No. 18-811

In The Supreme Court of the United States

JPAY, INC.,

Petitioner,

v.

CYNTHIA KOBEL AND SHALANDA HOUSTON,

Respondents.

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

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. The arbitration provision that JPay drafted, and that was in effect when Cynthia Kobel and Shalanda Houston began using its monetary transfer services, provided that arbitration must be conducted pursuant to one of two sets of rules promulgated by the American Arbitration Association, depending on the amount in controversy. It also specified that the "ability to arbitrate the dispute, claim or controversy" shall "be determined in the arbitration." Under either the "clear and unmistakable" standard for delegating issues of arbitrability that this Court has long espoused, or Petitioner's proposed "clearer and more unmistakable" standard reserved solely for delegating the question of class arbitrability, did this language delegate to the arbitrator the question of whether Kobel's and Houston's claims may be arbitrated on a classwide basis?

2. Is the availability of class arbitration a substantive gateway question of arbitrability presumptively for courts to decide in the absence of delegation, as the Eleventh Circuit held in the opinion below, or a question of "contract interpretation and arbitration procedures" as four members of this Court concluded in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 452 (2003)?

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INTRODUCTION

JPay suggests there is a neat, symmetrical circuit split over how the lower courts have applied *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010), which concerned how courts and arbitrators are to determine whether a contract allows for class arbitration, to the antecedent question of who gets to make that decision. But the opinions comprising this supposed circuit split paint a far less clear-cut picture than JPay's summary suggests.

Every court ruling on whether the class arbitration question has been delegated to an arbitrator, including the opinions JPay relies on as evidence of a circuit split, analyzed a different arbitration clause with different indicia of delegation. Some of those opinions, such as the opinion below and the Second Circuit's opinion in *Wells Fargo Advisors, LLC v. Sappington*, 884 F.3d 392 (2d Cir. 2018) pointed to multiple sources of evidence in concluding the issue had been delegated, including but not limited to the incorporation of an arbitration provider's rules. Other opinions, like *Spirit Airlines, Inc. v. Maizes*, 899 F.3d 1230 (11th Cir. 2018), also the subject of a pending petition for certiorari docketed as No. 18-617, involved arbitration clauses that referenced American Arbitration Association rules generally, rather than any particular set of AAA rules, and turned on whether such a blanket reference to AAA rules was sufficient to invoke the AAA's Supplementary Rules for Class Arbitrations; the opinion below, by contrast, explicitly declined to

rely on the AAA Supplementary Rules as a basis for its delegation finding. App. 28A n.4.

Arbitration, as this Court has often explained, is a matter of contract. And whether a particular contract delegates the question of class arbitration to the arbitrator will necessarily turn on what contractual language those parties used to express their intended delegation. The many factual distinctions among the opinions making up JPay's purported circuit split are entirely unsurprising given the fact-bound nature of the question they were answering, but they underscore why it is not an appropriate question for this Court's review.

Moreover, the conclusion the panel majority reached about delegation in the opinion below is both unremarkable and inconsequential. This Court has already provided guidance to parties on how to delegate threshold issues, and to courts on how to interpret such delegation clauses, in *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010). The Court in *Rent-A-Center*, like the Eleventh Circuit panel majority here, treated threshold issues of arbitrability as a unit that can be delegated together when a single evidentiary standard is met, not a sliding scale where different issues of arbitrability warrant different standards for delegation depending on their importance. And earlier this term, the Court rejected just such a selective approach to delegation that some lower courts were employing. *Henry Schein, Inc. v. Archer and White Sales, Inc.*, 139 S. Ct. 524, 531 (2019) (warning of the "time-consuming side show" that would result if courts and not arbitrators

could decide issues of arbitrability notwithstanding a valid delegation clause). Entertaining JPay's position that a heightened delegation standard should exist for certain arbitrability issues would invite a similar side show as parties audition other important issues for heightened "clearer and more unmistakable" status.

And with respect to the particular issue of class arbitration, the opinion below is quickly becoming irrelevant. Explicit class action waivers are already ubiquitous in arbitration agreements for many types of consumer products. JPay amended its own arbitration agreement in 2015 to include both a class action ban and a provision specifying that any interpretation of that waiver language must be decided by a court rather than an arbitrator. The petition's warnings about inconsistent rules facing companies in different parts of the country are overblown, for no matter where a corporation does business, it has a simple recourse if it does not want an arbitrator deciding questions about class arbitration: "put it in the contract." *Dish Network L.L.C. v. Ray*, 900 F.3d 1240, 1257 (10th Cir. 2018) (Tymkovich, J., concurring).

