No. 18-617

In The
Supreme Court of the United States

SPIRIT AIRLINES, INC.,

Petitioner,

v.

STEVEN MAIZES, VINCENT ANZALONE, LEE TRAYLOR, AND HOWARD MADENBERG,

Respondents.

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

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DAVID M. ROSENBERG-WOHL
Counsel of Record
HERSHENSON ROSENBERG-WOHL, A PROFESSIONAL CORPORATION
315 Montgomery Street, 8th Floor
San Francisco, CA 94104-1803
(415) 829-4330
david@hrw-law.com

JOSEPH ALLEN SCHREIBER
SCHREIBER LAW FIRM, PC
6 Office Park Circle, Suite 209
Birmingham, AL 35223-2681
(205) 936-3592
allen@schreiber.law

PATRICK C. COOPER
WARD & WILSON, LLC
2100 Southbridge Parkway, Suite 580
Birmingham, AL 35209-1302
(205) 821-0908
patrickcharles003@yahoo.com

ALFRED G. YATES, JR.
LAW OFFICE OF ALFRED G. YATES, JR., P.C.
300 Mt. Lebanon Boulevard, Suite 206-B
Pittsburgh, PA 15234-1507
(412) 391-5164
yateslaw@aol.com

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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INTRODUCTION

This Court's jurisprudence regarding arbitration clauses is well known. It receives a great deal of press and affects how lawyers in companies write their contracts with their customers. Arbitration contracts are enforceable, whether requiring arbitration, or doing so but limiting its scope. So when a company such as Spirit Airlines clearly chooses arbitration but decides not to limit its scope, that agreement too should be enforced. And by the arbitrator, because the parties have so decided.

Here, Spirit Airlines wrote a contract with its $9 Fare Club members, consumers all, that required arbitration but omitted a class action bar. Spirit could have chosen to incorporate the AAA's Consumer Arbitration Rules, both specifically and exclusively, but it chose not to so limit the parties. Rather, it chose to reference all AAA rules that might be applicable in a given situation: "'Any dispute arising between Members and Spirit will be resolved by submission by arbitration in Broward County, State of Florida in accordance with the rules of the American Arbitration Association then in effect.'" *Spirit Airlines, Inc. v. Maizes*, 899 F.3d 1230, 1231 (11th Cir. 2018). There are many rules that the AAA makes available, and they are identified all together, one after the other, on the organization's website: they include not just the consumer rules (likely applicable in this case), but employment rules and commercial rules (likely applicable in other situations in which Spirit might find itself). Notably, the website identified the prominently named Supplementary

Rules for Class Arbitrations as the rules self-evidently applicable for actions brought under any and all of these rules by a claimant (here consumers) on behalf of others. 899 F.3d at 1233 and n. 2.

Maizes, along with the fellow consumers that he – and the other named plaintiffs – seek to represent, chose to follow the path of contractual arbitration precisely as Spirit had set it out for them. They brought their claim in arbitration, pursuant to contract. That contract makes plain that, under the rules applicable to the particular dispute between the parties, in the event that Spirit somehow thought that a class action could not be brought in arbitration, the *arbitrator* would capably decide the issue. 899 F.3d at 1233-34 and n. 3. But Spirit moved to dismiss Maizes' claim, arguing that the case belonged not in their forum of contract but instead in federal court. Spirit argued that the contract actually required the federal court, not the arbitrator, to decide whether the contract permitted classwide arbitration. Maizes responded that the contract had clearly delegated this question to the arbitrator. The District Court for the Southern District of Florida agreed with Maizes, dismissed Spirit's action and ordered the contractual arbitration. Spirit appealed. The 11th Circuit affirmed the dismissal, not once but twice. Spirit now petitions this Court for relief.

Indisputably, there are numerous issues that this Court could clarify, even in the well-litigated field of arbitration. But Spirit is wrong in presenting this particular case as the right vehicle for this Court to clarify

anything. That is because the two questions Spirit has presented to this Court are divorced from what really happened in the 11th Circuit decision below. Rather, they are framed in a way to obscure the true, unreviewable conflict that exists, and as a result present questions that this Court has previously resolved.

REASONS FOR DENYING THE WRIT

I. Spirit misconstrues the 11th Circuit decision to conceal the true conflict in the circuits – a conflict that is not reviewable – because it involves how different states' laws of contract interpretation measure up to the "clear and unmistakable evidence" requirement of the FAA.

