No. 18-617

IN THE

Supreme Court of the United States

SPIRIT AIRLINES, INC.,

Petitioner,

v.

STEVEN MAIZES, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF *AMICUS CURIAE* OF THE CENTER FOR WORKPLACE COMPLIANCE IN SUPPORT OF PETITIONER

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The Center for Workplace Compliance (CWC) respectfully submits this brief *amicus curiae* with the consent of the parties. The brief supports the petition for a writ of certiorari.[1]

[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae's* intention to file this brief. All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

INTEREST OF THE *AMICUS CURIAE*

Founded in 1976, the Center for Workplace Compliance (CWC) (formerly the Equal Employment Advisory Council (EEAC)) is the nation's leading nonprofit association of employers dedicated exclusively to helping its members develop practical and effective programs for ensuring compliance with fair employment and other workplace requirements. Its membership includes over 240 major U.S. corporations, collectively providing employment to millions of workers. CWC's directors and officers include many of industry's leading experts in the field of equal employment opportunity and workplace compliance. Their combined experience gives CWC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of fair employment policies and requirements.

All of CWC's members are employers subject to a variety of federal employment-related laws and regulations. Many of them have contracts with their employees requiring individual arbitration of employment-related claims and disputes. Some of those agreements do not contain express class waiver clauses. Thus, the issues presented in this case are extremely important to the nationwide constituency that CWC represents.

The court below held that the question of class arbitrability was to be decided in arbitration, despite the absence of clear and unmistakable intent on the part of the parties to delegate that question to an arbitrator. That conclusion not only runs counter to this Court's prior pronouncements, but also undermines the value and utility of bilateral arbitration as

an effective means of dispute resolution and risk management.

Because of its strong interest in the subject, CWC has filed *amicus curiae* briefs in numerous cases before this Court supporting the enforceability of arbitration agreements as written. *See, e.g.*, *Lamps Plus, Inc. v. Varela*, No. 17-988 (U.S. 2018); *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018); *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564 (2013); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001). CWC thus has an interest in, and a familiarity with, the legal and public policy issues presented in this case. Because of its significant experience in these matters, CWC is well-situated to brief this Court on the importance of the issues beyond the immediate concerns of the parties to this case.

STATEMENT OF THE CASE

Respondent Steven Maizes is a consumer who joined Petitioner Spirit Airlines' (Spirit) "$9 Fare Club." Pet. App. 2a. As part of his membership, he agreed to the following:

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

Pet. App. 3a (emphasis added in part).

Maizes and three other individuals (the claimants) filed a claim in arbitration, alleging on behalf of themselves and a class of consumers that Spirit broke promises it made in the $9 Fare Club Agreement (Agreement). Pet. App. 2a. In response, Spirit sued the claimants in federal court, seeking a declaratory judgment that the arbitration clause contained in the Agreement did not authorize them to proceed collectively. Pet. App. 3a.

The district court dismissed the case. Pet. App. 4a. It found that the arbitration clause refers to the rules of the American Arbitration Association (AAA), which incorporate the AAA Supplementary Rules for Class Actions. *Id.* Rule 3 of the Supplementary Rules, in turn, authorizes the arbitrator to decide whether class arbitration is permitted. *Id.* The court thus rejected Spirit's contention that reference to the AAA rules did not constitute "clear and unmistakable" evidence that the parties agreed to delegate to the arbitrator the determination as to the arbitrability of class claims. Pet. App. 5a.

The Eleventh Circuit affirmed. Pet. App. 5a, 12a. It held that the parties' selection of AAA rules that themselves incorporate by reference supplementary rules delegating the class arbitrability question to the arbitrator amounted to "clear and unmistakable evidence that the parties chose to have an arbitrator decide whether their agreement provided for class arbitration." Pet. App. 7a (footnote omitted). Spirit filed a Petition for a Writ of Certiorari with this Court

on November 13, 2018. *Spirit Airlines, Inc. v. Maizes*, No. 18-617 (U.S. Nov. 13, 2018).

