No. 18-617

IN THE

Supreme Court of the United States

SPIRIT AIRLINES, INC.

Petitioner,

v.

STEVEN MAIZES, ET AL.,

Respondents.

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

REPLY BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

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

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

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This case raises two important questions about class arbitration. First, it raises the question whether a party must satisfy a higher burden to establish that an agreement delegates questions of *class* arbitrability to the arbitrator than to establish that it delegates questions of *bilateral* arbitrability. Three circuits hold parties to a higher burden; three others do not. Second, the case raises the question whether an arbitration agreement's reference to the standard arbitration rules of the American Arbitration Association is enough to delegate questions of class arbitrability to the arbitrator. Four circuits hold that it does not; four others hold that it does.

Respondents do not deny the importance of these questions. For good reason: "[T]he vast majority of contracting parties choose to incorporate standard arbitral rules like the AAA's into their arbitration agreements," Chamber of Commerce Amicus Br. 5, and the consequences of doing so should be uniform and predictable. Instead, Respondents raise three other arguments against certiorari: (1) that this Court and all the circuits *agree with Spirit* that a party trying to prove the parties delegated class arbitrability must hurdle a higher burden than those proving they delegated bilateral arbitrability, Opp. 12–15; (2) that neither this Court nor any circuit court requires express delegation, as Spirit supposedly demands, *id.* at 15–21; and (3) that the different outcomes in the cases stem from unreviewable differences in state law, not the uneven application of federal law, *id.* at 21–25.

These arguments are meritless. The Eleventh Circuit disagreed with its "sister circuits" on the

questions presented because it "read Supreme Court precedent differently." App. 8a. This Court should grant certiorari to resolve these important, recurring questions about the Federal Arbitration Act.

I. THE COURTS OF APPEALS ARE DIVIDED OVER THE FIRST QUESTION PRESENTED

A. The Third, Sixth, and Eighth Circuits agree with Spirit that a party seeking to prove that the parties delegated questions of class arbitrability to the arbitrator must meet a higher standard than those seeking to prove that the parties so delegated questions of bilateral arbitrability. The Second, Tenth, and Eleventh Circuits disagree. Pet. 9–13.

Respondents concede 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." Opp. 13. Respondents persist, however, that "the 2d, 10th and now 11th Circuits" "*agreed* with the 3d, 6th and 8th Circuits as to the special burden that applied in classwide arbitration." *Id.* (emphasis added). That is, Respondents urge this Court to deny certiorari because the circuits uniformly agree *with Spirit's view of the law*.

That strange contention is mistaken. Spirit lost this case precisely because the Eleventh Circuit rejected other circuits' approach. Spirit "argue[d] that [the Eleventh Circuit] should demand a higher showing for questions of class arbitrability than for other questions of arbitrability." App. 8a. While "Spirit's argument ha[d] some authority" behind it, the Eleventh Circuit declined to join its "sister circuits" on

this point, because it "read Supreme Court precedent differently." *Id.* It "*f[ound] no basis for [a] higher burden in Supreme Court precedent.*" *Id.* at 9a (emphasis added). So it followed its prior decision in *Terminix International Co. v. Palmer Ranch Ltd. Partnership*, 432 F.3d 1327 (11th Cir. 2005)—a case about *bilateral* arbitrability. *See* App. 6a–7a.

The Eleventh Circuit mirrored the approach of the Second Circuit—which *rejected*, rather than adopted, a "special burden" in the "classwide" context. Opp. 13. The Second Circuit "decline[d] to join" its "sister circuits that … require parties to explicitly delegate the particular question of class arbitration, in contrast to other questions of arbitrability, to an arbitrator." *Wells Fargo Advisors, LLC v. Sappington*, 884 F.3d 392, 398 (2d Cir. 2018). It explained that "these sister circuits have justified requiring more explicit language to delegate the question of class arbitrability … by explaining that 'class arbitration implicates a particular set of concerns that are absent in the bilateral context.'" *Id.* (quoting *Chesapeake Appalachia, LLC v. Scout Petroleum, LLC*, 809 F.3d 746, 764 (3d Cir. 2016)). But while the court viewed those concerns as "legitimate," it held that they do not "relate to" the delegation issue at hand. *Id.*

