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 OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

STEVEN P. LEHOTSKY
JONATHAN D. URICK
U.S. Chamber Litigation Center
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

ANDREW J. PINCUS
Counsel of Record
EVAN M. TAGER
ARCHIS A. PARASHARAMI
DANIEL E. JONES
MATTHEW A. WARING
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Amicus Curiae

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber represents the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the Nation's business community, including cases addressing the enforceability and interpretation of arbitration agreements.[1]

Many of the Chamber's members and affiliated companies employ arbitration agreements in their contracts. Arbitration allows them to resolve disputes promptly and efficiently while avoiding the high costs associated with traditional litigation. The arbitration contemplated by the Federal Arbitration Act ("FAA") is speedy, fair, inexpensive, and less adversarial than

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its members, and its counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice at least 10 days prior to the due date of the intention of *amicus* to file this brief. All parties consented to the filing of the brief.

litigation in court—in part because "arbitration as envisioned by the FAA" takes place on an individual rather than class-wide basis. *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 351 (2011). The Chamber's members have therefore structured millions of contractual relationships around arbitration agreements providing for bilateral dispute resolution.

By contrast, class arbitration is a worst-of-all-worlds Frankenstein's monster: It combines the enormous stakes, formality and expense of litigation—all of which is inimical to bilateral arbitration—with exceedingly limited judicial review of the arbitrators' decisions. It is for that reason that "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Concepcion*, 563 U.S. at 344.

For that reason, whether parties to an arbitration agreement agreed to depart from traditional arbitration procedures and instead authorize class arbitration is a fundamental, threshold question of monumental importance that parties expect will be decided by a court rather than an arbitrator. Yet the decision below and similar decisions from other circuits turn this expectation on its head, concluding that any time parties agree to use standard arbitration rules from the nation's most popular arbitration administrators, they are clearly and unmistakably authorizing arbitrators rather than courts to decide whether class arbitration is available. The Chamber has a strong interest in this Court's review and reversal of the judgment below.

INTRODUCTION AND SUMMARY OF ARGUMENT

Who decides whether an arbitration provision authorizes class-wide arbitration—a court or an arbitrator—is a question of tremendous practical significance. As this Court has observed, class arbitration is "not arbitration as envisioned by the FAA" and "lacks its benefits." *Concepcion*, 563 U.S. at 351. Rather, class arbitration is an unwieldy hybrid proceeding that forsakes the informality and expediency of traditional arbitration in favor of the procedural complexity and bet-the-company stakes of class litigation—but with sharply limited judicial review.

Like millions of other contracting parties, the parties in this case agreed to arbitrate any disputes they had pursuant to the arbitration rules of the American Arbitration Association ("AAA")—the country's most popular arbitration provider.

It is highly doubtful that the parties, simply by selecting the AAA rules, meant to agree to anything regarding the availability of class arbitration—let alone to delegate to the arbitrator the authority to decide that fundamental question. Yet the court below held that the parties had, in fact, delegated that question, because the AAA has promulgated supplementary rules for class arbitrations that permit arbitrators to decide whether an arbitration agreement authorizes class-wide arbitration.

That decision, which deepens *two* already-entrenched circuit splits (see Pet. 9-12, 23-26), warrants this Court's immediate review to restore uniformity and predictability to this critically important area of the law. The Chamber submits this brief to elaborate

upon two additional reasons why the Court should grant review.

First, the decision below cannot be reconciled with this Court's precedents, which require a contract to speak clearly and unmistakably in order to delegate gateway issues of arbitrability to an arbitrator. A contractual provision that simply selects standard rules of an arbitration provider to govern the procedures for any arbitration between the parties does not "clearly" or "unmistakably" delegate to the arbitrator the authority to decide the availability of class arbitration.

The only set of AAA rules that even mentions class arbitration is a supplemental set of rules—the Supplementary Rules for Class Arbitrations—and although those rules provide that an arbitrator *may* decide whether class arbitration is available, they do not *require* the arbitrator to do so. A chain of inferences built upon a supplemental set of rules not named in the contract, which themselves merely allow an arbitrator to decide whether class arbitration is available, is not sufficient to support a determination that the parties clearly and unmistakably took the issue out of the hands of the courts.