Finally, if this Court does grant JPay's petition, then it should also answer the question left open in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), and answered unanimously in the opinion below, of whether the availability of class arbitration procedures is presumptively a question for courts or arbitrators to decide in the absence of delegation. Petitioner conceded that this question is ripe for the

Court's review, Pet. i n.1, and the opinion below answered it incorrectly.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

1. As of October 2015, Cynthia Kobel transferred between $50 and $100 approximately ten times a year to Illinois prisoners as an act of charity, and Shalanda Houston transferred around $1000 each month to her husband incarcerated in Louisiana. Doc. 1-1 ¶¶69-81. Both women previously made these transfers using money orders, but after JPay took over monetary transfers to inmates in Illinois and Louisiana, the cost of each transfer dramatically increased because of exorbitant fees paid to JPay ($7.95 per transfer for Kobel and over $20 per month for Houston), with a portion of those fees being kicked back to state prison officials in exchange for JPay's continued exclusive access to their incarcerated populations. *Id.*

Kobel and Houston filed a claim with the American Arbitration Association ("AAA") in October 2015, alleging breach of contract and violation of Florida's Deceptive and Unfair Trade Practices Act. App. 5A. They sought to represent a class of "[a]ll natural persons who paid a fee to JPay for electronic money-transfer services and who agreed to arbitrate their claims with [JPay]." *Id.*

The arbitration provision in JPay's Terms of Service for its electronic money transfers in October 2015,

when Kobel and Houston filed their arbitration demand, provided as follows:

> In the event of any dispute, claim or controversy among the parties arising out of or relating to this Agreement that involves a claim by the User for less than $10,000, exclusive of interest, arbitration fees and costs, shall be resolved by and through arbitration administered by the American Arbitration Association ("AAA") under its Arbitration Rules for the Resolution of Consumer Related Disputes. Any other dispute, claim or controversy among the parties arising out of or relating to this Agreement shall be resolved by and through arbitration administered by the AAA under its Commercial Arbitration Rules. The ability to arbitrate the dispute, claim or controversy shall likewise be determined in the arbitration. The arbitration proceeding shall be conducted in as expedited a manner as is then permitted by the rules of the American Arbitration Association. Both the foregoing Agreement of the parties to arbitrate any and all such disputes, claims and controversies, and the results, determinations, findings, judgments and/or awards rendered through any such arbitration shall be final and binding on the parties and may be specifically enforced by legal proceedings in any court of competent jurisdiction.

App. 4A.

In December 2015, JPay amended its arbitration provision to require arbitration with JAMS instead of AAA and added the following paragraphs:

> f) RESTRICTIONS ON ARBITRATION: ALL DISPUTES, REGARDLESS OF THE DATE OF ACCRUAL OF SUCH DISPUTE, SHALL BE ARBITRATED ON AN INDIVIDUAL BASIS. YOU ARE WAIVING YOUR RIGHT TO PARTICIPATE IN A CLASS ACTION LAWSUIT, AND TO CERTAIN DISCOVERY AND OTHER PROCEDURES THAT ARE AVAILABLE IN A LAWSUIT. YOU AND JPAY AGREE THAT THE ARBITRATORS HAVE NO AUTHORITY TO ORDER CONSOLIDATION OR CLASS ARBITRATION OR TO CONDUCT CLASS WIDE ARBITRATION PROCEEDINGS AND ARE ONLY AUTHORIZED TO RESOLVE THE INDIVIDUAL DISPUTES BETWEEN YOU AND JPAY ALONE. FURTHER, YOU WILL NOT HAVE THE RIGHT TO CONSOLIDATION OR JOINDER OF INDIVIDUAL DISPUTES OR ARBITRATIONS, TO HAVE ANY DISPUTE ARBITRATED ON A CLASS ACTION BASIS, OR TO PARTICIPATE IN A REPRESENTATIVE CAPACITY OR AS A MEMBER OF ANY CLASS PERTAINING TO ANY CLAIM SUBJECT TO ARBITRATION.
>
> g) THE VALIDITY, EFFECT, AND ENFORCEABILITY OF THE FOREGOING WAIVER OF CLASS ACTION LAWSUIT AND CLASS-WIDE ARBITRATION, IF CHALLENGED, ARE TO BE DETERMINED SOLELY AND EXCLUSIVELY BY

> FEDERAL DISTRICT COURT LOCATED IN THE SOUTHERN DISTRICT OF FLORIDA OR FLORIDA STATE COURT IN MIAMI-DADE COUNTY AND NOT BY JAMS OR ANY ARBITRATOR.