The Tenth Circuit likewise "reject[ed] the analyses of the Third, Sixth, and Eighth Circuits," and has "instead adopt[ed] the approach of the Second Circuit." *Dish Network LLC v. Ray*, 900 F.3d 1240, 1247 (10th Cir. 2018). It, too, "disagree[d] with the reasoning of [the] circuits" that "require more specific language delegating the question of classwide arbitrability" than for "bilateral disputes." *Id.* In the face

of this express disagreement, we fail to see how respondents can maintain that "[t]here is no 3–3 split on this issue but unanimity." Opp. 13.

B. Respondents also argue that there is no need to review this question because this Court "answered" it—in *Spirit*'s favor—"in 1995." *Id*. at 15. Would that it were so. In *First Options of Chicago, Inc. v. Kaplan*, this Court set out the general principle that "courts should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so." 514 U.S. 938, 944 (1995) (internal quotation marks and alterations omitted). As the circuit split above suggests, however, the Court did not decide whether a party seeking to arbitrate arbitrability must satisfy a higher burden in the class context than in the bilateral context. *First Options* involved whether the parties had delegated to the arbitrator questions of *bilateral* arbitration; the Court had no occasion to address whether language sufficient to delegate questions of bilateral arbitrability to the arbitrator necessarily suffices to delegate questions of class arbitrability as well. *See id.* at 940.

II. THE COURTS OF APPEALS ARE DIVIDED OVER THE SECOND QUESTION PRESENTED

A. The second question presented asks whether an agreement may be interpreted to delegate the availability of class arbitration to the arbitrator if the agreement merely requires the arbitration to be conducted under a standard set of arbitration rules that in turn allegedly contain such a delegation. This question has divided the circuits 4-4: The Third, Fourth, Sixth, and Eighth Circuits agree with Spirit

that the answer is no, while the Second, Fifth, Tenth, and Eleventh Circuits say yes. Pet. 23–26.

Respondents concede that the "[c]ircuits *have* split … on the question of whether the incorporation of terms … is sufficient." Opp. 21. But they accuse Spirit of raising a different issue. "[T]here is no … split" on the second question presented, they say, because it asks whether an agreement may 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.'" Opp. 21 (quoting Pet. i). On Respondents' account, no court requires the "express statement" that Spirit supposedly demands. *Id.* at 19–21.

Respondents misunderstand the second question presented. Spirit is not demanding magic words. Instead, it wants only what the circuits on its side of the split have required: "express contractual language unambiguously delegating the question" to the arbitrator, not a "daisy-chain of cross-references" that might suggest a delegation. *Chesapeake Appalachia*, 809 F.3d at 761; *see also Reed Elsevier, Inc. v. Crockett*, 734 F.3d 594, 599 (6th Cir. 2013) (an agreement that "does not mention classwide arbitration at all" is "at best … silent or ambiguous as to whether an arbitrator should determine the question of classwide arbitrability"); *Catamaran Corp. v. Towncrest Pharmacy*, 864 F.3d 966, 973–74 (8th Cir. 2017) (an agreement that incorporates the AAA rules but does not "mention … class arbitration" does not meet the court's "demand" for "a more particular delegation of the issue than [it] may otherwise deem

sufficient in bilateral disputes"); *Del Webb Cmtys., Inc. v. Carlson*, 817 F.3d 867, 877 (4th Cir. 2016) (an agreement that "says nothing at all about the subject" other than incorporating AAA rules does not "unmistakably provide that the arbitrator would decide" class arbitrability). That is why Spirit's second question presented contrasts an "express statement making such a delegation" on the one hand, with "merely requir[ing] the arbitration to be conducted under standard arbitration rules" on the other. Pet. i.

In any event, Respondents' objection is a semantic dodge. Again, as a substantive matter, Respondents *agree* that the "circuits *have* split" on "whether the incorporation of terms … is sufficient." Opp. 21. There is no doubt that Spirit's second question presented fairly encompasses that acknowledged division. It expressly refers to incorporation by reference—even if (counterfactually) Spirit's proposed legal rule *were* more demanding than the Third, Fourth, Sixth, or Eighth Circuit's. This Court should resolve that disagreement, whatever it concludes the right standard ought to be.