SUMMARY OF REASONS FOR GRANTING THE PETITION

The decision below disregards this Court's command that before questions of arbitrability may be sent to an arbitrator, "'clear and unmistakable evidence'" must exist that the parties intended to delegate such questions. *Henry Schein, Inc. v. Archer & White Sales, Inc.*, __ S. Ct. __, 2019 WL 122164, at *6 (U.S. Jan. 8, 2019) (quoting *First Options of Chicago v. Kaplan*, 514 U.S. 938, 944 (1985)). Here, the parties' arbitration agreement contains neither clear nor unmistakable evidence of intent to delegate – rather, it merely refers to standard AAA arbitration rules "then in effect." Pet. App. 3a. The Eleventh Circuit nevertheless found that the parties had clearly and unmistakably agreed to delegate questions of arbitrability to an arbitrator. The decision is erroneous, and should be reviewed and reversed by this Court.

Review is warranted for three reasons. First, the decision below conflicts with this Court's well-established arbitrability jurisprudence. Specifically, this Court has said that "[C]ourts presume that the parties intend courts, not arbitrators, to decide what we have called disputes about 'arbitrability.'" *BG Grp., PLC v. Republic of Argentina*, 572 U.S. 25, 34 (2014). This presumption is rebutted only where "'there is clear and unmistakable evidence'" that the parties agreed to arbitrate arbitrability. *Henry Schein,* 2019 WL 122164, at *6 (quoting *First Options*, 514 U.S. at 944).

Second, the Eleventh Circuit's decision exacerbates the conflict in the courts on this issue, leaving employ-

ers unsure about how class arbitrability questions will be resolved.

Third, as a policy matter, the issue of *who decides* questions of class arbitrability is of considerable importance to employers. Class arbitration differs fundamentally from traditional, bilateral arbitration. Indeed, as this Court has observed, "class-action arbitration changes the nature of arbitration …." *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662, 685 (2010). Whereas employers choose bilateral arbitration because of its relative informality and efficiency, class actions are inherently inefficient and procedure-bound. The shift from bilateral to class arbitration is momentous, making the decision about who decides questions of class arbitrability one of critical importance.

REASONS FOR GRANTING THE PETITION

I. REVIEW OF THE DECISION BELOW IS NEEDED TO RESOLVE ISSUES OF SUBSTANTIAL IMPORTANCE TO THE EMPLOYER COMMUNITY

A. The Decision Below Is Inconsistent With This Court's Well-Established Arbitrability Jurisprudence

The Federal Arbitration Act (FAA) provides that agreements to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2, "reflect[ing] the fundamental principle that arbitration is a matter of contract." *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 67 (2010); *see also Henry Schein, Inc. v. Archer & White Sales, Inc.*, __ S. Ct. __, 2019 WL 122164 (U.S. Jan. 8, 2019).

Thus, the FAA establishes that arbitration agreements are "on equal footing with all other contracts," *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006), meaning that courts are "require[d] … to enforce [them] according to their terms." *Volt Information Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 478 (1989).

This is true regardless of whether those terms address, for example, *which disputes* are arbitrable, or *who decides* such questions:

> Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, so the question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about *that* matter. Did the parties agree to submit the arbitrability question itself to arbitration?

First Options of Chicago v. Kaplan, 514 U.S. 938, 943 (1995) (citations omitted). *See also Henry Schein*, 2019 WL 122164, at *2 ("[T]he question of who decides arbitrability is itself a question of contract").

1. Absent a "clear and unmistakable" agreement to the contrary, arbitrability questions are to be decided by a court

This Court defines questions of arbitrability as those "gateway" issues that the parties would expect a court, rather than an arbitrator, to decide:

> The Court has found the phrase ["question of arbitrability"] applicable in the kind of narrow circumstance where contracting parties would likely have expected a court to have decided the gateway matter, where they are not likely to have

> thought that they had agreed that an arbitrator would do so, and, consequently, where reference of the gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate.

Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83-84 (2002).

For these gateway issues, the presumption is that a court will decide them rather than an arbitrator. *BG Grp., PLC v. Republic of Argentina*, 572 U.S. 25, 34 (2014) ("[C]ourts presume that the parties intend courts, not arbitrators, to decide what we have called disputes about 'arbitrability'"). Among the gateway issues typically reserved for a court "include questions such as 'whether the parties are bound by a given arbitration clause,' or 'whether an arbitration clause in a concededly binding contract applies to a particular type of controversy.'" *Id.* at 34 (quoting *Howsam*, 537 U.S. at 84). Whether parties have agreed to submit to class arbitration is precisely the type of question that the Court has said repeatedly is for courts to resolve.