Doc. 42-2 at 3-4 (capitalization in original).

2. JPay sought a declaratory judgment that Kobel and Houston ("Claimants") could only arbitrate their claims individually and not on a classwide basis. The district court first denied Claimants' motion to compel arbitration of the class availability question, concluding it was for the court to decide, App. 63A-71A, and then granted JPay's motion for summary judgment, ruling that the arbitration provision did not contemplate class proceedings. App. 50A-62A.

On both occasions the court found it dispositive that the agreement contained no explicit reference to class arbitration. *See* App. 70 ("[W]ithout a clear reference in the Agreement to class arbitration, the parties have not unmistakably agreed to have the arbitrator determine questions of class arbitrability."); App. 58A ("[T]he lack of a reference to class arbitration in the Agreement supports a construction that only contemplates bilateral arbitration."); App. 60A ("A reference to the AAA rules in an arbitration provision—without any additional language regarding class procedures—is not enough to find that the agreement contemplates class arbitration.").

3. The Eleventh Circuit panel spent the first twenty-two pages of its opinion analyzing the state of

the law regarding class arbitration, including this Court's opinion in *Stolt-Nielsen*, in deciding as a matter of first impression in that circuit that the availability of class arbitration was a gateway question of arbitrability presumptively for courts to decide. Having reached that conclusion, the panel then "turn[ed] to the language in the parties' agreement to determine whether anything in it clearly and unmistakably evinces a shared intent to overcome that presumption." App. 23A.

The majority found such clear and unmistakable evidence in three distinct aspects of the agreement: 1) it referenced AAA rules on multiple occasions; 2) it included an express delegation clause that "[t]he ability to arbitrate the dispute, claim or controversy shall likewise be determined in the arbitration"; and 3) it was written "in unmistakably broad terms" because it called for the arbitration of "**any and all** such disputes, claims and controversies." App. 24A (emphasis added).

The majority noted that either of the first two pieces of evidence would be sufficient by itself to clearly and unmistakably delegate questions of arbitrability to an arbitrator. With the three pieces of evidence together, the parties' "expression of intent is unequivocal." *Id.*

4. Judge Graham's dissent, like the district court's two earlier opinions, suggested that the only way JPay's agreement could have delegated to the arbitrator the question of whether class proceedings

were available was to mention class arbitration explicitly. He concluded that "without a specific reference to class arbitration the court should presume that the parties did not intend to delegate to an arbitrator an issue of such great consequence." App. 42A.

REASONS FOR DENYING THE PETITION

I. Distinctions in the Language of Arbitration Provisions, Not Differing Approaches to *Stolt-Nielsen*, Explain Why Courts Have Reached Divergent Results on Delegation.

Any court confronting a dispute between parties to an arbitration agreement regarding whether, or how, that arbitration is to take place must first ask whether the particular issue in dispute is presumptively for the court or an arbitrator to decide. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002). If it is presumptively a court-decided issue, the next question is whether the parties to the particular agreement have delegated that issue to an arbitrator under the terms of their agreement, assuming it is the type of issue that can be delegated. *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 299 (2010). Any delegation to an arbitrator of a presumptively court-decided gateway issue of arbitrability must be clear and unmistakable. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944-45 (1995).

If the issue in dispute is whether a particular arbitration agreement allows for class proceedings, and

if the court 1) identifies that issue as presumptively for courts to decide and 2) concludes that it was not delegated under the terms of the parties' arbitration agreement, the court then reaches a third question to which *Stolt-Nielsen* is directly relevant: do the terms of the parties' agreement allow for class arbitration? A court answering that third, "clause construction" question must find some contractual basis in the arbitration agreement to support such a finding and cannot infer the availability of class arbitration solely from the parties' agreement to arbitrate. *Stolt-Nielsen*, 559 U.S. at 685. The Court in *Stolt-Nielsen* did not decide what contractual basis would be sufficient to authorize class arbitration, *id.* at 687 n.10, but may be preparing to offer additional guidance on this question in *Lamps Plus Inc. v. Varela*, No. 17-988 (argued Oct. 29, 2018).

The panel in the opinion below split only as to the second of these three questions, whether clear and unmistakable evidence of delegation existed under JPay's arbitration agreement. And while JPay asks this Court to resolve a purported circuit split regarding whether *Stolt-Nielsen*'s reasoning applies to the second question, much of the analysis of *Stolt-Nielsen* in the opinions JPay cites actually relates to the first, "who presumptively decides" question. The second, "clear and unmistakable delegation question," by contrast, is essentially "a textual one." App. 23A.