B. Respondents also again argue that this Court "answered" the second question presented "in 1995." Opp. 21. Respondents are again mistaken. As they acknowledge, this Court has never addressed "the precise nature of the evidence" required to demonstrate the parties' intent to delegate class arbitrability to the arbitrator. *Id.* at 15. *First Options*—the 1995 case that Respondents claim *did* decide all of these issues—certainly did not. It did not even involve a dispute over a reference to standard arbitration rules in the context of class arbitration; instead, it involved a claim that a party had clearly consented

to delegation under a bilateral agreement "merely [by] arguing the arbitrability issue to an arbitrator." 514 U.S. at 946.

No other case from this Court has addressed whether reference to a standard body of arbitral rules suffices either. As the division among the circuit courts shows, this Court's intervention is needed to resolve this recurring, contested question.

III. THE QUESTIONS PRESENTED RAISE ISSUES OF FEDERAL RATHER THAN STATE LAW

Finally, Respondents argue that the questions presented are "unreviewable" because they are "state law-specific." Opp. 3, 8. Not true.

A. "While the interpretation of an arbitration agreement is *generally* a matter of state law, the FAA imposes certain rules of fundamental importance." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 681 (2010) (emphasis added and citation omitted). One is the rule that "courts should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so." *First Options*, 514 U.S. at 944 (internal quotation marks and alterations omitted).

This clear-and-unmistakable standard comes from federal law. In *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643 (1986), this Court explained that this presumption "follows inexorably from" another federal-law principle: "'[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'" *Id.* at 648–49 (quoting *United Steelworkers of Am. v. War-*

rior & Gulf Navigation Co., 363 U.S. 574, 582 (1960)).

First Options reconfirmed the federal status of this rule. "When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally … should apply ordinary state-law principles that govern the formation of contracts." 514 U.S. at 944. But to that general principle, "*[t]his Court*" has "added an *important qualification*": "Courts should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so." *Id.* (emphasis added, internal quotation marks and alterations omitted). That is federal law, not state law.

The questions presented both concern the meaning of the federal clear-and-unmistakable standard. The first question asks whether, in applying this federal standard, a court must hold a party to a higher burden in the class context than in the bilateral context. The courts on one side of the circuit split have held that federal law establishes such a heightened burden. *See, e.g.*, *Chesapeake Appalachia*, 809 F.3d at 761, 764 ("[T]he general rule that courts should apply ordinary state law principles is subject to [a] qualification. … *Supreme Court rulings* highligh[t] the fundamental differences between bilateral arbitration and class arbitration." (emphasis added)). In contrast, the courts on the other side have held that federal law does not establish such a heightened burden—and that, in the absence of any federal rule, ordinary state-law principles of contract interpretation continue to govern. *See, e.g.*, App. 9a (finding "no basis for" other circuits' "higher burden *in Supreme Court precedent*" (emphasis added)).

Similarly, the second question presented asks whether a contract satisfies the federal clear-and-unmistakable standard when it merely refers to a body of standard arbitration rules that allegedly delegate class arbitrability to the arbitrator. The courts on one side of the circuit split have held that such a reference does not meet this federal threshold. *See, e.g.*, *Chesapeake Appalachia*, 809 F.3d at 765 ("[A]n agreement referring to the AAA rules *d[oes] not meet the 'clear and unmistakable' standard*." (emphasis added)). The courts on the other side have held that it does. *See, e.g.*, App. 9a n.5 ("We view Spirit's choice of AAA rules as 'clear and unmistakable' evidence that it wanted the arbitrator to decide whether this agreement permits class arbitration."). That, too, is a disagreement about federal law.

