No. 18-811

IN THE

Supreme Court of the United States

JPAY, INC.,

Petitioner,

v.

CYNTHIA KOBEL, SHALANDA HOUSTON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF

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The brief in opposition offers no persuasive reason why the Court should not grant certiorari.

Three circuits (including the panel majority in this case) have ignored this Court's warnings that class-action arbitration is fundamentally different from bilateral arbitration. They refused to apply *Stolt-Nielsen*'s standards to questions of arbitrability. They held, therefore, **contrary to three other circuits and this Court's precedent**, that "by simply agreeing to submit" disputes over "arbitrability" to an arbitrator, a party consents to arbitrate issues of class arbitrability.

Desperate to avoid scrutiny by this Court, Kobel advances an unpersuasive mischaracterization of circuit precedent to argue that there is no circuit conflict between the Eighth, Sixth, and Third Circuits on the one hand and the Eleventh, Tenth, and Second Circuits on the other. But this argument is rejected by the Eleventh, Tenth, and Second Circuits themselves which all cite to the conflicting circuits' cases and expressly recognize that they "disagree with the reasoning of these circuits" because the "concerns raised in *Stolt-Nielsen* do not apply, *as a doctrinal matter*, to the 'who decides' question of contractual intent to delegate." That "[w]hile we respect the work of our sister circuits, we have read Supreme Court precedent differently."

Kobel next puts the proverbial cart before the horse by arguing this Court should not grant certiorari because JPay is wrong. While this argument lacks persuasive force (JPay is correct) it is also sophistry in that (i) this argument will be fully vetted at merits briefing, and (ii) three circuits have already taken JPay's position which,

according to Kobel, should simply increase the need for the Supreme Court to "correct" these three wayward circuits.

Finally, Kobel's grab-bag of other purported barriers to review fares no better. For example, Kobel's speculation that the question presented is a "question whose salience is rapidly diminishing" as parties expressly prohibit class arbitration in their agreements ignores (i) the numerous recent cases involving the question presented here and (ii) the factual reality of the Eleventh Circuit's decision that injects this issue into almost every arbitration clause due to its reliance on the AAA rules as evidence of consent to arbitrate class arbitrability. (Pet. 16-21 & n.7).

I. The question presented asks this Court to determine a *legal standard* over which the circuits themselves acknowledged they are split.

The question presented seeks the answer to a purely legal question: is there a minimum level of contractual specificity required to allow an arbitrator, instead of a court, decide if class arbitration is permitted?

In *Stolt-Nielsen, S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010), this Court imposed such a minimum specificity on the issue of whether class arbitration can proceed. It held that a party's standard consent to arbitrate, without more, wasn't sufficient to compel class arbitration. *Id.* at 684. The Court imposed this minimum standard because the fundamental changes wrought by class arbitration meant that parties consenting to "arbitrate" simply weren't contemplating the radically different class arbitration. *Id.* at 682, 685, 687. Something more was needed to demonstrate that the parties had in fact contemplated class arbitration.

The question presented asks if these fundamental differences and the resultant presumption that parties simply weren't contemplating class arbitration, also means that when a party generically agrees to arbitrate issues of "arbitrability," it isn't, by itself, sufficient to let the arbitrator also decide "class arbitrability." Instead, this generic consent would be taken as an intention to refer only issues of "**bilateral** arbitrability" to arbitration.

The answer to the question presented is purely legal and is not a case-specific factual inquiry. Instead, it hinges on whether the concerns *Stolt-Nielsen* raised about party intent at the "consent to class arbitration" phase also apply as a doctrinal matter to party intent at the "consent to class arbitrability" stage. If those concerns apply, then generic consent to arbitrate issues of arbitrability, without more, doesn't contemplate *class* arbitrability. That means that such generic consent isn't sufficient to let an arbitrator decide class arbitrability because "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so." *First Options of Chi. Inc. v. Kaplan*, 514 U.S. 938, 944 (1994).

As demonstrated in JPay's Petition, the circuit courts of appeal have split 3-3 on this doctrinal question. Pet. 6-13.