The presumption that courts, not arbitrators, will decide questions of arbitrability can be overcome, but the burden is heavy: "[C]ourts 'should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so.'" *Henry Schein*, 2019 WL 122164, at *6 (quoting *First Options*, 514 U.S. at 944). *See also Howsam*, 537 U.S. at 83 ("The question whether the parties have submitted a particular dispute to arbitration, *i.e.*, the *question of arbitrability*, is an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise") (internal quotations and citation omitted).

The standard for overcoming the presumption that a court will decide class arbitrability questions is high because the question of who decides arbitrability "is rather arcane," *First Options*, 514 U.S. at 945, meaning that parties to an arbitration agreement are unlikely to have considered it. Presuming that the parties wanted an *arbitrator* to decide questions of arbitrability "might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide." *Id*. (citation omitted). Thus, if there are any doubts as to whom the parties wished to decide questions of arbitrability, the "clear and unmistakable" standard is not met, and the question must be left for a court to resolve.

2. The Eleventh Circuit incorrectly held that reference to standard commercial arbitration rules alone suffices as evidence of clear and unmistakable agreement to delegate arbitrability questions to the arbitrator

The arbitration clause contained in the Agreement is silent on the question of who decides class arbitrability, and the meaning and effect of the Agreement's reference to the AAA rules is, at best, ambiguous. The Eleventh Circuit nevertheless concluded, erroneously, that the parties had clearly and unmistakably delegated the issue to the arbitrator. Pet. App. 5a-7a.

Not only does the agreement lack an explicit reference to "class arbitration," it is also inherently ambiguous on the delegation issue. The arbitration clause at issue contains standard language providing that disputes are to be "resolved … *in accordance with the rules of the American Arbitration Association then*

in effect." Pet. App. 3a. This "implicates a daisy-chain of cross-references, [arising from the fact that] the AAA has adopted (and amended) numerous rules over many years, [and that t]he AAA website identifies more than fifty sets of rules." *Chesapeake Appalachia, LLC v. Scout Petroleum, LLC*, 809 F.3d 746, 761 (3d Cir. 2016) (internal quotations omitted). Far from explicitly delegating class arbitrability issues to arbitration, the agreement merely identifies dozens of rules without specifying which ones it intends to apply.

In *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, this Court held that imposing class arbitration on parties who have not explicitly authorized such proceedings is contrary to the FAA. The Court explained:

> An implicit agreement to authorize class-action arbitration … is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate. This is so because class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator. … We think that the differences between bilateral and class-action arbitration are too great for arbitrators to presume, consistent with their limited powers under the FAA, that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings.

559 U.S. 662, 685, 687 (2010) (footnote omitted). *Stolt-Nielsen* thus lends further credence to the idea that, unless there exists "'clear and unmistakable evidence'" that the parties agreed to arbitrate class arbitrability, the question must be resolved by the

courts. *Henry Schein,* 2019 WL 122164, at *6 (quoting *First Options*, 514 U.S. at 944).

B. The Federal Courts Of Appeals Are Deeply Divided Over When, And Under What Circumstances, An Arbitrator May Decide Class Arbitrability Questions

1. The Third, Sixth, and Eighth Circuits impose a higher burden for establishing that class arbitration questions may be decided by an arbitrator rather than a court, whereas the Second, Tenth, and Eleventh Circuits draw no distinction between class and bilateral arbitration

The federal courts of appeals have arrived at dramatically different conclusions on two questions: (1) what burden must be overcome to establish a clear and unmistakable intent to delegate class arbitrability questions to an arbitrator, and (2) whether a reference to standard arbitration rules is sufficient to establish such intent. This disagreement in the courts has placed employers with operations in multiple jurisdictions in an untenable position, unsure about the extent to which class arbitrability questions will be resolved consistently and in accordance with the terms of their written arbitration agreements.