The fact that Spirit crafts its "Questions Presented" by drawing passages and references from the 11th Circuit decision out of sequence (Petition at 6-8) is a strong indicator that it has artificially reorganized and recharacterized the decision below. Here is how the 11th Circuit *actually* reasoned:

The question was how to decide whether the parties' arbitration agreement delegated to the arbitrator the decision over whether the agreement included class-wide claims. *Spirit Airlines*, 899 F.3d 1232. The two-step process for answering the question, the 11th Circuit determined, had long been established by this Court's decision in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995) (unanimous opinion), reiterated, most

recently, in *Henry Schien, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 2019 U.S. LEXIS 566 at *10-11. *Spirit Airlines*, 899 F.3d 1232. The first issue to be decided was the "gateway" question: the *who*. Who should decide the question, the court or the arbitrator? Assuming that this question of who decides might not have been considered by the parties, the Court resolved this first issue by establishing a rebuttable presumption that the parties had not in fact considered this question – a burden that could be overcome by the introduction of "clear and unmistakable evidence" that the contract had in fact delegated this power to the parties' arbitrator. 514 U.S. at 944-45. This rebuttable presumption, this evidentiary burden, was a requirement flowing from the FAA's strong federal interest in making sure that arbitration agreements accurately reflected the bargaining of the parties. *See id.*; *see generally Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 681 (2010) ("While the interpretation of an arbitration agreement is generally a matter of state law . . . the FAA imposes certain rules of fundamental importance."). *Cf. Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 571 (2013) ("Nor, we continued, did the panel attempt to ascertain whether federal or state law established a 'default rule' to take effect absent an agreement.").

The second step of the process was the *how*. How should a court or an arbitrator determine whether or not the parties' contract met this "clear and unmistakable evidence" standard? The resolution here depended upon what state law said about contract interpretation, as measured against the backstop "clear and

unmistakable evidence" federal standard of the FAA.[1] That is, "When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally (though with a qualification we discuss below) should apply ordinary state-law principles that govern the formation of contracts." *First Options*, 514 U.S. at 944. The "clear and unmistakable evidence" inquiry is the "qualification," or backstop required by the FAA. *Id*. at 944. *See also id.* at 945 ("Arbitration Act's basic purpose is to ensure judicial enforcement of privately made agreements to arbitrate.") (quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219-20 (1985) (internal quotations omitted)).

Neither the District Court nor the 11th Circuit evaluated the first issue, the *who*. That is because the parties did not contest it. Even though it is an open issue,[2] Maizes simply conceded that the court had the power to decide the question. 899 F.3d at 1233 n. 1. As a result, the 11th Circuit "assume[d] . . . without deciding" that the court had the power to render the decision unless it found "clear and unmistakable evidence" that

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[1] The Amicus brief of the Chamber of Commerce (at 8) recognizes that the burden, or heightened standard, is the presumption itself, not some evidentiary standard to be applied to the court's review of the evidence under the applicable state law.

[2] The 11th Circuit noted that this Court had not "resolved whether the availability of class arbitration is a question of arbitrability under *First Options*" in light of *Oxford Health Plans LLC v. Sutter*, 569 U.S. 562, 569 n. 2 (2013) and *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452 (2003) (plurality opinion).

the parties' contract delegated the decisionmaking to the arbitrator. *Id*.

The second question, the *how*, the 11th Circuit *did* resolve, and precisely as *First Options* directed. Because the parties had not contested the court's power to decide the issue, the District Court reviewed the documents comprising the parties' contract under the applicable contract law of Florida, and it concluded that the parties' contract met the standard required by the FAA: the contract clearly and unmistakably provided that the arbitrator was to decide whether or not classwide arbitration was permissible. The 11th Circuit affirmed:

"The reasoning of *Terminix* applies here as well.[3] The parties' agreement plainly chose AAA rules. Those rules include the AAA's Supplementary Rules for Class Arbitrations, which, true to their name, supplement the other AAA rules. Supplementary Rule 3 provides that an arbitrator shall decide whether an arbitration clause permits class arbitration." 899 F.3d at 1233.

Spirit argued that a still higher showing was required: it was not clear enough and unmistakable enough for the parties to invoke an arbitrator's power through documents they indisputably had selected to reference in their contract but that given the importance of the classwide arbitration issue, the parties were obligated to have prominently called out the

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[3] *Terminix Int'l Co. LP v. Palmer Ranch Ltd. P'ship*, 432 F.3d 1327 (11th Cir. 2005) (applying Florida law of contract interpretation).

identity of the decisionmaker. 899 F.3d at 1234. The 11th Circuit refused to impose this requirement. While it recognized that four circuits had held that the adoption of AAA rules by reference was insufficient evidence of agreement (these are the 3d, the 4th, the 6th and the 8th Circuits, respectively), the 11th Circuit found the reasoning of those circuits unpersuasive and chose to follow instead the approach of the 5th Circuit. *Id*. at n. 4.