Second, if permitted to stand, the decision below will have harmful consequences for businesses, consumers, and employees alike. As this Court has often observed, class arbitration has little to recommend it: It replaces the efficiency and informality of bilateral arbitration with unmanageable procedural complexity; it creates uncertainty about the rights of absent class members; and it gives rise to inordinate settlement pressure due to the high stakes of class cases combined with the exceptionally limited scope of judicial review. Thus, the Court has held that parties should be directed to class arbitration when, and only

when, the arbitration provision reflects their actual agreement to authorize class procedures.

The same principle holds for the threshold question of "who decides" whether class procedures are available. Yet if the approach adopted below is allowed to stand, parties will routinely be held to have removed this crucial determination from the hands of courts, given that the vast majority of contracting parties choose to incorporate standard arbitral rules like the AAA's into their arbitration agreements. As a result, many parties will be at risk of being required by arbitrators to arbitrate their disputes on a class basis, with only limited grounds for judicial review of that critical determination.

The petition should therefore be granted and the judgment of the court of appeals reversed.

ARGUMENT

I. Incorporating Standard Arbitral Rules Does Not "Clearly And Unmistakably" Delegate The Question Of Class Arbitration.

A. Federal law reserves gateway issues of arbitrability for courts to decide unless parties clearly and unmistakably contract around that default rule.

The ability of parties to structure their arbitration agreements is a core aspect of the FAA's pro-arbitration policies. The FAA "imposes certain rules of fundamental importance, including the basic precept that arbitration 'is a matter of consent, not coercion.'" *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662, 681 (2010) (quoting *Volt Info. Scis., Inc.* v. *Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)). As this Court has repeatedly explained, a

"party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) (quotation marks omitted). For that reason, "parties may agree to limit the issues subject to arbitration" as well as "to limit *with whom* a party will arbitrate its disputes." *Concepcion*, 563 U.S. at 344.

Accordingly, an arbitrator has authority to decide a particular question only if the parties have authorized him or her to do so. See, *e.g.*, *Stolt-Nielsen*, 559 U.S. at 682 ("[A]n arbitrator derives his or her powers from the parties' agreement to forgo the legal process and submit their disputes to private dispute resolution."); *AT&T Techs., Inc.* v. *Commc'ns Workers of Am.*, 475 U.S. 643, 648-49 (1986) ("[A]rbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration.").

In keeping with these principles, this Court has recognized that "gateway question[s]" of "arbitrability"—*i.e.*, "whether the parties have submitted a particular dispute to arbitration"—are presumptively for the courts, not arbitrators, to decide. *Howsam*, 537 U.S. at 83-84 (quotation marks omitted). Such gateway questions include, but are not limited to, "whether parties have a valid arbitration agreement at all" (*Oxford Health Plans LLC* v. *Sutter*, 569 U.S. 564, 569 n.2 (2013) (quotation marks omitted)) and "whether an arbitration clause in a concededly binding contract applies to a particular type of controversy" (*Howsam*, 537 U.S. at 84).[2]

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[2] See also, *e.g.*, *Granite Rock Co.* v. *Int'l Bhd. of Teamsters*, 561 U.S. 287, 299-300 (2010) (disputes over "formation of the parties' arbitration agreement" and "its enforceability or applicability to

What these issues have in common is that "contracting parties would likely have expected a court" to decide them. *Howsam*, 537 U.S. at 83. That is because their resolution goes to the heart of the arbitral bargain, deciding the core question of what dispute or disputes the parties have agreed to submit to the arbitrators for decision. Farming out these gateway questions to the arbitrators would therefore "risk * * * forcing parties to arbitrate a matter that they may well not have agreed to arbitrate." *Id.* at 83-84.

For that reason, the FAA imposes a default rule that such issues are "for judicial determination," and parties must "clearly and unmistakably provide otherwise" in order to contract around that rule. *Howsam*, 537 U.S. at 83 (quoting *AT&T Techs.*, 475 U.S. at 649). As this Court explained in *First Options*:

> [G]iven the principle that a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration, one can understand why courts might hesitate to interpret silence or ambiguity on the "who should decide arbitrability" point as giving the arbitrators that power, for doing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide.

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the dispute" are ordinarily for the courts); *First Options of Chi., Inc.* v. *Kaplan*, 514 U.S. 938, 941 (1995) (same for dispute over whether arbitration clause applied to a party who "had not personally signed" the contract in which it was contained); *AT&T Techs.*, 475 U.S. at 651 (same for dispute over whether particular labor-management layoff dispute fell within the arbitration clause in a collective bargaining agreement); *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543, 546-48 (1964) (same for dispute over whether arbitration provision survived a corporate merger).