Regarding the burden that must be met to establish clear and unmistakable intent to delegate, the Third, Sixth, and Eighth Circuits agree that the "risks incurred by defendants in class arbitration … and the difficulties presented by class arbitration … all demand a more particular delegation of the issue than we may otherwise deem sufficient in bilateral dis-

putes." *Catamaran Corp. v. Towncrest Pharmacy*, 864 F.3d 966, 973 (8th Cir. 2017); *see also Reed Elsevier, Inc. ex rel. LexisNexis Div. v. Crockett*, 734 F.3d 594, 599 (6th Cir. 2013) ("[T]he question whether the parties agreed to classwide arbitration is vastly more consequential than even the gateway question whether they agreed to arbitrate bilaterally"); *Chesapeake Appalachia*, 809 F.3d at 764-65, (finding that, given the differences between bilateral and class arbitration, "it is conceivable that [the parties] may have … intended to delegate questions of bilateral arbitrability to the arbitrators—as opposed to the distinctive question of whether they thereby agreed to a fundamentally different type of arbitration not originally envisioned by the FAA itself"). These courts have rejected the notion embraced by the court below that mere reference to standard arbitration rules is sufficient to establish a "clear and unmistakable" intent to delegate the class arbitration question to the arbitrator.

In contrast, the Second and Tenth – and now Eleventh – Circuits disagree, finding instead that "[t]he fundamental differences between bilateral and classwide arbitration are irrelevant" when determining whether the clear and unmistakable burden has been met, *Dish Network L.L.C. v. Ray*, 900 F.3d 1240, 1247 (10th Cir. 2018). These courts look instead to state law to "define[] how explicit the clause's language must be to satisfy" the test. *Wells Fargo Advisors, LLC v. Sappington*, 884 F.3d 392, 399 (2d Cir. 2018). The Eleventh Circuit, for its part, simply "find[s] no basis for that higher burden in Supreme Court precedent." Pet. App. 9a (footnote omitted).

2. The Third, Fourth, Sixth, and Eighth Circuits require an express delegation of class arbitration questions to the arbitrator, whereas the Second, Fifth, Tenth, and Eleventh Circuits permit delegation by inference

Courts are also divided regarding whether the "clear and unmistakable" standard can be met by simple reference to standard arbitration rules. The Third, Fourth, Sixth, and Eighth Circuits agree that to overcome the presumption that a court will determine questions of class arbitrability, an arbitration agreement must contain "express contractual language unambiguously delegating the question." *Chesapeake Appalachia*, 809 F.3d at 761. *See also Del Webb Cmtys., Inc. v. Carlson*, 817 F.3d 867, 877 (4th Cir. 2016) ("[T]he parties did not unmistakably provide that the arbitrator would decide whether their agreement authorizes class arbitration. In fact, the sales agreement says nothing at all about the subject"); *Reed Elsevier*, 734 F.3d at 599 ("The principal reason to conclude that this arbitration clause does not authorize classwide arbitration is that the clause nowhere mentions it"); *Catamaran Corp.*, 864 F.3d at 972-73 ("[W]e see no mention of class arbitration. Each agreement states that any dispute … shall be resolved by arbitration under the AAA's applicable rules. But regarding class arbitration, there is complete silence. And silence is insufficient grounds for delegating the issue to an arbitrator"). Their rationale is consistent with *First Options*, which recognizes "an important qualification," 514 U.S. at 944, to the general rule that courts "should apply ordinary state-law principles that govern the formation of contracts…: Courts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evi-

dence that they did so." *Id.* (citations omitted). *See also Henry Schein,* 2019 WL 122164, at *6.

By contrast, the Second, Fifth, Tenth, and Eleventh Circuits permit delegation of class arbitrability questions to an arbitrator by mere reference to standard arbitration rules. Relying on either state law or intra-circuit precedent, these circuits have all concluded, without meaningful analysis, that "incorporation serves as clear and unmistakable evidence of the parties' intent to delegate such issues to an arbitrator." *Wells Fargo*, 884 F.3d at 396 (citing *Contec Corp. v. Remote Sol. Co.*, 398 F.3d 205, 208 (2d Cir. 2005) and *State ex rel. Pinkerton v. Fahnestock*, 531 S.W.3d 36, 45-48 (Mo. 2017) (*en banc*)); *Reed v. Fla. Metro. Univ., Inc.*, 681 F.3d 630, 635-36 (5th Cir. 2012) ("The parties' consent to the Supplementary Rules, therefore, constitutes a clear agreement to allow the arbitrator to decide whether the party's agreement provides for class arbitration"), *abrogated on other grounds by Oxford Health Plans LLC v. Sutter*, 569 U.S. 564 (2013); *Dish Network*, 900 F.3d at 1246 ("'[B]y incorporating the AAA Commercial Arbitration Rules into their agreement, the parties authorized the arbitrator to decide arbitrability issues'") (quoting *Ahluwalia v. QFA Royalties, L.L.C.*, 226 P.3d 1093, 1099 (Colo. App. 2009)) (footnote omitted); Pet. App. 6a ("[T]he parties' choice of AAA's Commercial Arbitration Rules was clear and unmistakable evidence that they intended an arbitrator to decide whether the arbitration agreements were enforceable") (citing *Terminix Int'l Co., LP v. Palmer Ranch Ltd. P'ship*, 432 F.3d 1327, 1332 (11th Cir. 2005)).