Differing conclusions of different circuits do not make a circuit split that is appropriately reviewable, however. While the 11th Circuit noted that it (and another circuit) had come to a different conclusion than some other circuits had regarding whether terms incorporated by reference into a contract were clear and unmistakably agreed to by the parties, the 11th Circuit did not perceive this different conclusion as a "circuit split" – and for good reason: *these circuits all considered different states' laws*. The 11th Circuit saw its job under *First Options* as interpreting the contract law of Florida against the "clear and unmistakable evidence" standard required by the FAA. *See First Options*, 514 U.S. at 944 ("The relevant state law here, for example, would require the court to see whether the parties objectively revealed an intent to submit the arbitrability issue to arbitration. . . ."). *Cf.* 899 F.3d at 1235 ("Yet any perceived ambiguity in Spirit's agreement can be

resolved through normal interpretive methods") (citing Florida law).[4]

The question *actually* presented for review by the 11th Circuit, therefore, is both plain and state law-specific: Was the Circuit wrong, *under Florida contract law as limited by the FAA*, to hold that Spirit had agreed, clearly and unmistakably, to have the arbitrator decide arbitrability based on the fact that Spirit specifically had chosen to incorporate the AAA class arbitration rules that so provided into its arbitration agreement?

Framing the question properly elucidates the actual "split" evident in the circuit decisions cited throughout Spirit's brief: The 6th and 8th Circuits interpreted the incorporation by reference notion[5] solely against the federal requirement of the FAA and thus found it deficient (the 3d Circuit complied, however, considering the law of Pennsylvania), while the 2d, 10th and now the 11th Circuits considered their respective state laws (Missouri, Colorado and Florida), in accord with the clear direction provided by *First*

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[4] *City of Homestead v. Johnson*, 760 So.2d 80, 84 (Fla. 2000) ("application of the rule of construction that the meaning of particular terms may be ascertained by reference to other closely associated words in the agreement yields the same conclusion").

[5] The 4th Circuit did not explicitly discuss the incorporation by reference standard: The arbitration agreement there provided: "The rules of American Arbitration Association (AAA), published for construction industry arbitrations, shall govern the arbitration proceeding and the method of appointment of the arbitrator." *Del Webb Cmtys., Inc. v. Carlson*, 817 F.3d 867, 869 (4th Cir. 2016). There was no discussion of any supplementary rules applicable for class actions.

Options, and found those state laws' treatment of incorporation by reference into contracts sufficient evidence of "clear and unmistakable" agreement to delegate under the FAA.

And yet that is not a *true* circuit split, in that the 11th Circuit below, in accord with the 2d and the 10th Circuits, as well as the 3d Circuit, properly followed established Supreme Court law, while the other circuits plainly did not. More, since the 3d Circuit is the only circuit decision cited here that is at odds with the 11th Circuit decision (*i.e.*, both the 2d and the 10th are in accord with the 11th), and they evaluated different state laws (Pennsylvania, for the 3d; Florida, for the 11th), their respective holdings, while at odds as to their conclusion, do not actually conflict with each other vis-à-vis the FAA.

This is not a situation presenting "compelling reasons" for this court's discretionary review on a writ of *certiorari*. Sup. Ct. R. 10. This Court has long recognized the need to tread carefully upon conflicts that arise out of differing states' interpretations of state law. "As to questions controlled by state law," the Court stated in *Ruhlin v. New York Life Ins. Co.*, "conflict among circuits is not of itself a reason for granting a writ of certiorari." *Ruhlin v. New York Life Ins. Co.*, 304 U.S. 202, 206 (1938). That is particularly applicable here. It is not just that this conflict is at heart about the interpretation of different states' laws vis-à-vis the FAA,[6]

[6] Spirit never presented this question to either the District Court or the 11th Circuit, much less as a federal question. Spirit

but that even if this Court were inclined to find these laws sufficiently comparable to try to elucidate a principle applicable to all, the record in the respective circuit court decisions is not full enough to permit this comparison, so any such attempt at clarity by this Court will be a difficult exercise, likely to be repeated upon being presented with a better case for review. As the Court noted in *Ruhlin*: "No decision at the present time could reconcile any 'conflict of circuits,' or do more than enunciate a tentative rule to guide particular federal courts." *Id*.

Faced with this situation, but nonetheless seeking to reverse the 11th Circuit's decision, Spirit constructs two questions that sound like they should be reviewable – but these questions are already resolved. The answer to Question One, whether a party has a higher burden to establish agreement to delegate class arbitrability to an arbitrator, is "yes". The answer to Question Two, whether there can be an agreement to delegate class arbitrability to the arbitrator without an express statement of delegation, is also "yes".[7]

Airlines' basis for federal jurisdiction below was that the parties were diverse. *See* Complaint, paragraphs 8 and 9.

[7] The Amicus briefs filed by both the Chamber of Commerce and the Center for Workplace Compliance follow Spirit's erroneous path of argumentation, equally ignoring the state-law interpretation underscoring each of the circuit court decisions noted (Chamber of Commerce Amicus brief at 8-12; Center for Workplace Compliance Amicus brief at 11-15).

II. Both of Spirit's "Questions Presented" have already been resolved by this Court.

Spirit says the 11th Circuit erred in two ways, each presenting a question for this Court.

