. Signature Retail Services, Inc.*, 2016 WL 74640 (N.D. Cal. Jan. 7, 2016); *Levin v. Caviar, Inc.*, 146 F. Supp. 3d 1146 (N.D. Cal. 2015); *Alixpartners, LLP v. Brewington*, 2015 WL 8538089 (E.D. Mich. Dec. 10, 2015); *Guess?, Inc. v. Russell*, 2015 WL 7175788 (C.D. Cal. Nov. 12, 2015); *Kag West, LLC v. Malone*, 2015 WL 6693690 (N.D. Cal. Nov. 3, 2015).

C. The Eleventh Circuit answered the second question presented incorrectly

Contrary to the Eleventh Circuit's decision, a contractual provision requiring the arbitration to be conducted under the AAA's rules does not clearly and unmistakably establish that the parties intended to delegate questions of class arbitrability to the arbitrator.

Under this Court's precedents, an arbitration contract satisfies a demand for a clear statement only if the necessary language appears in the contract itself—not if it appears in some other set of rules to which the contract refers. In *Mastrobuono*, this Court considered whether an arbitration agreement's reference to an external text "unequivocal[ly]" prohibited the arbitrator from awarding punitive damages. 514 U.S. at 60. The parties had agreed that their arbitration agreement "shall be governed by the laws of the State of New York"; those laws, in turn, allowed only courts—not arbitrators—to award punitive damages. *Id.* at 58–59. Even so, this Court ruled that this contractual reference to New York law was "not, in itself, an unequivocal exclusion of punitive damages claims." *Id.* at 60. The scope of the incorporation of New York law was unclear; one could reasonably read the provision to incorporate "only New York's substantive rights and obligations, and not the State's allocation of power between alternative tribunals." *Id.* In addition, "as a practical matter," the Court considered it "unlikely" that the parties "were actually aware" of the limits on punitive damages set out in an independent body of rules to which the contract referred, and not on the face of the contract itself. *Id.* at 63. In short, the clause, "at most," "intro-

duce[d] an ambiguity into [the] arbitration agreement"; it did not clearly preclude the arbitrator from awarding punitive damages. *Id.* at 62.

Mastrobuono defeats any claim that a contract clearly and unmistakably delegates issues of class arbitrability to the arbitrator by merely referring to the AAA rules. For one thing, the scope of the contractual provision requiring the arbitrator to follow the AAA rules is unclear. One can reasonably read the provision to incorporate the AAA's *procedures* for conducting arbitration, but not the AAA's "allocation of power between alternative tribunals." *Id.* at 60. (Indeed, elsewhere in its opinion, the Eleventh Circuit itself stated that "the choice of AAA rules covers dispute resolution procedures." App. 11a.) That is particularly so because the AAA's rules are constantly changing. One would reasonably expect parties to agree to follow whatever procedural rules are in effect at the time of the arbitration. But it would be surprising to learn that the parties had agreed to leave fundamental questions about who decides the very nature of the arbitration proceeding to the vagaries of amendments to AAA rules.

For another, "as a practical matter," it is even more "unlikely" here than in *Mastrobuono* that the parties "were actually aware" of the legal dispositions set out in the independent body of rules to which the arbitration agreement referred. 514 U.S. at 63. In *Mastrobuono*, the prohibition on arbitral awards of punitive damages was set out in the very rules to which the arbitration agreement referred: "the laws of the State of New York." In stark contrast, this case involves "a daisy-chain of cross-references"—"going from the [contract itself] to the

rules of the American Arbitration Association … and, at last, to the Supplementary Rules." *Chesapeake Appalachia*, 809 F.3d at 761.

In fact, two Members of this Court have *already* suggested that a contract like the one here does not require the arbitration of class arbitrability. In *Sutter*, the parties entered into a contract requiring arbitration "pursuant to the rules of the American Arbitration Association." 569 U.S. at 566. In this Court, the parties "agreed that the arbitrator should determine whether [the contract] authorized class procedures," and this Court accepted that concession. *Id.* at 569 n.2. But Justice Alito, joined by Justice Thomas, added: "Unlike petitioner, absent members of the plaintiff class never conceded that the contract authorizes the arbitrator to decide whether to conduct class arbitration. *It doesn't*." *Id.* at 574 (concurring opinion) (emphasis added). Justice Alito and Justice Thomas were right, and the Eleventh Circuit's contrary decision was wrong.

III. This case is an excellent vehicle for deciding both questions presented

This case cleanly presents both questions. *First*, the Eleventh Circuit squarely decided each of these questions. App. 5a; 8a–9a. There is no alternative ground for the Eleventh Circuit's decision. In particular, the Eleventh Circuit concluded that the arbitration contract delegates issues of class arbitrability to the arbitrator because of the contractual reference to the AAA rules alone. App. 5a–7a. The Eleventh Circuit identified no other contractual language that could independently justify this conclusion. App. 5a–7a.

Second, this case has been litigated in federal court. It is thus unaffected by Justice Thomas's view that the Federal Arbitration Act does not apply to state-court proceedings. *See Imburgia*, 136 S. Ct. at 471 (Thomas, J., dissenting).

Finally, this case lacks the defects that may have led the Court to deny certiorari in similar cases before. In 2014 and again in 2016, this Court denied certiorari on whether an arbitration agreement's reference to standard arbitration rules suffices to delegate issues of class arbitrability to the arbitrator (the second question presented here). *Reed Elsevier v. Crockett*, 572 U.S. 1114 (2014); *Scout Petroleum, LLC v. Chesapeake Appalachia, LLC*, 137 S. Ct. 40 (2016). Those petitions presented only the specific question about the significance of a contractual reference to standard arbitration rules (the second question presented here)—not the broader question about the burden a party must satisfy before arbitrating class arbitrability (the first question presented here). At the time of those petitions, there was no circuit split on the first question presented here; today, there is a 3–3 split. Similarly, when the Court denied certiorari in *Crockett*, there was only a 1–1 circuit split on the second question (between the Sixth and Fifth Circuits); and when it denied certiorari in *Chesapeake Appalachia*, there was only a 3–1 split (between the Third, Sixth, and Eighth Circuits on one side and the Fifth on the other). Today, the circuit split on the second question presented has reached 4–4.

The circuits are entrenched in their positions, and the circuit splits are only getting deeper with time. The Court should grant the petition to resolve both questions presented.

CONCLUSION

The Court should grant the petition for writ of certiorari.

Respectfully submitted.

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