A. *Stolt-Nielsen*'s analysis Has Been Applied by Lower Courts Assessing Whether Class Arbitration Is a Gateway Issue of Arbitrability Presumptively for Courts to Decide, and Again in Deciding It.

JPay suggests that three circuits have ruled that "the concerns raised in *Stolt-Nielsen* carry over into issues of arbitrability," while three others have not. Pet. 6. But JPay's analysis conflates the first, "who presumptively decides" question with the second, delegation question at issue here.

JPay first points to the Eighth Circuit's opinion in *Catamaran Corp. v. Towncrest Pharmacy*, 864 F.3d 966 (8th Cir. 2017). This opinion does cite heavily to *Stolt-Nielsen* in the context of arbitrability—but in answering the first question of who, presumptively, should decide if class procedures are available. After recounting the four fundamental differences between bilateral and class arbitration described in *Stolt-Nielsen*, the Eighth Circuit, like the Eleventh Circuit below, "conclude[d] that the question of class arbitration belongs with the courts as a substantive question of arbitrability." *Id.* at 971-72. While the Eighth Circuit then went on to hold that the arbitration clause in that case did not clearly and unmistakably delegate the question of class arbitration to the arbitrator, it based that holding on Supreme Court precedent long predating *Stolt-Nielsen*, as well as the factual finding that the clause was "silent" on the particular delegation question. *Id.* at 973 ("[R]egarding class arbitration, there is

complete silence. And silence is insufficient grounds for delegating the issue to an arbitrator." (citing *First Options*, 514 U.S. at 944-45)).[1]

JPay next cites to the Sixth Circuit's opinion in *Reed Elsevier v. Crockett*, 734 F.3d 594 (6th Cir. 2013). Like the Eighth Circuit's opinion in *Catamaran*, *Crockett* primarily focused on whether, as a matter of first impression in that circuit, the availability of class arbitration should be treated as a gateway question presumptively for courts to decide—and, like the panel below, answered that question in the affirmative with liberal reliance on *Stolt-Nielsen*. *Id.* at 597-99. After briefly noting that the arbitration clause at issue did not delegate the question to an arbitrator, *id.* at 599, the *Crockett* court then decided the issue itself, concluding that "Crockett asks us to" infer an "implicit agreement to authorize class-action arbitration . . . solely from the fact of the parties' agreement to arbitrate," precisely the sort of inference that *Stolt-Nielsen* had forbidden. *Id.* at 600 (internal quotation marks omitted).

Finally, JPay invokes the Third Circuit's opinion in *Chesapeake Appalachia, LLC v. Scout Petroleum, LLC*, 809 F.3d 746 (3d Cir. 2016). Of the opinions on JPay's preferred side of the purported circuit split, *Scout Petroleum* spends by far the most time discussing delegation, since the antecedent "who

[1] As discussed in greater detail in section I-B below, the panel majority did not find the JPay arbitration agreement to be "silent" on whether the availability of class arbitration had been delegated. App. 24A.

presumptively decides" question had already been addressed in the Third Circuit, which answered it in the same way as the opinion below in *Opalinski v. Robert Half Int'l Inc.*, 761 F.3d 326, 332-35 (3d Cir. 2014).

But what the Third Circuit said about delegation in *Scout Petroleum* does not support JPay's position. In contrast to the dissenting opinion below, which seemed to suggest that only an explicit reference to class arbitration would clearly and unmistakably delegate that issue to an arbitrator, the Third Circuit emphasized that "in order to undo the presumption in favor of judicial resolution, an arbitration agreement need not include any special 'incantation' (like, for example, 'the arbitrators shall decide the question of class arbitrability.'" *Scout Petroleum*, 809 F.3d at 758. In other words, *Scout Petroleum* underscored that whether a particular arbitration clause clearly and unmistakably delegates the availability of class arbitration to the arbitrator is a fact-intensive inquiry.

B. The Opinions Answering the Delegation Question Differently Turned on Textual Differences in the Clauses at Issue.

JPay charges that the Second, Tenth, and Eleventh Circuits have all parted ways with earlier cases requiring a higher level of delegation for the question of class arbitration than for other gateway issues of arbitrability. But both the Second Circuit in *Sappington* and the Eleventh Circuit in the opinion below considered arbitration clauses that contained more indicia of

delegation than anything the Third, Sixth, or Eighth Circuits considered in the cases on which JPay relies.