514 U.S. at 945.

B. The question whether the parties intended to authorize class arbitration is a gateway question for courts to decide absent express and unambiguous contractual delegation of that issue to an arbitrator.

Respondents in this case have not disputed "that the availability of class arbitration is a question of arbitrability." Pet. App. 5a. Accordingly, the issue is whether the parties' agreement to arbitrate "in accordance with the rules of the American Arbitration Association then in effect" (*id*. at 10a (emphasis omitted)) "clearly and unmistakably" overrides the FAA's strong presumption that courts should decide that question. It does not.

The Court's "clear[]" and "unmistakabl[e]" standard is a "heightened" one (*Rent-A-Center, W., Inc.* v. *Jackson*, 561 U.S. 63, 69 n.1 (2010) (quotation marks omitted)) that creates a "strong pro-court presumption as to the parties' likely intent" (*Howsam*, 537 U.S. at 86). And the question whether an arbitration agreement authorizes class procedures is one that the vast majority of contracting parties would expect a court to resolve, and that cannot be delegated to an arbitrator absent the clearest and most explicit agreement to do so.

1. As this Court has repeatedly recognized, the differences between traditional, bilateral arbitration and class arbitration are fundamental. The "virtues Congress originally saw in arbitration" are "its speed and simplicity and inexpensiveness." *Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612, 1623 (2018). Accordingly, "one

of arbitration's *fundamental* attributes" is its "individualized nature." *Id.* at 1622 (emphasis added).

"Class arbitration"—by contrast—is "not arbitration as envisioned by the FAA" and "lacks its benefits." *Concepcion*, 563 U.S. at 350-51. That is because the shift from bilateral to class-wide arbitration results in several "fundamental changes" (*Stolt-Nielsen*, 559 U.S. at 686) that wreak havoc on the type of arbitration that the FAA contemplates.

To begin with, "the switch 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." *Concepcion*, 563 U.S. at 348. Bilateral arbitration is an attractive alternative to litigation precisely because, in the ordinary course, it permits parties to trade the "procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution," including "lower costs" and "greater efficiency and speed." *Stolt-Nielsen*, 559 U.S. at 685; see also *Concepcion*, 563 U.S. at 348.

Class arbitration, by contrast, "*requires* procedural formality." *Concepcion*, 563 U.S. at 349. Before reaching the merits, the arbitrator "must first decide, for example, whether the class itself may be certified, whether the named parties are sufficiently representative and typical, and how discovery for the class should be conducted." *Id.* at 348. Moreover, the delays inherent in class arbitration are undeniable: In *Concepcion*, the Court cited statistics showing that class arbitrations take years to resolve instead of months—and *none* of the hundreds of class arbitrations discussed by the court ended with "a final award on the merits." *Id.* at 349.

In addition, class arbitration ratchets up the stakes of arbitration and the risk to defendants of an adverse decision. The "commercial stakes of class-action arbitration are comparable to those of class-action litigation" because the arbitrator's award "adjudicates the rights of absent parties." *Stolt-Nielsen*, 559 U.S. at 686. In a class arbitration, all of the risk is packed into a single arbitrator's (or panel's) decision and therefore "will often become unacceptable," pressuring defendants "into settling questionable claims." *Concepcion*, 563 U.S. at 350; see also *Green Tree Fin. Corp.* v. *Bazzle*, 539 U.S. 444, 459 (2003) (Rehnquist, C.J., dissenting) (observing that a class arbitration proceeding "concentrat[es] all of the risk of substantial damages awards in the hands of a single arbitrator").

2. Given these characteristics, the Court held in *Stolt-Nielsen* that "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." 559 U.S. at 685. Rather, there must be "a contractual basis for concluding that the party *agreed* to do so." *Id.* at 684.

It follows, therefore, that parties' silence on the antecedent "who decides" question cannot be construed as implicit—much less "clear" and "unmistakable"—consent to submit the availability of class arbitration to the arbitrator either. But deeming an unremarkable reference to the rules of the AAA—the most commonplace arbitration provider in the United States—to be a clear and unmistakable delegation of the class arbitrability issue would effectively do just that.