The Eighth, Sixth, and Third circuits have all applied the concerns raised by *Stolt-Nielsen* to the question of party intent at the class arbitrability phase. They therefore found that generic consent to arbitrate arbitrability isn't enough, and instead require that there be contractual evidence the parties intended to arbitrate "class arbitrability." *Catamaran Corp. v. Towncrest*

Pharmacy, 864 F.3d 966 (8th Cir. 2017); *Reed Elsevier, Inc. ex rel. LexisNexis Div. v. Crockett*, 734 F.3d 594 (6th Cir. 2013); *Chesapeake Appalachia, LLC v. Scout Petroleum, LLC*, 809 F.3d 746, 764–65 (3d Cir. 2016). The Second, Tenth, and Eleventh circuits have refused to apply these concerns and therefore find generic consent to arbitrate arbitrability sufficient. *Wells Fargo Advisors, LLC v. Sappington*, 884 F.3d 392, 398–99 (2d Cir. 2018); *Dish Network L.L.C. v. Ray*, 900 F.3d 1240, 1247 (10th Cir. 2018); *JPay, Inc. v. Kobel*, 904 F.3d 923, 941–43 (11th Cir. 2018); *Spirit Airlines, Inc. v. Maizes*, 899 F.3d 1230, 1234 (11th Cir. 2018), *cert. denied,* No. 18-617, 2019 WL 1231771 (Mar. 18, 2019).

This is the split JPay asks this Court to resolve.

Kobel's argument, that there is not a doctrinal disagreement on the effect of *Stolt-Nielsen*'s holdings, but rather a difference in outcome caused by fact-specific agreements (Opp. at 9), is refuted by the circuits themselves, which *all* recognize a doctrinal conflict on the contractual specificity required. For example, the Eleventh Circuit expressly recognized conflict with these circuits and rejected their legal rationale, not their application of fact to law:

> Throughout its argument, JPay points to and relies on three cases drawn from outside our Circuit: *Reed* . . . *Chesapeake Appalachia* . . . and *Catamaran* . . . as we see it, each of these cases conflates the "who decides" question with the "clause construction" question of class availability by analyzing the former question with reasoning developed in the context of

> the latter . . .The concerns raised in *Stolt-Nielsen* do not apply, *as a doctrinal matter*, to the "who decides" question of contractual intent to delegate . . . In *Spirit Airlines*, the defendant argued "that we should demand a higher showing for questions of class arbitrability than for other questions of arbitrability," but we rejected this, "find[ing] no basis for that higher burden in Supreme Court precedent."

JPay, 904 F.3d at 940–43 (emphasis added). In fact, the Eleventh Circuit was *unequivocal* about this being a disagreement over *legal standards* and not factual distinctions:

> While we respect the work of our sister circuits, we have read Supreme Court precedent differently. The out-of-circuit cases relied upon by Spirit import the reasoning of *Stolt-Nielsen* . . . [to] create[] a higher burden for showing 'clear and unmistakable' evidence for questions of class arbitrability than for ordinary questions of arbitrability . . . However, we find no basis for that higher burden in Supreme Court precedent.

Spirit Airlines, Inc. v. Maizes, 899 F.3d 1230, 1234 (11th Cir. 2018), *cert. denied*, No. 18-617, 2019 WL 1231771 (Mar. 18, 2019). The Tenth Circuit likewise expressly recognized conflict with the Eighth, Sixth, and Third Circuits holding that

> DISH contends the district court failed to apply the applicable law *by not following the*

> *guidance of multiple circuits* that require more specific language delegating the question of classwide arbitrability. . . *But we disagree with the reasoning of these circuits.* We instead adopt the approach of the Second Circuit in *Sappington* [that] *reject[ed] the analyses of the Third, Sixth, and Eighth Circuits* . . . [T]he situation we have here [is] whether there is clear evidence of the parties' intent to let the arbitrator decide the issue. *The fundamental differences between bilateral and classwide arbitration are irrelevant to us at this . . . stage of the analysis.*

Ray, 900 F.3d at 1246–47 (emphasis added). Finally, and as mentioned by *Ray*, the Second Circuit held that:

> *Some of these sister circuits* have justified requiring more explicit language to delegate the question of class arbitrability to an arbitrator by explaining that 'class arbitration implicates a particular set of concerns that are absent in the bilateral context. . . . *The concerns that some of our sister circuits have identified as unique to class arbitration indisputably relate, in our view, to [just whether class arbitration is a matter of arbitrability]. . . .*

Sappington, 884 F.3d at 398–99 (emphasis added).