Specifically, there were two different arbitration clauses at issue in *Wells Fargo Advisors, LLC v. Sappington*, 884 F.3d 392 (2d Cir. 2018). The Second Circuit concluded that the first, so-called "Tucker clause," delegated all questions of arbitrability, including the availability of class arbitration,[2] to an arbitrator in three distinct ways: 1) by using broad language requiring "any dispute" to be sent to arbitration; 2) by carving out two types of disputes from the arbitration clause, suggesting under the principle of *expressio unius est exclusio alterius* that the parties meant to include everything they did not explicitly exclude; and 3) by mentioning the AAA Securities Rules of 1993, which in turn stated that the rules in effect at the time of initiating arbitration would apply, and which at the time this arbitration was initiated had been replaced by the Commercial Rules that give the arbitrator the power to determine his or her own jurisdiction. *Id.* at 396-97.

The "Sappington clause" used different language that was also sufficient, in the Second Circuit's view, to delegate the class arbitration question to an arbitrator. It was similarly broad in scope to the Tucker clause and contained additional express delegation language stipulating that "[a]ny controversy relating to your duty to arbitrate hereunder, or to the validity or

[2] Unlike the opinion below, the Second Circuit in *Sappington* did not reach the "who presumptively decides" question and simply "assume[d] without deciding" that the class arbitration question was presumptively for the court. *Id.* at 394.

enforceability of this arbitration clause, or to any defense to arbitration, shall also be arbitrated[.]" *Id.* at 399.

By contrast, the clauses presented to the Third and Eighth Circuits contained no evidence of delegation beyond a generic reference to the rules of the AAA. *See Scout Petroleum*, 809 F.3d at 748 ("[I]n the event of a disagreement between 'Lessor' and 'Lessee' concerning 'this Lease,' performance 'thereunder,' or damages caused by 'Lessee's' operations, 'all such disputes' shall be resolved by arbitration 'in accordance with the rules of the American Arbitration Association.'"); *Catamaran*, 864 F.3d at 969 ("[I]f 'any disputes arising during the term of this Agreement' cannot be resolved informally, then 'either party may submit the dispute to binding arbitration in accordance with the Rules for the Conduct of Arbitration of the American Arbitration Association.'"); *see also Crockett*, 734 F.3d at 599 ("[A]ny controversy, claim or counterclaim . . . arising out of or related to this order . . . will be resolved by binding arbitration under this section and the then-current Commercial Rules and supervision of the American Arbitration Association.").

Even the Tenth Circuit's opinion in *Dish Network L.L.C. v. Ray*, which did rely largely on a reference to AAA employment rules as its evidence of delegation, also noted repeatedly that the arbitration clause at issue was "broad." *Ray*, 900 F.3d at 1245 ("[T]he broad language of the Agreement **and** incorporation of the Rules clearly and unmistakably shows the parties

intended for the arbitrator to decide all issues of arbitrability.") (emphasis added).

In other words, the courts finding evidence of delegation have almost always based that finding on multiple factors—broad language, express delegation clauses, carveouts of other disputes from arbitration, and incorporation of arbitration forum rules that give arbitrators the power to determine their own jurisdiction. JPay's arbitration clause possessed three of these markers of delegation.

The majority in the opinion below distinguished the Third, Sixth, and Eighth Circuit opinions on this basis, noting that none of those cases "analyzed a contract with two such mutually reinforcing methods of delegation" as AAA rule incorporation and an express delegation clause. App. 35A. Moreover, the Third Circuit found it significant in the contracts before it that "the leases do not expressly mention . . . who decides—the courts or the arbitrators—questions of arbitrability." *Scout Petroleum*, 809 F.3d at 758. But JPay's arbitration clause does expressly mention who decides such threshold matters, leading the majority below to opine that this language might have constituted clear and unmistakable delegation of the class arbitration issue in the Third Circuit as well. App. 35A (citing *Scout Petroleum*, 809 F.3d at 758).

The cases present a similarly nuanced and fact-bound picture on the topic of AAA rule incorporation, the other supposed circuit split noted by Spirit Airlines in its petition for certiorari, No. 18-617. For one thing,

that petition is incorrect in claiming a 4-4 split on whether AAA rules alone suffice to clearly and unmistakably delegate the class arbitration question, because, as mentioned above, the Second and Tenth Circuit opinions did not rely on AAA rules alone. *See Sappington*, 884 F.3d at 396 ("The Tucker clause demonstrates the parties' clear and unmistakable intent to arbitrate all questions of arbitrability, including the availability of class arbitration, in three ways.").