First, Spirit argues that the 11th Circuit mistakenly held that there is no higher standard for the arbitrability of class claims than there is for bilateral claims. As framed, that claim is untrue. The 11th Circuit determined that an agreement to give an arbitrator the power to determine the arbitrability of class claims *does* require a higher burden of proof – that burden is the *presumption* recognized by this Court that the parties have not agreed for an arbitrator to decide arbitrability which must be rebutted by "clear and unmistakable evidence" that they have done so. 899 F.3d at 1232. Properly framed, there is no circuit conflict on this issue: as detailed below, all the decisions cited by Spirit agree on this point.

Next, Spirit argues that the Court mistakenly held that the parties had agreed to have their arbitrator decide the availability of classwide arbitration even though they had not stated so expressly. This claim is true – the 11th Circuit did so hold – but the holding is unremarkable: refusal to require an explicit statement of agreement for the parties' arbitrator to arbitrate classwide issues is plainly consistent with present Supreme Court law. This Court has held that a party meets the burden of proving delegation of arbitrability to an arbitrator by introducing evidence that is "clear and unmistakable," evidence which may *but need not*

include a specific statement of delegation.[8] Here too, there is no circuit conflict: all the decisions cited by Spirit agree on this point as well.

A. This Court has already determined that there is a higher burden to establish an agreement to delegate to the parties' arbitrator the determination of the availability of classwide arbitration.

As stated above, this Court's decision in *First Options* made clear that the significance of classwide arbitration required a higher standard of proof that the parties had agreed to delegate the question to their arbitrator, hence this Court's articulation of the presumption that the parties did not in fact consider the issue and had therefore failed to agree to put it before an arbitrator. 514 U.S. 944-45. This is the standard to be applied by whomever it is who decides whether the parties' agreement calls for arbitration of classwide issues. Whether that decisionmaker is the court (not

[8] It is a misstatement by Spirit to say that the parties' agreement "merely requires the arbitration to be conducted under standard arbitration rules." *First*, that statement implies that the parties chose one particular set, where by contrast it is clear that a host of possible arbitration rules were encompassed, *see* 899 F.3d at 1233 n. 2, and that they chose any rules that might be applicable in a given situation: "in accordance with the rules of the American Arbitration Association then in effect" 899 F.3d 1232. *Second*, given the admitted significance of the Supplementary Rules for Class Arbitrations, 899 F.3d 1233, the implication that the parties chose the "standard rules" (an argument echoed by the Center for Workplace Compliance Amicus brief at 11) is that they did not in fact choose the Supplementary Rules, which is the very question here.

contested below) or the arbitrator,[9] the burden of the evidentiary presumption is clear. More, the reason for that burden is precisely the same as the host of factors concerning the import of classwide arbitration that Spirit notes in its petition for *certiorari*.

There is no 3-3 split on this issue but unanimity. Spirit maintains, correctly, that the 3d, the 6th and the 8th Circuits all impose a greater burden to show that the parties agreed to delegate to an arbitrator the power to decide the applicability of classwide arbitration rather than to show delegation for bilateral arbitration. *See, e.g.*, *Chesapeake Appalachia, LLC v. Scout Petroleum, LLC*, 809 F.3d 746, 763-65 (3d Cir.), *cert. denied*, 137 S.Ct. 40 (2016); *Reed Elsevier, Inc. v. Crockett*, 734 F.3d 594, 598-99 (6th Cir. 2013), *cert. denied*, 572 U.S. 1114 (2014); and *Catamaran Corp. v. Towncrest Pharm.*, 864 F.3d 966, 972-73 (8th Cir. 2017).

Spirit tries to construct a circuit split with the 2d, 10th and now 11th Circuits on the other side. But while it is true that these three circuits came to an opposing conclusion regarding the agreement of the parties to delegate, these three nonetheless agreed with the 3d, 6th and 8th Circuits as to the special burden that applied in classwide arbitration – it is just that they viewed the evidence as sufficient to rebut this evidentiary presumption. In *Wells Fargo Advisors, LLC v. Sappington*, 884 F.3d 392 (2d Cir. 2018) the 2d Circuit noted the "presumption" and the "clear and

[9] As this was uncontested below, this case is not an opportunity to clarify *Bazzle* in light of *Sutter*.

unmistakable evidence" required to "overcome" that burden. 884 F.3d at 395. In *Dish Network LLC v. Ray*, 900 F.3d 1240, 1247 (10th Cir. 2018), the 10th Circuit relied upon the 2d Circuit to precisely that effect.[10] So too the 11th Circuit. *Spirit Airlines, Inc. v. Maizes*, 899 F.3d 1230, 1232-33 (11th Cir. 2018).

As stated in more detail above, the 11th Circuit's note that other circuits (namely the 3d, 4th, 6th and 8th) "have created a higher burden" is *not*, as Spirit would have it here, a higher burden for delegating the question of classwide arbitrability to an arbitrator (that is already the law of *First Options*) – rather, the 11th Circuit is claiming that these other circuits have demanded a "higher burden" for establishing agreement to delegate classwide arbitrability to the arbitrator than is provided by evidence of the parties' incorporation by reference of AAA terms to that effect. *See* 899 F.3d at 1234 ("Spirit's argument has some authority. 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.").[11]

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[10] The 10th Circuit made clear that to apply a heightened standard to state law, beyond the burden already applied by *First Options* by way of the judicial presumption, would be inappropriate. *See* 900 F.3d 1240, 1246-48.