Indeed, decisions like the one below turn the clear-and-unmistakable standard on its head. The upshot of their reasoning is that parties who incorporate commonplace arbitral rules cannot reserve for courts the decision regarding availability of class arbitration unless their agreement expressly carves out that issue for judicial resolution. But the whole point of the clear-and-unmistakable standard is to create a "strong pro-*court* presumption" for issues of arbitrability—a safeguard that ensures that parties will not be forced "to arbitrate a matter that they may well not have agreed to arbitrate." *Howsam*, 537 U.S. at 84, 86 (emphasis added). That safeguard is especially critical for the class arbitrability issue, because class arbitration represents a fundamental departure from the type of informal, individualized proceeding envisioned by the FAA. See pages 8-10, *supra*.

3. The error in the decision below is further confirmed by the daisy-chain of inferences that must be drawn in order to conclude that a general reference to a particular arbitration provider's rules is enough to delegate the issue of class arbitration. The parties' arbitration agreement here simply incorporated "the rules of the [AAA] then in effect" (Pet. App. 3a (emphasis omitted)), which the court took to include the AAA's Supplementary Rules for Class Arbitrations. But neither the AAA's consumer nor its commercial arbitration rules themselves refer to or incorporate the Supplementary Class Rules; indeed, they do not mention the notion of class arbitration at all.

Thus, the court below was required to infer that (1) the parties were aware of the Supplementary Class Rules, even though they were not referenced in either the agreement itself or the text of the AAA's underlying arbitration rules; (2) the parties clearly intended

the Supplementary Class Rules to apply to their dispute, notwithstanding the agreement's silence as to those rules; and (3) in particular, the parties clearly intended to have the Supplementary Class Rules divest courts of their jurisdiction to rule on the availability of class-wide arbitration. This piling of inference upon inference stretches this Court's "clear and unmistakable" requirement beyond recognition.

Moreover, even if a general reference to the AAA's rules were deemed to further incorporate the Supplementary Class Rules as well, the Supplementary Class Rules do not *require* that the issue of class arbitrability be decided by the arbitrator. On the contrary, they explicitly recognize that the decision may be made by a court instead. Specifically, Supplementary Class Rule 1(c) contemplates that "a court" may, "by order, address[] and resolve[] any matter that would otherwise be decided by an arbitrator under these Supplementary Rules" and requires the arbitrator in such circumstances to "follow the order of the court." AAA, *Supplementary Rules for Class Arbitrations* 3 (Oct. 8, 2003), perma.cc/6D8N-XG3Q.

The Supplementary Class Rules therefore do not dictate whether a court or an arbitrator decides the availability of class arbitration. This language's recognition that courts may have a role to play in determining whether class procedures are available in arbitration further confirms that the mere choice to arbitrate under the AAA rules does not come close to qualifying as "clear and unmistakable" intent to delegate the class arbitration question to the arbitrator.

II. The Questions Presented Are Frequently Recurring And Exceptionally Important.

The questions presented recur with great frequency. It is very common for arbitration provisions—whether in employment contracts, consumer contracts, or commercial agreements—to call for arbitration under the rules of an arbitration provider such as the AAA or JAMS (formerly known as Judicial Arbitration and Mediation Services, Inc.). Parties generally find it simpler to incorporate a set of existing rules by reference than to draft their own set of rules and insert them into their contract, and selecting an established provider's arbitral rules helps ensure that the chosen provider will accept a dispute arising out of the contract.

It is unsurprising, then, that there have been at least *thirty* federal cases in the past three years alone that have presented the question whether a contract incorporating the AAA rules delegates issues of class arbitrability to the arbitrator. See Pet. 29 & n.2.[3] The questions presented recur with great frequency—and will continue to do so unless this Court resolves the conflict among the lower courts over whether incorporation of arbitral rules is sufficient to delegate to an

[3] While the issue arises most frequently in the context of the AAA's rules, it is also presented by agreements that incorporate the rules of JAMS, because JAMS has similar class action procedures that in some circumstances would permit an arbitrator to decide whether an arbitration agreement authorizes class arbitration. See JAMS Class Action Procedures R. 2 (May 1, 2009), https://www.jamsadr.com/rules-class-action-procedures/.

arbitrator the question whether the parties agreed to class arbitration.[4]

The questions presented are also critically important for many of the same reasons that the decision below is incorrect. Because "[a]n incorrect 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," the decision "whether the parties agreed to classwide arbitration is vastly more consequential than even the gateway question whether they agreed to arbitrate" at all. *Reed Elsevier, Inc. ex. rel. LexisNexis Div.* v. *Crockett*, 734 F.3d 594, 599 (6th Cir. 2013) (alterations, citation, and quotation marks omitted).