To be sure, courts interpreting arbitration agreements must overlay the *First Options* standard atop "ordinary state-law principles" that govern the interpretation of contracts. 514 U.S. at 944. The critical point, however, is that there is no disagreement about the underlying ordinary state-law principles of contract interpretation. Nobody suggests that Florida law on incorporation by reference differs from, say, Pennsylvania law on incorporation by reference. The Third Circuit, for example, noted that it was "uncontested" that incorporation by reference was proper "under Pennsylvania law," but held that *federal* law imposed a higher standard in determining whether the parties intended to delegate arbitrability to an arbitrator. *Chesapeake Appalachia*, 809 F.3d at 761. As a result, the circuits' disagreement about the effect of a contractual reference to AAA rules is not attributable to differences in state law. Instead,

the circuits disagree because they interpret the federal clear-and-unmistakable standard differently. Questions about that standard belong to this Court, not the various state courts of last resort.

This is not the first arbitration case in which a party opposing certiorari has raised the cry of "state law." *See, e.g.*, Opp. 7, *Lamps Plus v. Varela*, No. 17-988 (U.S.), 2018 WL 1394198; Opp. 14–18, *Kindred Nursing Ctrs. Ltd. v. Clark*, No. 16-32 (U.S.), 2016 WL 4710183; Opp. 3, *DirecTV, Inc. v. Imburgia*, No. 14-462 (U.S.), 2015 WL 455815. *Lamps Plus* is perhaps the most analogous. The petitioner sought certiorari on whether particular contractual language satisfied *Stolt-Nielsen*'s federal-law rule that a contract authorizes class arbitration only if there is a "contractual basis for concluding" that the parties in fact "*agreed* to" class arbitration. 559 U.S. at 684. The respondent claimed that the case involved only the application of "state contract-law principles." 2018 WL 1394198, at *7. The Court agreed to hear the case anyway; the "FAA requires more" than "the fact of the parties' agreement to arbitrate" to authorize class arbitration, *Stolt-Nielsen*, 559 U.S. at 685, 687, and the question whether the contract at issue satisfied that federal standard was for this Court.

So too here. If it is a federal question whether contractual language shows that the parties "agreed" to class arbitration, it is even more obviously a federal question whether contractual language shows that the parties "clearly and unmistakably agreed" to delegate the issue of class arbitrability to an arbitrator—a standard stemming solely from this Court's decision in *First Options*, not the ordinary requirements of state contract law.

B. Respondents similarly maintain that the Eleventh Circuit "bas[ed] its decision on state law." Opp. 23. It did not. On the first question, it ruled: "we find no basis for [a] higher burden *in Supreme Court precedent*." App. 9a (emphasis added). And on the second, it "view[ed] Spirit's choice of AAA rules *as 'clear and unmistakable evidence*'"—an application of the federal-law standard from *First Options*, not just Florida law. *Id.* at 9a n.5 (emphasis added).

Respondents point to a portion of the Eleventh Circuit's opinion that "cit[ed] Florida law." Opp. 8. But that portion addressed a *separate* question: "whether the Florida Arbitration Code or the AAA rules apply" to the arbitration. App. 10a. That state-law question is not relevant to the questions presented. On those questions, the Eleventh Circuit relied on federal and not Florida law.

* * *

Once Respondents' meritless arguments about whether the circuits disagree and whether the questions presented involve federal law are cleared away, the case for certiorari is easy. Whether in "employment contracts," "consumer contracts," or "commercial agreements," "[i]t is very common for arbitration provisions … to call for arbitration under the rules of an arbitration provider such as the AAA and JAMS." Chamber of Commerce Amicus Br. 13. But as it stands, the legal effect of these common provisions on the critical issue of classwide arbitrability differs across the circuits. That disagreement alone deserves this Court's attention, given the "great frequency" with which these issues recur. *Id.*

It is even more important for this Court to grant review because the decision below, if allowed to stand, "will have harmful consequences for businesses, consumers, and employees alike." *Id.* at 4. Under the Eleventh Circuit's approach, the "crucial determination" of class arbitrability will be "removed … 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." *Id.* at 5. And by giving that determination to the virtually unreviewable judgment of an arbitrator, the Eleventh Circuit's approach makes it more likely that parties will be forced into unwieldy, bet-the-company class arbitration "fundamental[ly]" different from the bilateral arbitration that they desired. *Stolt-Nielsen*, 559 U.S. at 686. This Court should intervene.

CONCLUSION

The Court should grant the petition for writ of certiorari.

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