[11] It is telling that Spirit in its petition does not mention the 4th Circuit opinion in this context. That is probably because its articulation of the burden exceeds that articulated by *First Options*: rather than noting the presumption that can be overcome by clear and unmistakable evidence, the 4th Circuit opines that this Court is about to decide that the presumption is *irrebuttable*:

When Spirit posits "1. Must a party overcome a higher burden to show than 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?" Spirit asks a question that was answered by this Court in 1995.

B. This Court has already determined that Spirit does not have to make an express statement that it has chosen to delegate to the parties' arbitrator the decision as to the availability of classwide arbitration but can make that choice clear in other ways.

As stated above, this Court's decision in *First Options* stated that proof of the parties' agreement to delegate the question of the availability of classwide arbitration to the arbitrator required "clear and unmistakable evidence". 514 U.S. 944-45. While the precise nature of the evidence has not been elucidated by this Court, it is already clear that Spirit's "express statement making such a delegation" is *not* required. This is implicit in the *First Options* framing of the standard, which says nothing about what sort of evidence is "clear and unmistakable." *See also Stolt-Nielsen*

"The evolution of the Court's cases are but a short step away from the conclusion that whether an arbitration agreement authorizes class arbitration *presents a question as to the arbitrator's inherent power, which requires judicial review*" (emphasis added). *Del Webb Cmtys., Inc. v. Carlson*, 817 F.3d at 875.

S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 687 n. 10 (2010) ("We have no occasion to decide what contractual basis may support a finding that the parties agreed to authorize class-action arbitration.") (Alito, J., joined by Roberts, J., Scalia, J., Kennedy, J., and Thomas, J.); *Stolt-Nielsen*, 559 U.S. at 699 ("[T]he Court does not insist on express consent to class arbitration.") (Ginsburg, J., dissenting, joined by Stevens, J., and Breyer, J.).[12] Contrary to the point advanced by Spirit, no circuit court has required the incantation of specific words, whether in the context of agreeing upon class action arbitration or agreeing upon the power of the arbitrator to determine the issue.

Even if this Court were inclined to clarify just what evidence is (and is not) sufficient to meet the "clear and unmistakable evidence" standard for delegating the question of classwide arbitrability to an

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[12] The Chamber of Commerce Amicus brief mischaracterizes the *Stolt-Nielsen* decision (at 10), as does the Center for Workplace Compliance Amicus brief (likewise at 10). The statement, "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, is not a holding of the Court but rather dicta. The holding of the case was that given the evidence that the parties *had agreed they had not agreed* at all as to classwide arbitrability, the arbitrator panel could not have properly found that the parties had by contrast actually consented to the issue. Having so held, the Court went on to explain that there are indeed circumstances where an arbitrator could infer consent, but that the panel could not have implied an agreement to arbitrate classwide issues from the parties' agreement to arbitrate generally, given the admission they had not reached any agreement regarding classwide arbitration specifically. 559 U.S. at 684-85.

arbitrator, neither this 11th Circuit decision nor the circuit court decisions cited by Spirit justify the grant of its petition for a writ of *certiorari* here. As shown by Spirit's cases, there is no 3-4 split on this issue but rather unanimity. Spirit maintains, correctly, that the 2d, 10th and now 11th Circuits have accepted their respective states' laws regarding incorporation of contractual terms by reference as sufficiently compliant with the need to show "clear and unmistakable evidence" of agreement under *First Options* and the FAA. *See*, *e.g.*, *Wells Fargo Advisors, LLC v. Sappington*, 884 F.3d 392, 395 (2d Cir. 2018) (Missouri contract law regarding incorporation by reference is relevant towards evaluating the parties' compliance with the "clear and unmistakable evidence" standard *First Options*); *Dish Network LLC v. Ray*, 900 F.3d 1240, 1245-48 (10th Cir. 2018) (sufficient evidence of agreement to incorporate by reference AAA rules under Colorado contract law as limited by Federal law); *Spirit Airlines, Inc. v. Maizes*, 899 F.3d 1230, 1233 (11th Cir. 2018) (considering Florida law of contract construction); also citing *Terminix Int'l Co. LP v. Palmer Ranch Ltd. P'ship*, 432 F.3d 1327, 1329 n. 2 (Florida contract law: ambiguous term defined against drafter); 1331 n. 3 (Florida state law governs enforceability of contracts generally). None of these circuits required, much less noted "an express statement making such a delegation" under state law.