Thus, while there were factual differences in the various agreements at issue in the cases cited above, those differences are not the reason the circuits are divided. They are split along a doctrinal difference on whether

consent to class arbitrability requires something more because of the concerns raised in *Stolt-Nielsen*. That is the question presented. And on that question, there is a clear, deep, and well-recognized circuit split that will not resolve itself. In fact, it keeps getting deeper, with three circuit courts deciding the question in 2018 alone.

Once this Court resolves the doctrinal conflict and imposes a uniform legal framework to apply in these cases, then the factual differences of each case will come into play.

II. Kobel's brief unpersuasively argues the merits

Kobel asks this Court not to grant certiorari because she believes adopting JPay's position on the minimum specificity required to delegate class arbitrability would mark a deviation from prior precedent treating all categories of arbitrability as a unitary category and lead to "collateral litigation." Opp. at 19-20.

But Kobel's argument lacks persuasive force. The Court's *Stolt-Neislen* ruling also marked a departure from prior precedent treating all categories of consent to arbitration as a unitary category, and it did so without causing excessive collateral litigation. If the Court grants certiorari and decides to likewise depart from treating all consent to arbitrability as a unitary category, it will likewise not engender excessive collateral litigation.

Furthermore, when viewed in context, Kobel's argument is exposed as pure sophistry. Denying certiorari because JPay is "wrong" puts the cart before the horse. Kobel will have an opportunity to present these arguments

during merits briefing, but they aren't a reason to deny certiorari. Second, Kobel forgets that three circuits *already* treat bilateral and class arbitrability differently. Thus, if the consequences of this rule are as dire as Kobel claims, the imperative for this Court to step in and fix it—by directing the Eighth, Sixth, and Third circuits to conform their rulings with the Eleventh, Tenth, and Second circuits—would be all the more necessary.

Finally, Kobel claims that even if this Court reversed the Eleventh Circuit, and found a party's generic consent to arbitrate arbitrability does not constitute consent to arbitrate class arbitrability, it would not change the outcome of this case because the language in JPay's arbitration agreement would purportedly satisfy this burden. Opp. 22. That argument is baseless; every jurist to apply this standard to the case at hand (the district court and the panel dissent) have held JPay did not consent to arbitrate class arbitrability.[1]

III. Kobel is wrong to suggest the issue is easily avoided and is declining in occurrence

The issue of who decides class arbitrability remains an important and active issue. In addition to the cases listed in the Petition, (Pet. at 19), this issue has come up in many other cases.

For example, in *Herrington v. Waterstone Mortg. Corp.*, 907 F.3d 502, 507 (7th Cir. 2018) after the Seventh

1. It's worth noting that not even the panel majority went that far. They certainly could have said that JPay would lose even if the higher standard is applied, but they declined to do so.

Circuit found that consent to class arbitration was a matter of arbitrability for a court to decide, and remanded the case to the district court for a determination on whether the parties had consented to class arbitration, the plaintiff then argued that "the arbitration agreement delegates the class arbitrability question to the arbitrator" because the agreement mandated arbitration pursuant to the AAA's employment rules. *Herrington v. Waterstone Mortg. Corp.*, No. 11-CV-779-BBC, ECF No. 160, at 19.

The Sixth Circuit also had to deal with this issue at the end of 2018, finding that the consent to class arbitration question had to stay with the court because "[h]ere, the parties have not identified a provision in the contract that clearly and unmistakably gives the arbitrator power to decide this matter." *Rogers v. SWEPI LP*, No. 18-3229, 2018 WL 6444014, at *4 (6th Cir. Dec. 10, 2018).

State appellate courts have had to grapple with this issue as well. For example, in *Robinson v. Home Owners Mgmt. Enters., Inc.*, 549 S.W.3d 226, 240 (Tex. App. 2018) the court held that "where a bilateral arbitration agreement says nothing about delegating the question of class-arbitration availability to an arbitrator, the judicial system retains its presumed role as the adjudicator of this substantive gateway issue."[2]

2. This reply is by no means meant to represent a complete recitation of every case addressing this issue. Suffice to say, there are certainly more, *e.g.*, *Levy v. Lytx, Inc.*, No. 16-CV-03090-BAS(BGS), 2017 WL 2797113, at *6 (S.D. Cal. June 28, 2017) (finding consent to AAA rules delegated class arbitrability to the arbitrator); *Mitchell v. Craftworks Rests. & Breweries, Inc.*, No. CV 18-879 (RC), 2018 WL 5297815, at *10 (D.D.C. Oct. 25, 2018) (finding clear consent to arbitrate class arbitrability); *Sakyi v.*