This pronounced conflict in the courts underscores the need for definitive guidance from this Court regarding what proof is sufficient to demonstrate

a clear and unmistakable intent to delegate class arbitrability issues to an arbitrator rather than to a court.

C. Because Of The Profound Differences Between Class And Bilateral Arbitration, The Answer To The "Who Decides" Question Is Of Paramount Importance To Employers

1. Imposing class procedures fundamentally alters the nature of arbitration

Employers choose bilateral arbitration because of, among other things, the efficiencies it offers. As this Court has observed, class arbitration is fundamentally different from standard bilateral arbitration, not least because it dramatically raises the stakes of a dispute while simultaneously reducing the opportunity for meaningful judicial review. Because the stakes are so high, ensuring that the parties' contractual wishes and expectations are enforced consistently is of paramount importance to employers.

For them, the question of whether any number of claims can be joined into a single classwide arbitration proceeding is a critically important question because "class-action arbitration changes the nature of arbitration …." *Stolt-Nielsen*, 559 U.S. at 685. With conventional bilateral arbitration, "parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution." *Id.* With class arbitration, however, "the relative benefits … are much less assured." *Id*. Recognizing the "fundamental changes brought about by the shift from bilateral arbitration to class-action arbitration," *id.* at 686, this Court in *Stolt-Nielsen*

held that class arbitration cannot be imposed in the absence of a contractual basis for doing so. In other words, silence is insufficient to establish the parties' intent to submit to class arbitration.

Employers agree to resolve disputes through arbitration because it offers the "promise of quicker, more informal, and often cheaper resolutions for everyone involved," *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018) (citation omitted). "A prime objective of an agreement to arbitrate is to achieve 'streamlined proceedings and expeditious results,'" *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 346 (2011) (citation omitted), by making use of "the traditionally individualized and informal nature of arbitration." *Epic Systems*, 138 S. Ct. at 1623.

In fact, "the relative informality of arbitration is one of the chief reasons that parties select arbitration," *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 269 (2009), as it "reduc[es] the cost and increase[s] the speed of dispute resolution." *Concepcion*, 563 U.S. at 345 (citations omitted). Indeed, "[p]arties generally favor arbitration precisely because of the economics of dispute resolution," *14 Penn Plaza*, 556 U.S. at 257, as it provides the "'essential virtue of resolving disputes straightaway.'" *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 568 (2013) (citation omitted).

Resolving disputes quickly and inexpensively is "of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001). Thus, many employers have adopted alternative dispute resolution programs with a mandatory arbitration component primarily in an effort to reduce litigation costs and to minimize ill will between the parties to a dispute.

By contrast, class actions are inherently inefficient and procedurally complex. Accordingly, as one commentator has noted, the "laissez-faire environment" of arbitration "is not one in which the class action vehicle belongs," owing to the myriad procedures that a class action – indeed, any class proceeding – requires in order to ensure fairness and due process:

> Class actions require all the process that can be afforded. Before class members' rights are extinguished we insist on many procedural safeguards. For example, class counsel have duties running to absent class members, people they do not know; settlements require court approval and consideration of the public interest; and the general public gets to chime in on whether they think things are fair. If an absent class member is going to forfeit his right to sue without consent, it must be done in the fairest manner possible.

Neal Troum, *The Problem with Class Arbitration*, 38 Vt. L. Rev. 419 (2013) (footnotes omitted).