The 5th Circuit too is in accord with these circuits. The 5th Circuit interpreted the state law of Texas and the parties' contract incorporating by reference AAA rules that included the Supplemental Rules. *See Reed*

v. Fla. Metro. Univ., 681 F.3d 630, 640 n. 10 and 642 (5th Cir. 2012).[13] Because in that case there was a party admission that "the parties clearly did not discuss whether class arbitration was authorized," the 5th

[13] In *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564 (2013), this Court upheld the 3d Circuit's refusal to vacate an arbitrator's decision because the arbitrator based his decision that class action arbitration could be maintained "as evidenced by the words of the arbitration clause itself," 569 U.S. 570 (internal quotations omitted). Those words were as follows: "No civil action concerning any dispute arising under this Agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration in New Jersey, pursuant to the rules of the American Arbitration Association with one arbitrator." 569 U.S. at 565 (unanimous opinion). "[T]he arbitrator focused on the text of the arbitration clause quoted above. He reasoned that the clause sent to arbitration 'the same universal class of disputes' that it barred the parties from bringing 'as civil actions' in court: The 'intent of the clause' was 'to vest in the arbitration process everything that is prohibited from the court process.' And a class action, the arbitrator continued, 'is plainly one of the possible forms of civil action that could be brought in a court' absent the agreement. Accordingly, he concluded that 'on its face, the arbitration clause . . . expresses the parties' intent that class arbitration can be maintained.' " *Id*. (internal citations omitted). (There, the parties agreed upon the arbitrator's power to determine classwide arbitrability.) *See id. Sutter* distinguished *Reed*, above, where vacatur was proper (569 U.S. at 568 n. 1) – evidently because in *Reed*, unlike in *Sutte*r, the 5th Circuit had inferred agreement from avowed silence, and that was not permissible in light of this Court's recently decided decision in *Stolt-Nielsen*. *See* 569 U.S. at 571 ("We overturned the arbitral decision there because it lacked any contractual basis for ordering class procedures, not because it lacked . . . a 'sufficient' one. The parties in *Stolt-Nielsen* had entered into an unusual stipulation that they had never reached an agreement on class arbitration. In that circumstance, we noted, the panel's decision was not – indeed, could not have been – 'based on a determination regarding the parties' intent.' ") (internal citations omitted).

Circuit determined that "[t]he arbitration agreement at issue here fails to address class arbitration," 681 F.3d at 642 (internal quotations omitted), an avowed lack of an agreement could not provide the evidentiary basis for an agreement under this Court's recent decision in *Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010). Importantly, the 5th Circuit noted that admitted lack of agreement did not suffice under Texas contract law as well. 681 F.3d at 640 n. 10 ("Texas law . . . provides '[F]or a court to read additional provisions into [a] contract, the implication must clearly arise from the language used, or be indispensable to effectuate the intent of the parties. It must appear that the implication was so clearly contemplated by the parties that they deem it unnecessary to express it.'"). Were it to have been applied, Texas law too was not thought to require "an express statement making such a delegation."

Spirit is correct that the 3d, 4th, 6th and 8th Circuits all require more than the parties' incorporation of AAA rules by reference to indicate an agreement to have the parties' arbitrator decide whether or not classwide arbitration is available. *See, e.g.*, *Chesapeake Appalachia, LLC v. Scout Petroleum, LLC*, 809 F.3d 746, 763-65 (3d Cir.), *cert. denied*, 137 S.Ct. 40 (2016); *Del Webb Cmtys., Inc. v. Carlson*, 817 F.3d 867, 875 (4th Cir. 2016); *Reed Elsevier, Inc. v. Crockett*, 734 F.3d 594, 598-99 (6th Cir. 2013), *cert. denied*, 572 U.S. 1114 (2014); and *Catamaran Corp. v. Towncrest Pharm.*, 864 F.3d 966, 972-73 (8th Cir. 2017). But while each of those four circuits found mere incorporation by reference of AAA

rules inadequate, *none* of them required "an express statement making such a delegation" in this circumstance.[14]

In fact, each of these Circuits makes clear that evidence of delegation need *not* include such an express statement. Some of these cases explicitly consider the presence or absence of other evidence. *See, e.g.*, *Chesapeake Appalachia, LLC v. Scout Petroleum, LLC*, 809 F.3d 746, 761-63 (3d Cir.), *cert. denied*, 137 S.Ct. 40 (2016) (in seeking "express contractual language unambiguously delegating the question," the court looked not for a single incantation but expansively, noting the use of singular terms in the contract to support an agreement limited to bilateral arbitration, the absence of the mention of class actions in certain rules, and the presence in these rules of procedural matters of the sort it expected the parties to have agreed to delegate to the arbitrator); *Reed Elsevier, Inc. v. Crockett*, 734 F.3d 594, 599 (6th Cir. 2013), *cert. denied*, 572 U.S. 1114 (2014) (noting that the contract's language suggested bilateral agreement only: "the clause limits its scope to claims 'arising from or in connection with *this Order*,' as opposed to other customers' orders" (emphasis in original). Others emphasize merely the complete lack