And it makes sense this issue keeps presenting itself. It is very common for arbitration clauses to mandate arbitration under the rules of an arbitral institution such as the AAA or JAMS because it's just simpler for parties to incorporate a set of existing rules than to draft their own. Furthermore, selecting rules promulgated by an established institution makes it easier to have that institution administer the arbitration. Under the panel majority decision, however, every such selection would constitute consent to arbitrate class arbitrability because all of these rules provide for an arbitrator to determine his own jurisdiction. But, as this Court has held, this question about who should decide arbitrability "is rather arcane. A party often might not focus upon that question or upon the significance of having arbitrators decide the scope of their own powers." *Kaplan*, 514 U.S. 938, 945.

Thus, Kobel's claim that this issue is easily avoided by contractual changes, and therefore doesn't merit this Court's attention, is misguided. Numerous future litigants are signing contracts with references to the AAA and JAMS rules without a thought as to who should decide class arbitrability. They will seldom know to ask for a change based on this seemingly innocuous incorporation of the AAA rules by reference.

IV. This case is a good vehicle

Notably, Kobel does not argue this case isn't a good vehicle to decide the question presented. That's because it is the best vehicle presented to the Court yet.

Estee Lauder Cos., Inc., 308 F. Supp. 3d 366, 381 (D.D.C. 2018) (same).

In fact, while the Court recently denied certiorari over *Spirit Airlines, Inc. v. Maizes*, No. 18-617, this case has advantages over *Maizes* in that unlike *Maizes*, here the Eleventh Circuit decided that (i) consent to class arbitration is a question of arbitrability, (ii) there is a clear generic agreement to arbitrate arbitrability in the body of the arbitration clause, and (iii) there is a clear incorporation to specific sets of the AAA rules (commercial and consumer) as opposed to just a generic reference to the AAA rules.

These three factors make this case the perfect vehicle to resolve the question of the whether *Stolt-Nielsen's* concerns and attendant requirements apply to the consent to class arbitrability phase. In this case, the Court can directly address that question without the problems that arise when the agreement to arbitrate arbitrability is (i) only incorporated by reference, or (ii) worse (and as in *Maizes*) when the agreement over arbitrability requires a "'a daisy-chain of cross-references'—going from the [agreements] themselves to 'the rules of the American Arbitration Association' to the Commercial Rules and, at last, to the Supplementary Rules." *Chesapeake Appalachia*, 809 F.3d 746 at 761.

Kobel requests that, should the Court grant certiorari, it also grant it over the question of whether the availability of class arbitration is a question of arbitrability for a Court to decide; an issue "this Court has not yet decided." *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 569–70 n.2 (2013).

While JPay notes this question is the subject of another pending petition (*see E. & J. Gallo Winery, et al.*,

v. Refugio Arreguin, No. 18-319) JPay does not object to Kobel's request. (Pet. at i). JPay is confident that should the Court grant certiorari over this question, it will be resolved in JPay's favor as the Third[3], Fourth,[4] Sixth,[5] Eighth,[6] and Ninth[7] Circuits have already done.

Finally, JPay requests that, at a minimum, the Court hold JPay's petition pending the decision in *Varela v. Lamps Plus, Inc.*, No. 17-988. The Court's decision in *Varela* may further explain the intersection of class and bilateral arbitration and its attendant standards in a way that could alter the Eleventh Circuit's decision not to apply *Stolt-Nielsen*'s concerns to the arbitrability phase.

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3. *Opalinski v. Robert Half Int'l Inc.*, 761 F.3d 326 (3d Cir. 2014).

4. *Del Webb Cmtys., Inc. v. Carlson*, 817 F.3d 867 (4th Cir. 2016).

5. *Reed Elsevier, Inc. v. Crockett*, 734 F.3d 594 (6th Cir. 2013).

6. *Catamaran Corp. v. Towncrest Pharmacy*, 864 F.3d 966 (8th Cir. 2017).

7. *Eshagh v. Terminix Int'l Co.*, 588 F. App'x 703 (9th Cir. 2014); *Varela v. Lamps Plus, Inc.*, 701 F. App'x 670 (9th Cir. 2017), cert. granted, No. 17-988.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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