Second, as the majority in the opinion below observed, neither the Third nor Sixth Circuits had previously held, as the Eleventh Circuit had, that incorporation of AAA rules was sufficient to delegate other questions of arbitrability. App. 34A. Thus, the Eighth Circuit's opinion in *Catamaran* is the only federal appellate opinion to hold that referencing the AAA rules is sufficiently clear and unmistakable evidence to delegate questions of bilateral, but not class, arbitrability. *Id.* n.5 (citing *Catamaran*, 864 F.3d at 973).

Third, Spirit Airlines posits that all four circuits to allow delegation of the class arbitration issue based on the parties' incorporation of "standard AAA rules" have relied on the AAA's Supplementary Rules for Class Arbitrations. No. 18-617, Pet. 1-2. But there is no single set of "standard" AAA rules; rather, the AAA has promulgated over fifty sets of rules, and different arbitration agreements reference different AAA rules depending on the nature of the parties' relationship. *See* App. 26A-27A. The arbitration agreement in *Ray*, for example, involved an employment relationship and referenced the AAA's employment rules. And the Tenth

Circuit premised its delegation holding on the language of AAA Employment Rule 6(a), along with the arbitration agreement's broad scope, and said nothing at all about the Supplementary Class Action Rules. *Ray*, 900 F.3d at 1245 (quoting Rule 6(a), which says that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement."). Similarly, the majority opinion below relied on language in AAA's Consumer and Commercial Rules giving arbitrators power to determine their own jurisdiction as one of the three sources of clear and unmistakable evidence of delegation in JPay's agreement, and did not base its delegation finding on the Supplementary Rules. App. 27A-28A and n.4.[3]

In short, the nine appellate opinions cited by JPay and Spirit Airlines do not reflect a division about how and when to apply *Stolt-Nielsen* so much as they reflect nine different answers to the question of whether nine different arbitration clauses clearly and unmistakably delegated the class arbitration question to an arbitrator. Wading into this fact-bound question will necessarily put this Court in the contract interpretation

[3] The Brief in Opposition to Spirit Airlines' certiorari petition also points out that the *Sappington* and *Ray* courts made their delegation findings based on Missouri and Colorado law, respectively. However, this case does not present an opportunity for this Court to decide how state and federal law should interact with respect to the "clear and unmistakable delegation" question because the opinion below only analyzed the issue under federal law.

business, not the best use of its limited resources. And for the reasons discussed in the next two sections, the Court's intervention here is both unnecessary and likely to be counterproductive.

II. A Sliding Delegation Scale Is Inconsistent with This Court's Precedent, Would Bring Collateral Litigation Rather Than Clarity, and Would Not Change the Outcome of This Case.

This Court has always treated the "clear and unmistakable evidence" standard for delegating presumptively court-decided gateway issues to an arbitrator as a binary: any issue within the scope of delegation is for the arbitrator to decide if the requisite clear and unmistakable evidence is present, and if that level of evidence is not present, it remains with the court. *See Henry Schein, Inc. v. Archer and White Sales, Inc.*, 139 S. Ct. 524, 530 (2019) ("This Court has consistently held that parties may delegate threshold arbitrability questions to the arbitrator, so long as the parties' agreement does so by 'clear and unmistakable' evidence." (citing *First Options*, 514 U.S. at 944)); *United Steelworkers of Am. v. Warrior and Gulf Nav. Co.*, 363 U.S. 574, 583 n.7 (1960) (requiring a "clear demonstration" that the parties intended the arbitrator to decide arbitrability).

Nor has this Court required parties to enumerate every potential challenge to arbitrability in their contract for a court to find that a particular challenge falls

within the scope of a valid delegation clause. In *Rent-A-Center, West, Inc. v. Jackson*, for example, the parties' arbitration clause specified that "[t]he Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement." 561 U.S. at 66. Although this language said nothing specifically about unconscionability, the Court held that the plaintiff's argument that the arbitration clause was unconscionable had to be resolved by the arbitrator, because the parties' delegation clause "is an agreement to arbitrate threshold issues concerning the arbitration agreement," and the plaintiff's unconscionability challenge implicated the agreement's "enforceability." *Id.* at 68, 71.

The majority below surveyed these precedents in concluding that "a consistent body of caselaw has spoken of questions of arbitrability as a unitary category." App. 38A. It also warned that requiring more specificity around delegation than the courts have asked of parties previously would "burden[] contracting parties hoping to delegate as much as possible . . . with explicitly listing and delegating as many questions of arbitrability as they could think of." App. 40A. A few general categories of delegation, like those in the *Rent-A-Center* agreement, could grow into unwieldy laundry lists.