Indeed, the enormous stakes of class arbitration (see page 10, *supra*) make it critically important that the issue be decided in the correct forum. After all, "when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once," the risk of error becomes "unacceptable" and subjects defendants to the hydraulic pressure of "settling questionable claims." *Concepcion*, 563 U.S. at 350; see also *Stolt-Nielsen*, 559 U.S. at 686 (explaining

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[4] This Court's recent opinion in *Henry Schein, Inc.* v. *Archer & White Sales, Inc.*, No. 17-1272, expressly left unresolved whether incorporation of the AAA rules "in fact delegate[s] the arbitrability question to an arbitrator." Slip op. 8 (Jan. 8, 2019). And as the petition explains, because the "who decides" questions presented here are not presented in *Lamps Plus Inc.* v. *Varela*, No. 17-988, there is no need to hold the petition pending the decision in *Lamps Plus*. See Pet. 18-19. Instead, the Court should grant plenary review without ado, because businesses urgently need clarification of the questions presented here.

that the "commercial stakes of class-action arbitration are comparable to those of class-action litigation").

These concerns are compounded by the lack of meaningful judicial review of the arbitrator's award. An arbitral decision will not be overturned by the courts as long as the arbitrator is "arguably construing or applying the contract." *Oxford Health*, 569 U.S. at 569 (quotation marks omitted).

"Defendants are willing to accept the costs of these errors in [bilateral] arbitration, since their impact is limited to the size of individual disputes, and presumably outweighed by savings from avoiding the courts." *Concepcion*, 563 U.S. at 350. But when a single erroneous decision could destroy a company, it becomes "hard to believe that defendants would bet the company with no effective means of review." *Id.* at 351. Thus, the *in terrorem* pressure of a class arbitration is even greater than the already substantial pressure that results from class action litigation in court.

Moreover, the concern that arbitrators will err on the side of authorizing lengthy and costly class arbitration proceedings is hardly hypothetical. In *Stolt-Nielsen*, the AAA reported that of the 135 putative class arbitrations administered by the AAA between 2003 and 2009, arbitrators issued awards concluding that the arbitration clause at issue *authorized* class arbitration in *95* of those proceedings, or 70 percent. See Br. of AAA as *Amicus Curiae*, *Stolt-Nielsen*, 2009 WL 2896309, at *22 (filed Sept. 4, 2009).

It also remains unsettled whether a class arbitration is even capable of yielding a judgment binding on all parties, and for that additional reason the decision whether class arbitration is available should not

lightly be stripped from the courts. Even if the arbitrator were to observe all of the procedural formalities required to "bind absentees in litigation," such as notice, an opportunity to be heard, and the right to opt out (*Concepcion*, 563 U.S. at 349), absent class members might argue that they are not bound by the arbitrator's decision, because, for example, their arbitration agreements do not authorize class arbitration or they were not afforded their contractual right to participate in the selection of the arbitrator.

As Justice Alito put it in his *Oxford Health* concurrence (joined by Justice Thomas), "[w]ith no reason to think that the absent class members ever agreed to class arbitration, it is far from clear that they will be bound by the arbitrator's ultimate resolution of this dispute." 569 U.S. at 574 (Alito, J., concurring). That is because "silence" from absent nonparties as to a particular arbitrator's authority to conduct a class arbitration is not the same as the contractual consent that is required for that arbitrator to have authority over those nonparties. *Id.* at 574-75 (Alito, J., concurring) (citing 1 Restatement (Second) of Contracts § 69(1) (1979)).

The upshot of a class arbitration's vulnerability to collateral attack is that "absent class members [can] unfairly claim the 'benefit from a favorable judgment without subjecting themselves to the binding effect of an unfavorable one.'" *Oxford Health*, 569 U.S. at 575 (Alito, J., concurring) (quoting *Am. Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538, 546-47 (1974)). That result is palpably unfair. An absent "class member" would be able to recover under a favorable decision by the arbitrator, but could invoke due process principles to avoid being bound by an unfavorable decision.

In short, it is imperative that the Court resolve the questions presented—not only to bring uniformity to the law but also to alleviate the significant burden that the decision below, and others like it, impose on parties that contract to arbitrate disputes under standard arbitral rules.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

STEVEN P. LEHOTSKY
JONATHAN D. URICK
U.S. Chamber Litigation Center
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

ANDREW J. PINCUS
Counsel of Record
EVAN M. TAGER
ARCHIS A. PARASHARAMI
DANIEL E. JONES
MATTHEW A. WARING
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Amicus Curiae

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