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[14] *Mastrobuono*, cited by Spirit (at 31), does not hold that incorporation by reference of the law of New York was too imprecise to indicate the parties' agreement to specific terms. Rather, that decision held as contrary to both the FAA and contract law Shearson Lehman's argument that the parties knew that the NASD rules, on the one hand, and New York law, on the other – *both* incorporated by reference into the agreement – differed on the authority of an arbitrator to award punitive damages. *Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52, 59-63 (1995).

of evidence. *See, e.g.*, *Catamaran Corp. v. Towncrest Pharm.*, 864 F.3d 966, 973 (8th Cir. 2017) ("regarding class arbitration, there is complete silence"); *Del Webb Cmtys., Inc. v. Carlson*, 817 F.3d 867, 876-77 (4th Cir. 2016) ("the sales agreement says nothing at all about the subject"); *Reed Elsevier, Inc. v. Crockett*, 734 F.3d 594, 599 (6th Cir. 2013), *cert. denied*, 572 U.S. 1114 (2014) ("The principal reason to conclude that this arbitration clause does not authorize classwide arbitration is that the clause nowhere mentions it."). No circuit court requires express delegation.

When Spirit posits "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?" Spirit asks a question that was also answered by this Court in 1995.

III. The circuit split noted by the 11th Circuit and by Spirit in its brief is unreviewable.

Spirit is by no means wrong to point out that there *is* a circuit split identified by the 11th Circuit: Circuits *have* split, to differing degrees, on the question of whether the incorporation of terms showing that the arbitrator has jurisdiction over the availability of classwide arbitration is sufficient evidence of the parties' agreement to this effect under the "clear and unmistakable" federal standard. This is similar to Question 2 as presented by Spirit, above, but it is

meaningfully different because Sprit's articulation masks the importance of state contract laws of incorporation by reference, laws that are required to be considered, as a matter of bedrock principle, by *First Options*. As shown below, when properly presented as the actual split in the circuit courts, it becomes clear that the split is a question of different circuit courts interpreting different state laws against the federal "clear and convincing evidence" requirement – not merely a federal question of the sufficiency of the AAA rules – and that is not a circuit split that either should – or can – properly be resolved here and now.

This is the true split: The 2d, 10th and now the 11th Circuits[15] have indicated that *yes*, incorporation of the arbitrator's authority by reference of AAA rules into the parties' contract is sufficient to meet the burden of rebutting the presumption that the parties have not so agreed – while the 3d, 6th and 8th Circuits[16] have indicated that *no*, something more is required

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[15] The 5th Circuit decision referenced by the 11th Circuit, *Reed v. Fla. Metro. Univ.*, 681 F.3d 630 (5th Cir. 2012), did not specifically consider the Texas law of incorporation by reference but did, in evaluating a contract that incorporated the AAA's Supplemental Rules for Class Actions confirm the dictate of *First Options* that state contract law is to be considered against the federal "clear and unmistakable evidence" standard. *See Reed*, 681 F.3d at 640 n. 10 and 642.

[16] The 4th Circuit has held that adoption of the rules of the AAA does not constitute agreement to have the arbitrator decide questions of class arbitrability, but it did not consider whether or not the Supplemental Rules of Class Arbitration had been incorporated by reference, much less background state law regarding contract construction. *See Del Webb Cmtys., Inc. v. Carlson*, 817 F.3d 867, 869 (4th Cir. 2016).

than terms incorporated by reference to prove an agreement to that effect.

The 2d, 10th and the 11th Circuits considered their respective state laws (Missouri, Colorado and Florida), in accord with the clear direction provided by *First Options*, and found those state laws' treatment of incorporation of terms by reference into contracts sufficient to constitute evidence of "clear and unmistakable" agreement to delegate the question of classwide arbitrability to the arbitrator under the FAA. *See Wells Fargo Advisors, LLC v. Sappington*, 884 F.3d 392, 395 (2d Cir. 2018) (Missouri law of contract interpretation meets federal standard under *First Options*); *Dish Network LLC v. Ray*, 900 F.3d 1240, 1246-48 (10th Cir. 2018) (same, Colorado law).

The 11th Circuit did the same thing, basing its decision on state law (here, Florida), just like the 2d and 10th Circuits. In finding the parties' contractual incorporation of the AAA's class action rules "clear and unmistakable evidence" of their agreed-upon delegation of classwide arbitrability to the arbitrator, the 11th Circuit adopted the reasoning of its earlier decision in *Terminix*, which relied upon an evaluation of the contract law of Florida. *See* 899 F.3d at 1233 (citing *Terminix Int'l Co. LP v. Palmer Ranch Ltd. P'ship*, 432 F.3d 1327, 1329 n. 2 (under Florida law, an ambiguous term is interpreted against the drafter); 1331 n. 3 (Florida law governing the enforcement of contracts generally)).