Thus, the difference between default, bilateral arbitration and class arbitration is not merely one of degree; rather, the shift to class arbitration is a pivotal one. As this Court has emphasized repeatedly, "class-action arbitration changes the nature of arbitration," *Stolt-Nielsen*, 559 U.S. at 685, by trading "the virtues Congress originally saw in arbitration, its speed and simplicity and inexpensiveness," for slower and costlier procedures that come to resemble litigation. *Epic Systems*, 138 S. Ct. at 1623. *See also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) ("By agreeing to arbitrate ..., [a party] trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration"); *Concepcion*, 563 U.S.

at 348 ("[S]witch[ing] from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment"). In short, class arbitration "greatly increases risks to defendants." *Concepcion*, 563 U.S. at 348.

Considering the high stakes involved, *who decides* questions of class arbitrability is of critical importance, and employers must have assurance that the issue will be decided correctly. Given the judiciary's expertise in deciding issues related to complex class and collective actions and its understanding of the far-reaching implications of class proceedings, courts are best equipped to weigh whether the parties to an arbitration agreement clearly and unmistakably agreed to submit to class arbitration procedures. As this Court has observed, "align[ing] (1) decisionmaker with (2) comparative expertise will help better to secure a fair and expeditious resolution of the underlying controversy." *Howsam*, 537 U.S. at 85.

Adhering to the general rule that class arbitrability questions must be resolved by a court also serves important goals related to efficient dispute resolution. Weakening the presumption against arbitration of class arbitrability questions would almost certainly result in courts eventually considering the issue anyway. For instance, Rule 5(d) of the AAA Supplementary Rules for Class Arbitrations[2] permits either party to an arbitration to petition a court "to confirm or to vacate the Class Determination Award," thus delaying the arbitrator's consideration of the merits

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[2] *Available at* https://www.adr.org/sites/default/files/Supplementary%20Rules%20for%20Class%20Arbitrations.pdf.

while clogging a court's docket. And although the arbitrator's award is unlikely to be disturbed, *see infra* Section I.C.2, this bouncing back and forth between arbitration and court introduces inefficiencies that are completely unnecessary, both for the parties and the judicial system.

The Eleventh Circuit erroneously relied on rules of a commercial arbitration provider, which were incorporated by reference into the arbitration provision, to find clear and unmistakable evidence that the parties agreed to delegate class arbitration questions to the arbitrator. Review by this Court is needed to clarify what evidence is sufficient to satisfy the "clear and unmistakable" standard in the class arbitrability context.

2. Limited judicial review leaves parties without effective recourse in high-stakes disputes

Access to full judicial review is one feature of litigation that parties forgo when agreeing to arbitrate. *See Concepcion*, 563 U.S. at 350. Section 10 of the FAA provides that a court "may make an order vacating the award upon the application of any party to the arbitration":

> (1) where the award was procured by *corruption, fraud, or undue means*;
>
> (2) where there was evident *partiality or corruption* in the arbitrators, or either of them;
>
> (3) where the arbitrators were guilty of *misconduct* in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by

> which the rights of any party have been prejudiced; or
>
> (4) where the arbitrators *exceeded their powers*, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10 (emphasis added). In other words, "review under § 10 focuses on misconduct rather than mistake," and provides "no effective means of review." *Concepcion*, 563 U.S. at 350-51. Indeed, this Court has said that a "court should give considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances." *First Options*, 514 U.S. at 943.

Agreeing to limited judicial review may be an acceptable risk for an employer dealing with a bilateral dispute, but once class proceedings are introduced, the stakes soar. *See Concepcion*, 563 U.S. at 348. Access to full judicial review thus is much more important in class arbitration, and the lack thereof in the arbitral context casts doubt on whether an employer would ever agree to classwide arbitration in the first instance such that silence on the question simply cannot serve as credible evidence of consent. *Id*. at 351 ("We find it hard to believe that defendants would bet the company with no effective means of review") (footnote omitted).

The high stakes of the class arbitrability question require a strong presumption that courts, not arbitrators, will answer such questions. Employers need certainty that, unless they enter into an arbitration agreement that expressly says otherwise, questions of class arbitrability will be resolved in a court, thus preserving the right to seek meaningful judicial review.

CONCLUSION

Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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