Moreover, JPay's request for a sliding scale where some issues require clearer and more unmistakable evidence of delegation than others would reopen a door

that this Court has recently closed, allowing courts to pick and choose which issues they should decide themselves notwithstanding a valid delegation clause. This Court concluded in *Henry Schein* that the judicially created "wholly groundless" exception to the "clear and unmistakable" delegation standard would increase complexity rather than efficiency, and so would JPay's proposed "really important issue enhancement" to that standard.

For one thing, parties' contracts provide for arbitration and delegate threshold issues to arbitrators in myriad ways, and adopting a sliding scale approach to delegation would require courts to adjudicate whether a particular contract's language met a particular heightened delegation standard. *See Henry Schein*, 139 S. Ct. at 531 (describing the "collateral litigation" likely to ensue over whether a particular argument for arbitration was "wholly groundless" or merely "groundless").

Further, while in this case JPay is only seeking a heightened delegation standard for the issue of class arbitration, the next litigant might seek enhanced delegation evidence for whether an arbitrator can authorize collective action proceedings under the Fair Labor Standards Act, *Robinson v. J&K Administrative Mgmt., Inc.*, 817 F.3d 193, 197-98 (5th Cir. 2016), or whether an arbitrator has the power to let a business association arbitrate disputes on behalf of its members, *Fantastic Sams Franchise Corp. v. FSRO Ass'n Ltd.*, 683 F.3d 18, 23-26 (1st Cir. 2012), or any number of other questions that a party in a particular case may

claim as exceptionally important and thus not susceptible to delegation under the traditional "clear and unmistakable" standard. If this Court seeks to settle the law by making a uniform standard for delegation less than uniform, the law will not remain settled for long.

Perhaps JPay would argue that collateral litigation is an acceptable price to pay to remedy the purported injustice of applying a lesser standard of delegation in this case than the class arbitration issue warrants. But given the three mutually reinforcing types of delegation present here, the Eleventh Circuit would undoubtedly reach the same result in this case even under a heightened evidentiary standard. App. 29A-30A ("[A]ltogether independent of incorporating the AAA rules, the language these parties employed in this agreement evinces the *clearest possible intent* to delegate questions of arbitrability to the arbitrator.") (emphasis added).

JPay drafted an arbitration agreement that clearly and unmistakably stated an intent for arbitrators to resolve all disputes between the parties, including disputes regarding arbitrability. No less unmistakable is JPay's current sense of regret for not carving out the availability of class arbitration from the universe of disputes it wanted arbitrators and not courts to resolve. But this Court need not, and should not, indulge JPay's buyer's remorse.

III. Parties Who Do Not Want Arbitrators Deciding the Class Arbitration Issue Can Make This Intention Plain in Their Contracts, as JPay Has Already Done.

JPay calls for this Court's immediate intervention to resolve what it describes as a deepening circuit split, citing four federal appellate decisions on the issue in 2018 and 26 federal cases involving the issue since 2015. Pet. 18-19. This list of post-2015 cases, taken wholesale from Spirit Airlines' earlier-filed petition, No. 18-617, Pet. 29 n.2, inflates the total by including the district court opinions in the same cases already listed for their 2018 appellate opinions. It also includes cases that do not even discuss the "who decides" and delegation issues on which JPay seeks certiorari. *E.g.*, *Anytime Labor—Kansas LLC v. Anderson*, 2018 WL 3313027, at *2-*3 (W.D. Miss. July 5, 2018) (applying *Stolt-Nielsen* and concluding that the parties' agreement did not allow class arbitration, without ever considering whether the arbitrator should have decided the issue instead); *Levin v. Caviar, Inc.*, 146 F. Supp.3d 1146, 1152-60 (N.D. Cal. 2015) (discussing whether food delivery drivers qualified for the FAA's transportation worker exemption, whether clickwrap agreements are enforceable, and whether a waiver of California Private Attorney General Act claims made the arbitration clause unconscionable—and saying nothing about class arbitration or the standard for delegation to an arbitrator).

Moreover, given the thousands of arbitrations initiated each year with just one major arbitration

provider, Pet. 19, the fact that courts have been called on to resolve questions regarding delegation to arbitrators in around two dozen distinct cases over a four-year period is not a crisis necessitating this Court's involvement. This conclusion is amplified by the chronological trend in the list of cases: they do not comprise an equal distribution by year but fall off from 15 in 2016 to just three in 2018.[4]

This downward trend is unsurprising given the growing prevalence of class action waivers. A study by the Consumer Financial Protection Bureau of over 800 mandatory, pre-dispute arbitration agreements that consumers entered into with banks and other financial service companies found that between 85% and 100% of the arbitration agreements, covering 99% of the market share subject to binding pre-dispute arbitration, contained provisions explicitly banning class arbitration. Bureau of Consumer Fin. Prot. Proposed Rule, Arbitration Agreements, 81 Fed. Reg. 32830, 32842 (May 24, 2016). And while many of the cases listed in footnote 7 of JPay's petition involved employment claims, the proportion of employment agreements containing class waivers has no doubt increased substantially since this Court's decision in *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018).