By contrast, the 6th and 8th Circuits interpreted the incorporation by reference notion solely against

the federal requirement of the FAA, and it was by taking this shortcut – by considering no state law background rule of contract construction contrary to *First Options* – that these courts found the particular agreements that they considered to be deficient under the federal "clear and unmistakable evidence" standard. *See*, *e.g.*, *Catamaran Corp. v. Towncrest Pharm.*, 864 F.3d 966, 970 (8th Cir. 2017) (discussion limited to consent as required under the FAA; no discussion of state contract law); *Reed Elsevier, Inc. v. Crockett*, 734 F.3d 594, 599-600 (6th Cir. 2013), *cert. denied*, 572 U.S. 1114 (2014) (same).[17]

The only circuit decision cited by Spirit which properly applied the *First Options* analysis and is at odds with the 11th Circuit's decision is that of the 3d Circuit.[18] That Circuit recognized that "[c]ourts usually apply ordinary state law principles governing contract formation to decide whether the parties agree to arbitrate a certain matter," found incorporation by reference proper under Pennsylvania law, but nonetheless determined that the agreement before it could equally be interpreted to support bilateral as well as classwide arbitration and on that basis held that the agreement did not provide "clear and unmistakable evidence" of agreement. *Chesapeake Appalachia, LLC v.*

[17] The 6th Circuit's refusal to consider state law was as intentional as it was appropriate to that given arbitration agreement, as the agreement specified exclusively federal rules of interpretation – *i.e.*, "Issues of arbitrability will be determined in accordance solely with the federal substantive and procedural laws relating to arbitration." 809 F.3d at 760-61.

[18] *I.e.*, both the 2d and the 10th Circuit's decisions are in accord with the 11th Circuit decision.

Scout Petroleum, LLC, 809 F.3d 746, 760-61 (3d Cir.), *cert. denied*, 137 S.Ct. 40 (2016). What the 3d Circuit thought about the agreement before it, in light of the interaction of Pennsylvania law and federal law, does not conflict, however, with what the 11th Circuit thought about the agreement before it under the interaction of federal law with the state law of Florida.

CONCLUSION

This is how the law stands:

Under *First Options*, the 11th Circuit properly conducted its analysis and did so in the same manner as did the 2d and 10th Circuits, as well as the 3d. The 5th Circuit's decision is in accord. While the 3d Circuit came to a different result than did the 2d, 5th, 10th and 11th Circuits, there is no conflict of law since all underlying state laws considered by these circuits were different.

The 4th and the 8th Circuits did not follow *First Options* properly (the 6th was excused from doing so by contract). Were this Court to have considered either the 4th or the 8th Circuit's decisions, it might have been presented with a circuit conflict to resolve, but it does not face one here, where the 11th Circuit decision is consistent with the law that has been long established by *First Options*.

Spirit has littered its brief with many tantalizing statements and observations, each of which – given the

right case – could conceivably lead to appropriate review and clarification by this Court. This is not the right case to review any of them. Spirit's fundamental analysis is built upon faulty foundations; *whatever* arguments Spirit constructs upon them are necessarily precarious. A narrowly focused opposition to a petition for *certiorari* is not the place to chase all to ground. This much is clear, though: unless this Court wants to revisit *First Options*, a unanimous decision neither seriously questioned by this Court or by any appellate court – there is nothing either remarkable or troubling presented by this particular 11th Circuit decision. Spirit's petition for writ of *certiorari* should be denied.[19]

Respectfully submitted,

DAVID M. ROSENBERG-WOHL
Counsel of Record
HERSHENSON ROSENBERG-WOHL,
A PROFESSIONAL CORPORATION
315 Montgomery Street,
8th Floor
San Francisco, CA 94104-1803
(415) 829-4330
david@hrw-law.com

PATRICK C. COOPER
WARD & WILSON, LLC
2100 Southbridge Parkway,
Suite 580
Birmingham, AL 35209-1302
(205) 821-0908
patrickcharles003@yahoo.com

[19] Neither the recently-decided *Henry Schein* nor the *Lamps Plus* case (*Lamps Plus Inc. v. Varela*, No. 17-988 (O.T. 2018)) are relevant to the analysis above. *Henry Schein* did not address whether the parties in fact delegated arbitrability to the arbitrator. *Henry Schein, Inc. v. Archer & White Sales, Inc*., 139 S. Ct. 524, 2019 U.S. LEXIS 566 at *14, while in *Lamps Plus*, the parties agreed the court would decide.

JOSEPH ALLEN SCHREIBER
SCHREIBER LAW FIRM, PC
6 Office Park Circle,
Suite 209
Birmingham, AL 35223-2681
(205) 936-3592
allen@schreiber.law

ALFRED G. YATES, JR.
LAW OFFICE OF ALFRED G.
YATES, JR., P.C.
300 Mt. Lebanon Boulevard,
Suite 206-B
Pittsburgh, PA 15234-1507
(412) 391-5164
yateslaw@aol.com