JPay wants this Court to provide guidance on a question whose salience is rapidly diminishing as more

[4] This figure of three 2018 cases is based only on the footnote's string cite, Pet. 19 n.7, and does not include the four appellate opinions separately discussed in the text of the JPay and Spirit Airlines petitions.

and more parties contract around any possibility of class arbitration, or of the arbitrator authorizing such class procedures. Chief Judge Tymkovich, in his concurrence in *Ray*, noted that any party "wishing to avoid classwide arbitration has an easy way to do so: put it in the contract." 900 F.3d at 1257. He also cautioned that courts not "do violence to [their] FAA jurisprudence to save parties from opting for classwide arbitration contrary to our perception of their best interests." *Id.*

Within two months of claimants filing their arbitration demand, JPay had amended its arbitration agreement to both forbid class arbitration and forbid arbitrators from ruling on the question of whether class arbitration was available. Doc. 42-2 at 3-4. In-house counsel, consulting attorneys and human resources professionals can advise businesses wanting to avoid legal exposure and uncertainty on how to take similar steps before they face a putative class arbitration claim. Adequate market solutions are available to address what is essentially a question of best practices for contract drafting, and this Court need not become involved.

IV. If This Court Grants the Petition, It Should Also Address the "Who Presumptively Decides" Question Left Open in *Bazzle*.

For all the reasons discussed in the preceding sections, this Court should deny the petition. But if it does decide to review the opinion below, it should also

review the panel's answer to the first, "who presumptively decides" question, because the panel got the answer wrong.[5]

This Court in *Howsam* cautioned that the phrase "question of arbitrability" is "limited in scope" and went on to identify two types of gateway questions that satisfied this definition and would be presumptively for courts to decide: (1) "whether the parties are bound by a given arbitration clause," and (2) "whether an arbitration clause in a concededly binding contract applies to a particular type of controversy." *Howsam*, 537 U.S. at 83-84. But whether the parties to a concededly binding contract, with a dispute that concededly falls within that contract's arbitration clause, can arbitrate that dispute on a classwide basis implicates neither of these gateway questions. Instead that question implicates whether particular procedural devices will be available within the arbitration. *Ray*, 900 F.3d at 1254 (Tymkovich, J., concurring) (citing *Epic Systems Corp.*, 138 S. Ct. at 1624-25, for the proposition that class actions and other claim-aggregating mechanisms are procedural devices).

Moreover, the rule that questions of arbitrability are presumptively for courts to decide is not based on

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[5] This argument need not have been the subject of a cross-petition because it does not seek modification of the judgment below. *See Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 119 n.14 (1985). The panel directly stated that regardless of its answer on the "who presumptively decides" question, "the question in this case would be headed for arbitration either way" because of its decision on the delegation issue. App. 23A.

their superior importance, as such a hierarchy reserving the most important questions for judicial review suggests a distrust for arbitral decisionmaking that this Court's FAA jurisprudence has long sought to eradicate. Instead, the "reverse presumption" for questions of arbitrability derives from the parties' likely expectations, because questions of arbitrability are "rather arcane," and parties cannot be expected to have focused on "the significance of having arbitrators decide the scope of their own powers." *First Options*, 514 U.S. at 945. But given the high stakes to corporations of class arbitration, the limited judicial review when an arbitrator decides in the first instance if class procedures are available, and the number of cases this Court has already heard on the topic of class arbitration procedures, these issues hardly seem like "arcane" matters that drafting parties would have been unlikely to consider. *See Spirit Airlines*, 899 F.3d at 1234 n.5 ("[I]f the change from bilateral to class arbitration is as important as *Stolt-Nielsen* states, then we would expect Spirit to have thought about who it wanted to decide that issue when it drafted the arbitration agreement.").

The question of who presumptively decides if class arbitration procedures are available remains open in this Court. *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 569 n.2 (2013). Although the Court should not review this case at all, especially in the context of proliferating class action waivers that are swiftly moving this entire area of inquiry towards becoming an academic exercise, any grant of the petition should include

Respondents' second question presented, allowing this Court to conclusively resolve the question answered by a four-justice plurality in *Bazzle*.

CONCLUSION

The petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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